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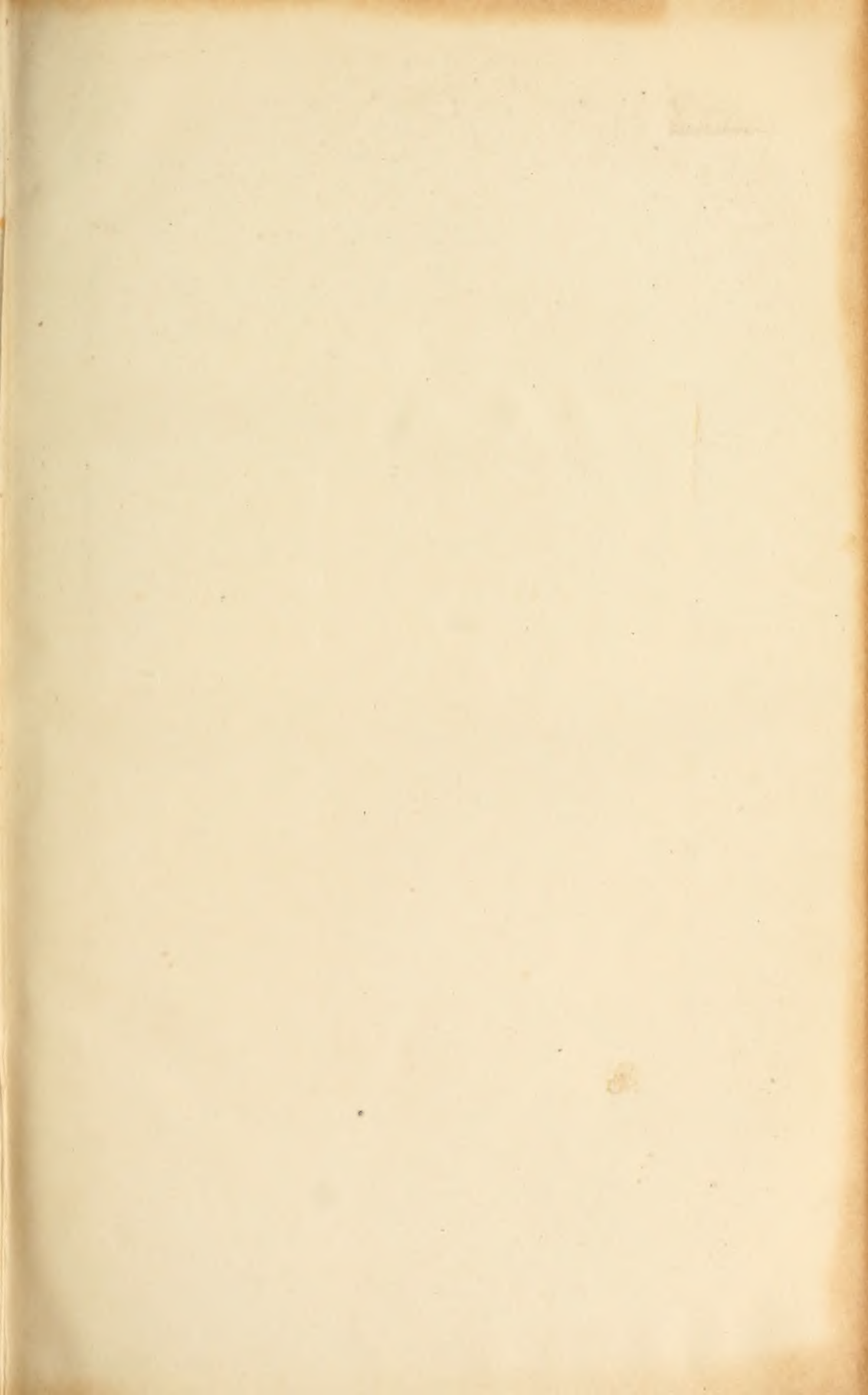
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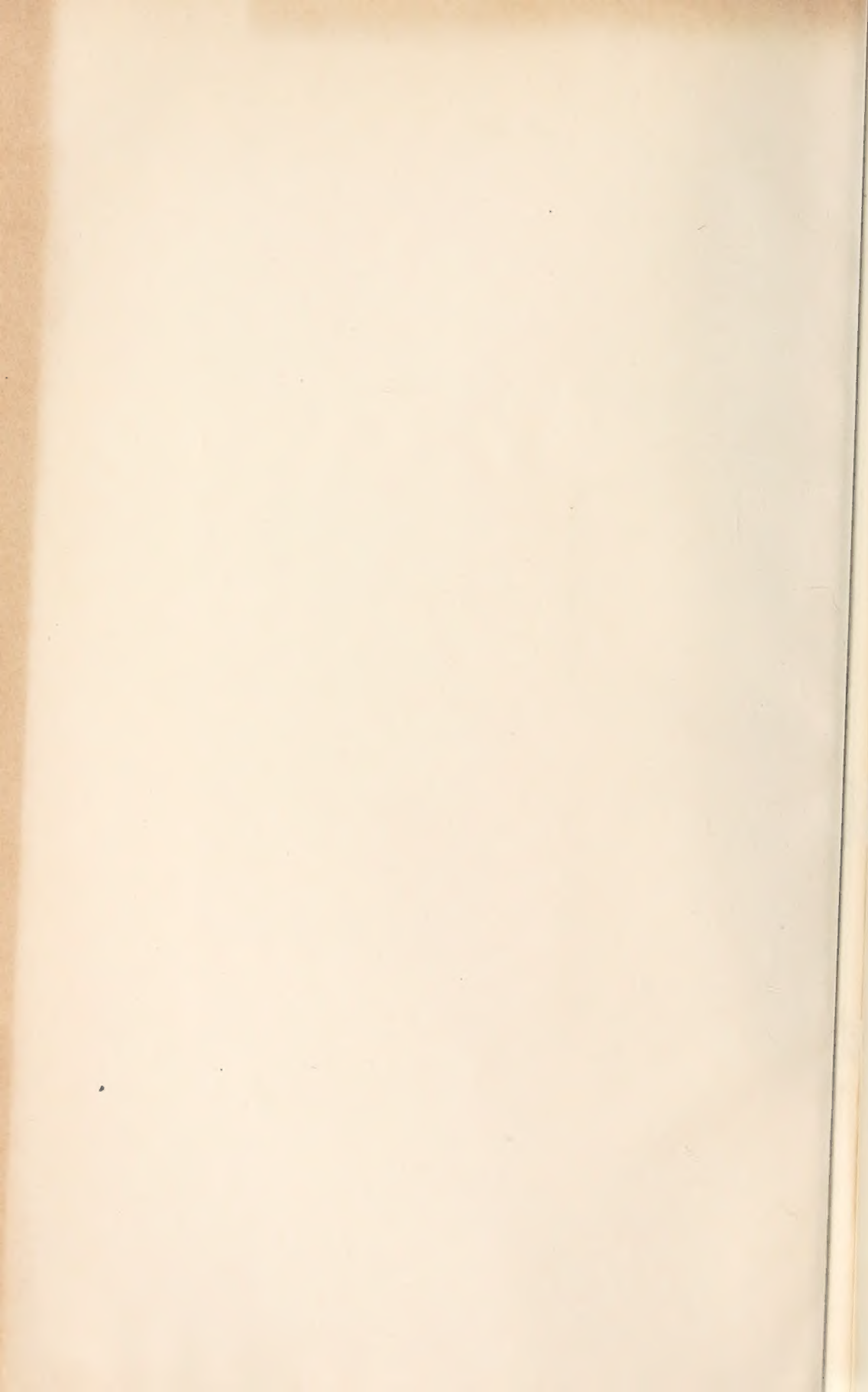
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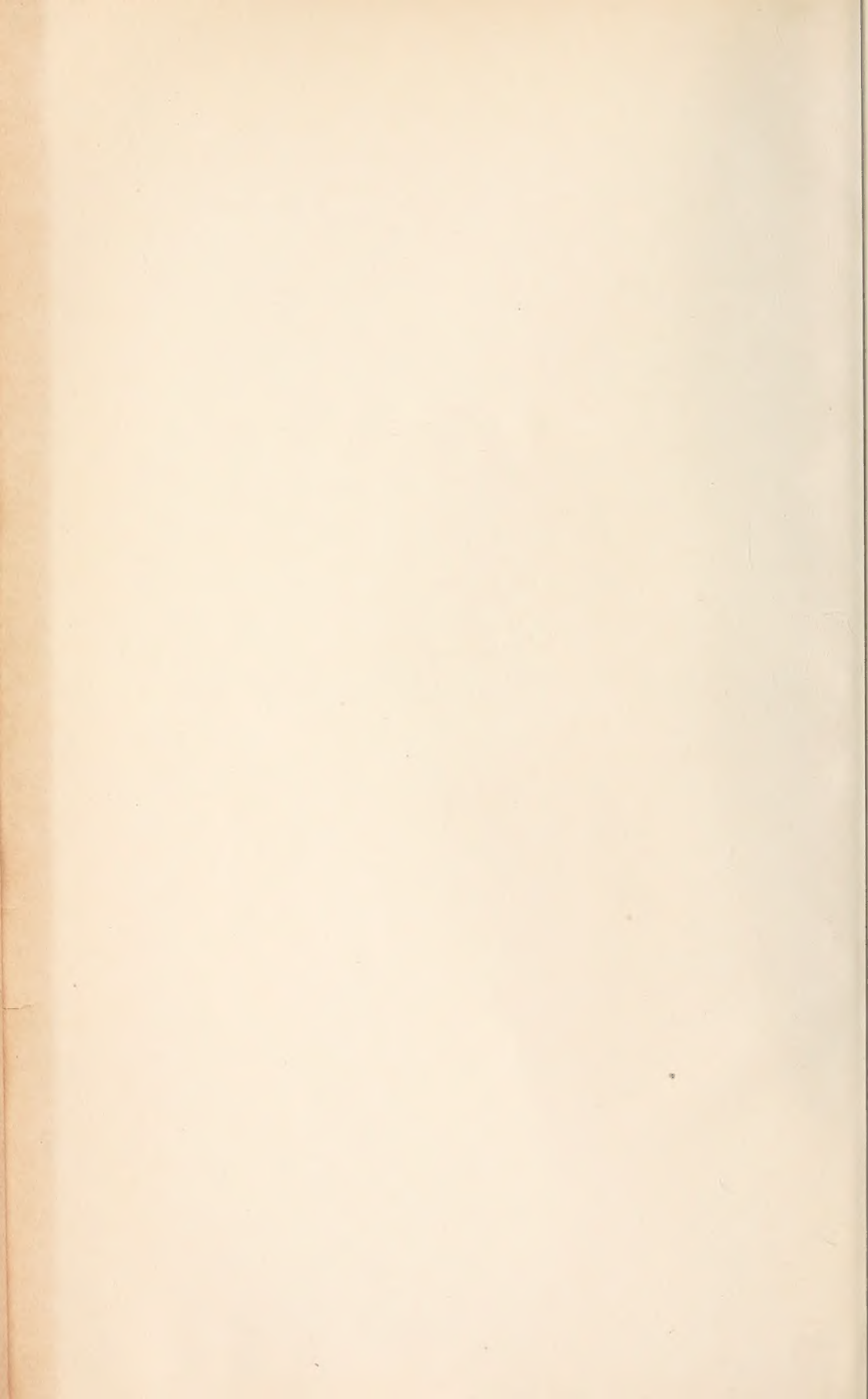


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CONSULTATIVE COMMITTEE

THE RIGHT HONOURABLE THE EARL OF HALSBURY,
LATELY LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE RIGHT HONOURABLE LORD ALVERSTONE,
LATELY LORD CHIEF JUSTICE OF ENGLAND

THE RIGHT HONOURABLE SIR R. B. FINLAY, G.C.M.G., K.C.,
LATELY ATTORNEY-GENERAL

EDITOR

MAX. ROBERTSON, BARRISTER-AT-LAW

THE
ENGLISH REPORTS

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EXCHEQUER DIVISION

II

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1914

REPORTS of CASES ARGUED and DETERMINED
in the COURT of EXCHEQUER, from Michaelmas
Term, 56 Geo. III. to Easter Term, 56 GEO. III.,
both inclusive. Vol. II. By GEORGE PRICE,
Esq., of the Middle Temple, Barrister at Law.
London, 1817.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF
EXCHEQUER, MICHAELMAS TERM, 56 GEO. III.

——— *v.* ———. Monday, 6th November 1815. —It is sufficient that affidavits appear expressly by the jurat to have been sworn by all the deponents: and it is not necessary that they should be severally named in the jurat as having been sworn, as in the King's Bench.

An affidavit by two persons, in the jurat of which it was expressed to have been sworn, "by both the deponents," was tendered to the Court this day, in support of a special motion, and received.

Dauncey, on putting in the affidavit, apprised the Court of the peculiar form of the jurat, which, he said, he felt himself called on to do in consequence of their recent intimation on that point (*a*): but submitted that, in this Court, if an affidavit clearly appear to have been sworn by all the deponents, as in the present case, such a caption should be deemed sufficient, there being no existing rule requiring [2] that each of the deponents should be mentioned by name in the jurat as having been sworn to its contents; and to that the Court assented.

WESTON *v.* FAULKNER. Tuesday, 7th November 1815. Service of all processes intended to bring a party into contempt, should be personal if possible: but if it can be made appear to the Court that service cannot be effected personally, and that there was probable cause to suspect that the party kept out of the way for the purpose of avoiding such personal service, the Court will grant a rule nisi for an attachment, and order that service, by leaving the rule at the dwelling house, shall be efficient.

Owen moving for an attachment against a party for not obeying an order of the Court, stated, from an affidavit, that it not having been found practicable to effect personal service of the order, it had been left at the dwelling house of the person against whom it had been drawn up; that the mode of leaving it there was by throwing it in at the window, there being no person in the house to whom it could be delivered; and that it was believed that such absence had been the effect of a design to avoid the service of such order.

The Court (having premised that service of all processes throughout, having for their object to bring a party into contempt, should be personal, unless specially ordered that it might be otherwise), directed a rule to be moved for, calling on the person who was the object of it, to shew cause why what had been done in the present instance should not be deemed good service, and intimated, that it might be part of the order

(a) *Re v. The Sheriff of London*, ante, vol. i. p. 338.

to be made on the present application (if no cause should be shewn against it), that service of such order at the dwelling house, should be considered sufficient to ground the application for an attachment.

- [3] ATTORNEY GENERAL *v.* WOODHEAD. Wednesday, 8th November 1815. —The Court will not, after verdict, arrest a judgment, on affidavit that a bill has been found against a witness indicted for perjury on a material point of evidence given by him on the trial.—Nor does it seem that a conviction would be sufficient ground for sending a cause back to a Jury for re-investigation.

A verdict had been found for the Crown, at the last Revenue Sittings, on an information against the defendant, under the 21st Geo. III. ch. 55, for receiving spirituous liquors from a person not having painted over the outward door of his place of business, the words Distiller, Rectifier, or Compounder of spirituous liquors, in compliance with the provision in the 19th Geo. III.

Pell, Serjeant, now moved for a new trial, on an affidavit, which charged the material witness on the part of the Crown with having falsely deposed at the trial, that there was a hole in the wall of the defendant's premises, through which the spirits had been conveyed, whereas (as it was now sworn in the affidavit) there was not, nor could there have been, any such hole. It further stated, that an indictment had since been preferred against the witness for perjury, charged to have been committed on that occasion, at the sessions; and that the Grand Jury had found the bill.

But the Court holding that on that affidavit there was not sufficient ground,

It was moved that the judgment might be arrested till the event of the trial should be known.

THOMSON, Chief Baron. The Court cannot blend a criminal and civil proceeding, for the purpose [4] of contradicting a fact sworn to on a trial. It would be pregnant with the greatest mischief if even a conviction of perjury, on evidence given by a witness, were to be received in answer to a verdict. His Lordship adverted to the case of *Bartlett v. Pickersgill* (Cox's Cases in Equity, p. 16), where the plaintiff petitioned for leave to file a supplemental bill, in nature of a bill of review, the defendant having been convicted of perjury in the main subject of his answer; but Lord Keeper Henley dismissed the petition.

Rule refused.

——— *v.* ———. Same day.—Service of an order of Court on a servant of the party, not at his dwelling-house, insufficient.

Dauncey moved to make absolute, a rule for an attachment on an affidavit of service of the rule on a servant of the party.

Per Curiam. There is no case of service on a servant being held good, unless it be at the dwelling-house, where all proceedings not required to be personally served should be left.

Motion refused.

HALL *v.* FRANKLIN. Friday, 10th November 1815.—Service of *venire facias* at dwelling-house, on defendant's wife, good.

Owen moved for a *distringas*, for non-appearance to a writ of *venire facias*, on affidavit of service on the wife of defendant, at his dwelling-house.

Motion granted.

- [5] REX *v.* BOYLE. Saturday, 11th November 1815.—The Court will not appoint a re-argument after a decision, in the absence of the Crown officer, to give him an opportunity of being heard.

Dauncey moved that this case, which had been argued and disposed of at the sittings after last Trinity Term (*a*), in the absence of the Solicitor General, might be permitted to be brought before the Court for a second argument, that the Solicitor

(*a*) Vide ante, vol. i. 436.

General might have an opportunity of being heard: which the Court considering to be irregular and impracticable,
Refused.

WATTLEWORTH v. W. H. PITCHER. Same day.—The Court will order the solicitor of a plaintiff residing abroad, who has been employed to commence an action at law, to accept a subpoena on an injunction bill, supported by an affidavit of the facts, and of the subsistence of an account between the parties.

Parker moved that A. E. Pitcher, the defendant's attorney in an action commenced at law, might be ordered to accept a subpoena in this cause, on the part of the defendant, he having refused to do so on application, and that serving it on him might be deemed good service. The plaintiff had filed a bill for an injunction to restrain the defendant from proceeding further at law, in the action brought by him to recover a sum of money, and for an account. The affidavit in support of the motion stated, that the defendant, who resided at Martinique, having authorized his said attorney to bring the action now sought to be restrained, the plaintiff had in consequence, been held to bail, on an affidavit of debt made by the defendant's said attorney, and that mutual accounts subsisted between the parties.

Motion ordered.

[6] EDMONDS v. LEMAN. Same day.—Interlocutory judgment may be signed on the last day of the time given by the rule to plead, if no plea then filed.

Williams, J. moved to set aside the interlocutory judgment which had been signed in this cause for irregularity. The writ was returnable on the first general return day of the present term. The rule to plead, which is said to be a four day rule, inclusive, expired on Thursday the 9th, and the plaintiff signed the judgment on the 10th, which was now sought to be set aside, on the ground that the defendant had all the 10th to plead in, and that judgment ought not to have been signed till the 11th. It was contended, that by the practice of the Court of King's Bench, judgment could not be signed till the day after the last day of the time for pleading, although it was admitted that, in the Common Pleas, according to the case of *Laing v. Bunsted* (2 Bl. 1243), the practice was to compute the time to plead inclusively, as had been done in the present case: but the question now raised was, whether the plaintiff had done right, and was entitled by the practice of this Court, to sign judgment, for want of a plea on the 10th.

[The Master being referred to, reported, that according to the usage of this Court, what had been done was correct. The defendant should have pleaded by the 10th, or the plaintiff might sign judgment on that day.]

Per Curiam. Motion refused.

[7] It was suggested, that the defendant had a good defence to the action.

Chief Baron. If you come to set aside a regular interlocutory judgment, on the ground of having a good defence, you must make another application, supported by an affidavit of merits.

IN THE EXCHEQUER CHAMBER. In Error.

——— v. ———. Monday, 13th November 1815. It is sufficient, on a motion for interest on affirmance of a judgment, to apprise the Court of the cause of action, ore tenus: an affidavit is not indispensable.

Knowles, Common Serjeant, moved, that interest might be computed and allowed on the affirmance of this judgment.

To a question from the Court, he answered, that he was not furnished with the usual affidavit, as to the cause of action, but that he was instructed that it was on a bill of exchange.

GIBBS, Chief Justice. It is not absolutely necessary that an affidavit should be made of the cause of action: it is sufficient if the Court be informed of the fact by counsel.

- [8] *WILLIAMS v. DETHICK*. Wednesday, 15th November 1815. A person occupying a house for a limited period, for which he pays neither rent nor taxes, admissible to justify as special bail.

Jones D. F. opposed the justification of one of the defendant's bail, on the ground that he was not a housekeeper, in the sense in which that description was meant to be understood, as applicable to sufficiency of bail.

He was employed by the Commissioners in the repair of the water-works in Swallow-street, and they allowed him a house to live in during the period of his employment, for which he paid no rent or taxes.

The Court held, that he was such a housekeeper as might become bail; and he was allowed to justify.

BRANKER v. MASSEY. Same day.—On motion to set aside proceedings as *infra dignitatem*, on an affidavit that the demand sued for does not amount to 40s. the Court will not inquire into the amount, if an affidavit be put in on shewing cause, that the demand exceeded that sum, but will at once discharge the rule with costs.

Cause was shewn against a rule why these proceedings should not be set aside, as beneath the dignity of the Court, which had been granted on an affidavit, that the debt (if any) was under 40s.; when it was stated by an affidavit on the part of the plaintiff, that the debt amounted to more than 40s. the Court discharged the rule, with costs.

- [9] *McNABB AND OTHERS v. INGHAM AND ANOTHER*. Friday, 17th November 1815.—Service of *venire facias ad resp.* by leaving it with a clerk of the defendants at their counting-house, not sufficient to obtain *distringas*, though after several ineffectual calls made for the purpose of personal service.

Littledale moved for a *distringas* against the defendants, for not having appeared to a *venire facias ad resp.* on an affidavit, stating that the deponent had served the defendants with copies of the original, which was returnable on the 11th instant, by delivering them to a person at the counting-house of defendants, at Liverpool, who informed the deponent that he was their clerk; that he had used all means to serve them [in person] by attending at their office on the 9th, 10th, and 11th, without meeting them, that he was told by the Clerk that they were both from home, and could not be seen; and that one of them was in Liverpool, but where he could not tell.

Per Curiam. It would be going beyond the rule, to grant a *distringas* on such a service.

Motion refused.

WICKHAM v. MEALING. Saturday, 18th November 1815.—If the day on which a defendant is called on to appear, be omitted in the notice attached to *mesne process*, the Court will set aside the writ, and all subsequent proceedings, notwithstanding the defendant has suffered a whole term to elapse without giving notice to the plaintiff, and does not apply to the Court till after the execution of a writ of inquiry.

Gaselee had obtained a rule on the 7th, calling on the plaintiff to shew cause, why the writ of *quo minus*, which had been served on the defendant, and [10] all subsequent proceedings, should not be set aside for irregularity. The affidavit of the defendant and his attorney stated, that defendant had been served with the annexed copy of a writ of *quo minus* on the 23d May, and that he had not been served with any other copy; that the writ was issued on the 19th May, and that it had no notice subscribed, specifying the time when the defendant was to appear at the return thereof*, and that he was informed by his attorney, that he had good ground of

* The blank for the day of appearance, in the notice underneath the usual printed form of copy of process for service, which should have been the 4th of June, had been neglected to be filled up.

defence to the action : that on the 14th of June, notice of the omission was given to the plaintiff's clerk in Court : and that, notwithstanding such notice, the plaintiff had proceeded in the action, and executed a writ of inquiry of damages. The clerk of the defendant's agent also made an affidavit, that he had called on the plaintiff's clerk in Court, on the 15th day of June, after the defendant had been served with notice of declaration, and had informed one of his clerks of the defect, and that in case of plaintiff's proceeding further, the Court would be moved to set aside the proceedings.

Dumcey shewed cause : submitting, that if the omission in the notice under the writ, of the day of appearance, were irregular, yet, where in the body of the process the day was distinctly stated, as here, (for the writ calls on the defendant to appear in fifteen days of the Holy Trinity), it should hardly be held to be a fatal omission : for the defect in this case [11] is, that the appearance day is not mentioned at all in the notice, not that a day is mentioned repugnant to that in the body of the writ. But even if it were, there had been such gross and reprehensible delay, in defendant not applying to set aside the process for that irregularity before, as the Court would not encourage by entertaining the motion. The defendant was served on the 23d of May : that (Easter) term did not end till the 26th ; the writ was returnable on the first return in the following term : yet, during the whole of that term no notice was taken of the defect, and not till the 15th, the day after the term was over, was any intimation made of it, and then a verbal message only is given to one of the clerks of the plaintiff's agent. It is laid down in the books to be the practice, and it is founded on principle, that wherever a defendant would take advantage of an irregularity in mesne process, he must proceed to do so before appearance, whether by his own attorney, or by plaintiff's according to the statute (*b*), or all objection is waived (1idd's Practice, p. 162 516). In this case, the plaintiff has not only signed judgment, but has executed a writ of inquiry.

The Court held, that the words of the statute could not be got over ; and therefore, notwithstanding the delay, and the stage of the proceedings, made the

Rule absolute, with costs.

[12] CAULIN v. SIR ROBERT LAWLEY, BART. Tuesday, 21st November 1815.

Service of venire on defendant's servant, at his dwelling house, during his absence abroad, not sufficient, nor will the Court grant a rule to shew cause why such service should not be sufficient

[Commented on, *Kemp v. Sumner*, 1828, 2 Y. & J. 406.]

Owen moved for a distringas, for not appearing to venire. The affidavit stated the service to have been on a servant of defendant, at his dwelling house, after having called there three times without seeing him, when deponent was told by the servant that the defendant had been gone abroad six months, and was not expected to return for two years.

THOMSON, Chief Baron. (After referring to the officer, who reported that it was not effectual service.) The question is, whether, where a man is abroad, and remains out of the kingdom for two years, he can be so served with this process. The officer thinks with me, that it is not good service, for the purpose of founding a distringas, unless it can be shewn, that the defendant has gone abroad for the purpose of avoiding the service.

Owen then applied for a rule to shew cause, why the service at the dwelling house should not be deemed good service ; which the Court

Refused.

[13] THE KING, IN AID OF EVERETT & CO. v. MOWBRAY AND OTHERS. Wednesday, 22d November 1815.—The rule of Court, of 15th Car. I., that no debts, without specialty, shall be found by inquisition for debts in aid, unless it be by order on motion in open Court, or unless it be for debts due to the King's farmers, not to be limited to a confined construction of persons answering the description of King's farmers, but is to be considered as extending to all persons becoming

(*b*) The plaintiff in this case had entered an appearance. See Statutum.

accountable to the Crown for money belonging to the public in their hands. — The rule of the 3d of William III. that fiats shall not be granted on a simple contract debt in vacation, unless by order of a Baron, held not to be intended to infringe the authority of the Chancellor of the Exchequer to sign such fiats.

Scarlett moved for a rule to shew cause, why this extent should not be set aside for irregularity. It had been issued against the defendants, who were bankers at Durham, in aid of Everett and Company, bankers in London, founded on an extent against Everett and Company. Everett himself was receiver-general for the county of Middlesex, and had paid the money officially received by him into his own bank, to the account of himself and partners. The extent had been issued in the usual manner, and the fiat was granted on the common affidavit in vacation, by the chancellor of the exchequer, and signed by him.

The first objection made was founded on the rule made in this Court in the 15th of Charles I. that "no debt, without specialty, shall be found by inquisition for debts in aid, unless it be by order or motion in open Court, and unless it be for debts due to the King's farmers;" and it was contended that, admitting Everett himself, in character of receiver-general, were entitled to be considered as the King's farmer, so as to give him a right, yet, that having paid the money into his bank, the debt was no longer due from him as receiver-general, but from him and his partner, merely as accountable [14] to the Crown for having become possessed of the Crown's money.

[Graham, Baron. Still Everett would be entitled, for the debt of one partner is the debt of all.]

Then the question arises, whether the receiver-general is, as such, the King's farmer?

[Thomson, Chief Baron. There can be no doubt of that.]

In that case the extent should have issued on behalf of Everett and Company, qua farmers of the King. This is a mere simple contract debt, and not in any manner founded on specialty.

Thomson, Chief Baron. This was originally a debt due to the Crown from Everett alone, as the King's receiver or farmer. But whatever his description may be, there have been some thousands of instances in this Court since that rule of the 15th Charles I. down to the present time, wherein that rule has not been adhered to. Then he, as the person originally solely liable, pays the money into the hands of himself and partners, which makes them all accountable to the Crown for that money, as having received it with knowledge that it was public money. The debt being accordingly found, by inquisition, to be due from all, another inquisition finds the debt due to them, from Mowbray and Company, their debtors, upon which the extent issued; and issued, as appears to me, quite in the common course of the business of this Court, [15] established by an usage too ancient to be disturbed.

That rule is, therefore, so far obsolete, at least as you construe it. The King's farmer means the King's accountant; and there never was a motion, that I am aware of, made in open Court for an extent in such a case, merely on the ground, that it was necessary so to make it, because the debt due to the Crown was a simple contract debt.

[Graham, Baron. By the intervention of the inquisition, a simple contract debt is made a debt of record.]

Another objection was then made, founded on the rule of 1691, which orders, that no extent in aid shall issue for a simple contract debt in vacation, unless it be by order of a Baron of the Court. In the present instance, the fiat having been granted in vacation, and signed, not by one of the four Barons, but by the Chancellor of the Exchequer, it was urged, therefore, to be irregular, inasmuch as it was contrary to that rule of Court.

[Graham, Baron. That rule cannot be construed to take from the Chancellor of the Exchequer his inherent power of granting fiats. He is at the head of the Court, and is, as such, constantly in the habit of signing fiats, particularly when the Barons are absent from town.]

It was admitted, that the practice of the Court was against the objection; but it was suggested, [16] that as the Chancellor of the Exchequer was nowhere called a Baron in the books, and as the rule was express, the practice being against the rule, could not be regular. It was also mentioned, as merely matter of opinion on the part

of a high professional character, that the late Chancellor of the Exchequer had himself refused to sign such fiats, from a doubt entertained by him of his having authority to do so.

Sed per Curiam. There can be no doubt on that question. The objections are altogether void of foundation, and the present extent appears to be quite in course.

Rule refused.

ELLISON v. COATH. Same day.—This Court will order a plaintiff shewing cause against a rule for judgment, as in case of a nonsuit, for not proceeding to trial according to notice, to pay the defendant costs, give a peremptory undertaking, and (if the venue has been changed to a county where no assizes are held in the spring) consent that the venue shall be brought back to the original county, that the trial may be brought on without further delay.

Owen shewed cause against a rule which had been obtained for judgment, as in case of a nonsuit, for not proceeding to trial according to notice. He put in an affidavit of the absence of a material witness, submitting, that, according to the practice of the other Courts, any reasonable excuse disclosed on an affidavit, accompanied by a peremptory undertaking, and (in this Court) payment of costs, would be held good cause against making this sort of rule absolute. On the part of the defendant, it was pressed, that the plaintiff should not be allowed to get rid of the present rule, as he had harassed the [17] defendant with great delay, by changing the venue from Cornwall to Bristol.

The Court, however, discharged the rule; but they imposed on the plaintiff, the terms of a peremptory undertaking, on his part, to proceed to trial at the next assizes for the county of Cornwall; and that he should, for that purpose, consent that the venue should be brought back from Bristol (where it was now laid, there being no assizes held there in the spring) to Cornwall; the change of venue to be incorporated in the present order,—and that he should pay the costs of the defendant.

Rule discharged.

THE KING v. DE CAUX. Friday, 24th November 1815.—The landlord of premises on which goods have been seized under an extent in aid, is not entitled, under the 8th Anne, to call on the sheriff to pay twelve months rent, due before the teste of the writ.

Abbott, on the behalf of the defendant's landlord, moved, that the sheriff of the county of Norfolk might be ordered, (out of the proceeds of the sale of the goods, chattels, and effects of the defendant, which had been seized under this extent in aid on the premises of the applicant, in the occupation of the defendant, as his tenant), to pay to him the sum of 294l. 10s. being one year's rent due for the farm and premises on which the property of the defendant had been so taken, and which rent was due to the applicant before the time of the teste and suing forth of the said extent:—and that the said sheriff, after payment of the said rent, and the debt and [18] damages to be levied by the said extent, might be further ordered to pay, out of the surplus monies arising from the said levy, the amount of such further rent as should be found to be due to the said landlord.

The motion was founded on the 8th of Anne, ch. 14, s. 1, which provides, that no goods or chattels, lying or being on any premises leased, &c. shall be liable to be taken by virtue of any execution, “unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the premises, by virtue of such execution or extent,” pay to the landlord of the said premises one year's rent. And the question was, whether the proviso in the act, that it should not be construed to the prejudice of the Crown, precludes the landlord in the case of extents in aid. It was submitted, that in the case of *The King v. Cotton* (Parker, 112), Chapman was a bond debtor to the Crown, and the extent was immediate, which distinguished that from the one now before the Court;

But they held, that an extent, although issued in aid of a subject, was a prerogative process, and ultimately, and in effect operating for the benefit of the Crown, and that the Act did not affect levies under that process. As to the word extent,

used in the clause, that might be satisfied by applying it to such as were of a private nature, of which there are several, as extents on statute staple, and others.

Motion refused.

[19] *COOK v. JOHNSON*. Saturday, 25th November 1815.—If the plaintiff recover less than 5l. in an action brought in London, where the original debt has been reduced by payments and not by set-off, the defendant will be permitted, on motion, to enter a suggestion on the roll, under the London court of conscience act, in order to have his costs allowed.

The plaintiff, on the trial of this cause at Guildhall, having recovered less than 5l. Barnwall obtained an order, that the plaintiff should shew cause, why the defendant should not be at liberty to enter a suggestion on the roll, under the London court of conscience act, on an affidavit that not more than 3l. 10s. the sum recovered, was due at the time of the commencement of the suit.

Clarke, N. R. now shewed cause. He stated, that the action had been brought for the balance of an account for wages, amounting originally to upwards of 30l. and that plaintiff had only received 10l. 5s. which was verified by an affidavit of the plaintiff; and submitted, that this being an action for the balance of an account, reduced by subsequent payments, but still for a demand of more than 5l. was not within the Act; and he cited the case of *McCollam v. Carr* (1 B. P. 223), where Eyre, C. J. said, "Is there any case where the ultimate balance of an account only being under 40s. the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in accounts between merchant and merchant, might by such means come to be decided before a county court. It seems to me, that the original demand ought to be under 40s."

But the Court, distinguishing between cases [20] where the original debt was reduced by payments and where there was a set-off, were of opinion, that the sum actually recovered by the verdict was the criterion by which they were to be guided; and made the

Rule absolute.

SCOTT v. ALLSOPP AND OTHERS, Executors, &c. Wednesday, 22d November 1816.

—Bond for securing money already advanced, and to be in future advanced, in account current, (although the obligation be under a penalty in a sum certain, however less than 20,000l.) cannot be received in evidence, unless it bear a 20l. stamp: being he'd, notwithstanding the penalty, to be a bond for the security money which may become due and payable on an account current, together with sums already advanced, where the total amount of the money secured, or to be ultimately recoverable thereupon, is uncertain and without limit, in the words of the 48 Geo. III. ch. 149. Those words are to be construed as applying to the effect of the condition of the bond, without regard to the amount of the penalty, which is not to be considered as limiting the extent of the security, where such bond is given to secure the payment of a final balance on account current.

The plaintiff had been nonsuited on the trial of this cause, at the Summer Assizes at Hereford, by the direction of Mr. Baron Wood. It was an action of debt, on a bond from the defendant's, testator and others, in a penalty of 4950l. The condition (reciting that the obligors, who were bankers, had frequent occasion to borrow money of the plaintiff, and to negotiate bills belonging to or received from him) was, that if they or either of them should pay the plaintiff "all and every such sum or sums of money as they now stand indebted to the said J. B. Scott, or which they shall or may hereafter owe or stand indebted, in account current, to the said J. B. Scott, his executors, administrators, or assigns, Then," &c.

The defendant pleaded the general issue and [21] *plene administravit præter 2000l.* Replication joined issue, and prayed judgment as to the said 2000l. Breaches suggested (under the statute), that defendant's testator, at the time of the execution of the bond, was indebted, cum aliis, to the plaintiff in 850l. account current; and that, after making the said bond, the testator, in his life time, stood indebted to the plaintiff, in account current, 13,000l. Yet, &c.

The objection on which the nonsuit had been directed by the learned judge was, that the bond being ingrossed on a 7l. stamp, had not been duly stamped, according to the statute of the 48th Geo. III. ch. 149, schedule, part 1, and was not therefore a valid security, or capable of sustaining the present action. By that statute, there is imposed on "Bond in England, and personal bond in Scotland, given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced, or due, or without, as the case may be, where the total amount of the money secured, or to be ultimately recoverable thereupon shall be uncertain and without any limit, 20l. And where the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum, the same duty as on a bond for such limited sum."

6th November.—Jervis obtained a rule to shew cause, why the nonsuit should not be set aside, and a new trial [22] granted; having contended, that all the cases had now fully established, (whatever may once have been the doctrine,) that on a bond in a sum penal, nothing beyond the amount of the penalty can be recovered at law; and that, if that were so, the present bond did not come within the description in the act, of "bonds whereon the sum ultimately recoverable should be uncertain and without limit;" but that it was rather of the class of those wherein the sum ultimately recoverable was limited not to exceed a given extent, such limit having been fixed by the amount of the penalty of the bond, beyond which, the obligor is not legally liable. The first case which occurs, is that of *Branquin v. Perrot* (2 Bl. 1190), where, in an action for a single breach of a bond the defendant was permitted to pay the whole penalty into Court, with costs. The next is the case of *White v. Sealy* (1 Doug. 49). There it was held, that on a bond, conditioned for the payment of a yearly rent by a third person, the defendants were not, as sureties, liable for more than the whole penalty. In a subsequent case, indeed, of *Lord Lonsdale v. Church*, it was ruled that a plaintiff might recover beyond the extent of the penalty, in the shape of interest and damages, for the detention of the debt; but that case was soon overruled, first by that of *Collins v. Collins* (2 Bur. 820), though the question was only collaterally met there. The last case on the point is that of *Wilde v. Clarkson*, (6 T. R. 304), expressly overruling that of *Lord Lonsdale v. Church*, and establishing the doctrine, that the [23] obligor is not liable beyond the amount of the penalty.

22d November. —Dauncey and Campbell now opposed the rule. They admitted that the plaintiff could not, on a bond, recover more by action than the amount of the penalty; but contended, that notwithstanding that was the rule of law, it afforded the plaintiff no argument to satisfy the Court that this bond was not liable to the largest duty: for it is a bond standing, and operating, in effect, as a security for a much larger sum than the amount of the penalty, and in course of time, may actually be the means of having secured to the plaintiff the repayment of money to an indefinite amount, although, when it comes to be put in suit and proceeded on, no more than the penalty may possibly be recoverable, and perhaps still less may be in fact recovered. It comes, therefore, fully and completely within the statute.

If, indeed, this bond does not come within the words and meaning of the act, there can hardly be such an instrument as an unlimited bond devised, on which the statute would operate, and some such case as the present was precisely that for which the act meant to provide. This is, in truth, a floating security for the balance of an account current, and the sums advanced on the faith of it might exceed, and in this case really had infinitely exceeded, the amount of the penalty expressed in it: and it was for that reason that the nonsuit had been directed at the trial. Suppose the amount of the penalty had been advanced and repaid twenty times over, [24] this bond having already operated so as to secure such advances, would still have stood as a security for the whole penal sum, and the last advance made on it, would have been as effectually recoverable under it, as the first.

The clause, providing that, — where there shall be a limitation that the bond shall not stand as a security for more than a given sum, there shall be a given duty imposed, must be taken to be applicable to such bonds only as shall contain an express stipulation, that the obligors shall not be liable on it beyond a certain amount; and that, as soon as that amount shall have been repaid, the bond shall be rendered, ipso facto, void. Such was the bond given in the case of *Kirby v. The Duke of Marlborough* (2 Maule and Selwyn, 18). There are three classes of bonds con-

templated by the act, within one of which this must come, as it is not to be supposed that any exemption was intended. They are 1st, Bonds for a sum certain; 2dly, for securing an indefinite balance on an account current; and, 3dly, for securing a balance on such an account within a certain limit. Now the Defendants contend, that the bond which is the subject of the present question, is of the second class, and ought, as such, to have borne a 20l. stamp to be admissible in a Court of law: and that nothing but an express provision introduced into the condition, that it should not operate as an available security for more than a certain sum of money, can transfer such Bonds from the second class to the third.

[25] Jervis, Abbot, and Puller, supported the rule. They observed, that the question, as now put, was really merely whether it be absolutely necessary,—to bring bonds for uncertain sums within the third class of bonds enumerated in the Act,—that the limitation should be expressly introduced in the condition of the bond, and be found there only: or whether, as the Plaintiffs contend, (which seems to be denied on the other side), it be sufficient for that purpose, that there be a limitation in the amount of the sum ultimately recoverable on the bond, contained in any part of the instrument, either expressly or virtually; and that such limitation may be adopted, as well in the obligatory part of the bond as in the condition; and that it would even be sufficient, if it can be collected from the general tenor of the bond, that the parties had intended any such limitation.

It is admitted, that nothing beyond the penalty could be recovered on this bond, either at law or in equity: now the Plaintiffs proposition is, that the term “recoverable,” as used in the Act of Parliament, was obviously intended to imply, recoverable by suit. If (as is contended) this Bond must be construed to be one which, (inasmuch as it might possibly ultimately secure a much larger sum than the whole amount of the penalty,) is therefore to be considered as a bond given to secure an indefinite sum, the same reasoning would apply to such a bond, even though it should contain an express limitation in the condition, of the amount which it was meant to secure; and therefore, even then it must still have been deemed an unlimited bond: yet they admit, that such a bond would come within [26] the third class of bonds, for securing an uncertain sum, but limited as to the utmost extent of that sum. The true criterion of ascertaining to which description of bonds this really belongs is, by inquiring for what sum the surety, as distinguished from the principal, would be liable in an action at law. In this case, that would be the amount of the penalty, and no more, and therefore the penalty operates, in effect, as a limitation; and it will then make no difference whether the bond be given to secure a primary gross sum, or the aggregate of various sums to be advanced at different periods on an account current.

It is said, that no Bond could be devised but such as the present, to satisfy the second description of Bonds in the statute. This might have been a Bond without express penalty, a single Bond, generally for all such sums as might be from time to time advanced; and such a Bond, though it would operate as a covenant, was most probably the exact kind of instrument in the contemplation of the legislature, as it would be, truly and unequivocally, a Bond for securing an indefinite sum of money. There are also certain covenants in use, with a penal clause at the end. A covenantee electing to proceed on the penal clause, could recover no more than the amount of the penalty.

[Graham, Baron. If money had been previously paid on the Bond by the surety, or recovered from him, would it not still stand as a security for the whole penalty?]

[27] The form of the judgment, in such a case, would be, for the penalty, with 1s. damages for the detention of the debt, and execution would issue for the sum due, and costs; but the plaintiff would not be entitled to levy more than the penalty. Nor on *scire facias*, for a larger sum due, could more be recoverable than the amount of the penalty. And it would be the same thing, if a clause of limitation were introduced in the condition.

As it is not only necessary to bring a Bond, within the description within which this is contended to be, to shew that the sum intended to be secured is uncertain and without limit; but that the sum ultimately recoverable thereon is so too:—and as by law nothing beyond the amount of the penalty can be recovered:—wherever, therefore, there is a certain penalty in the obligatory part of a Bond, as in this, it is not an unlimited Bond, but for a final sum certain, and therefore not liable to a higher duty than that imposed on Bonds for such sum.

THOMSON, Chief Baron. This point depends entirely on the true construction to be put on this Act of Parliament, as to the several kinds of Bond in the contemplation of the Legislature, when it imposed these various duties on Bonds of different descriptions; but of whatever description such bonds may be, the duties must be taken to be payable with reference to the time of the execution, without regard to future periods.

The question before the Court is, what sum was payable for the duty on this particular Bond at that [28] time? This statute contemplates, in the first place, Bonds intended as securities for definite and certain sums: and proceeds, by a scale, to assess the duties payable on those sums being so secured, beginning with the small sum of one pound, and progressively rising to 20,000*l.*: and, as I read the act, it has in view the sums payable by the condition of the Bond, without adverting to the amount of the penalty. The next description of Bond, and that which is made liable to the largest duty, is that which shall be given to secure the repayment of money advanced, and to be advanced, upon an account current, where the total amount of the money so secured thereby, or to be ultimately recoverable thereupon, shall be uncertain and without limit. Then the third class comprehends those wherein it is expressed that the money to be secured thereby, or to be ultimately recoverable thereon, shall be limited not to exceed a given sum: then the same rate of duty is imposed on such Bond as if it had been made to secure such given sum: the statute always applying to the money intended to be secured by the condition of the Bond at the time of its execution.

On the part of the plaintiff it has been contended, that as no more than the penalty of this bond is at any time recoverable at law, that operates as a limitation of the amount of the security, and makes it a Bond securing an indefinite sum, but a sum still within the extent of the penalty. Now I cannot but consider the words in the Act, where the money secured, or to be ultimately recoverable, "shall be limited not to exceed a given sum," as containing [29]-plating an express limitation, to be provided by the condition of the bond.

Then, inasmuch as the present Bond was made to secure the repayment of certain money, already advanced at the time of the execution, as well as all such further sums as should be thereafter advanced by the obligors on an account current, I cannot but consider it to be a Bond, whereby the total amount of the money intended to be secured, or to be ultimately recoverable thereon, was, at the time of the execution, uncertain and without limit: and that, therefore, the amount of duty payable thereon, at that time, was 20*l.*

In another part of the Act, Bonds given as security for the transfer of shares in the public funds, (which are generally given in a penalty), are made liable to a duty proportioned to the value of the stock secured to be transferred, which is to be computed according to the average price of such stock at the time of the execution of the bond. There, there is not the least reference to the penalty of such bonds, and the duty which attaches is payable on the money advanced, with reference to the object of the condition of the bond.

It seems to me, therefore, that in this case, the penalty is out of the question; and measuring the duty payable at the time of the execution of the bond, by the terms and object of the condition, the bond given in this instance required a 20*l.* stamp, and for want of it, could not be used in support of this action. I [30] think my Brother Wood was right in directing a nonsuit, and that it ought to stand.

GRAHAM, Baron. The Act looks to the general nature of the security, and has no reference to the penalty. Nothing is more frequent than persons, becoming security for others in an uncertain sum, guarding themselves by limiting their engagement to an express amount, and providing (if the instrument be a bond) by the condition, that as soon as so much money shall have been paid, their liability shall cease. In that case, the duty imposed by this Act on such bonds, would be measured by the amount of the limitation; but where there is no such limitation so expressed, the sum secured is uncertain and without limit, and the instrument of security is subject to the highest duty. Now I take this to be exactly such a case, and therefore, that this bond is precisely that which was meant by the Act to be made liable to the largest duty. If, as soon as 1000*l.* had become due, the plaintiff had sued on the bond, and had been paid, although he could not have ultimately recovered at law more than the penalty, yet if, on the commencement of each frequent suit, he had, toties quoties, received so much, the bond would have, in the end, secured to him a much larger sum than the

amount of the penalty, and therefore I think that this bond should have borne the stamp to be imposed on such as are liable to the highest duty of 20l.

WOOD, Baron. On the best re-consideration that I have been able to give this case, it appears to me, [31] that the duty on these bonds was meant to be measured by the sum intended to be secured by the condition of the bond. All Bonds, whatever may be the penalty, are intended to secure the sum expressed in the condition, and according to the condition: and had the Legislature meant to have imposed the duty on the penalty, it would have been, in most cases, imposed on double the sum actually advanced, and intended to be secured.

(Having read the words of the Act.) The bond in question was given to secure the balance of an account current after payment, by the principal, of the money advanced at the time of its execution, and of all sums thereafter to be advanced, without limit as to the ultimate or total amount.

I am therefore of opinion, that the condition of this bond, containing no restriction as to the total amount of the money for which it was intended to stand as a security, brings it within the description of bonds made liable by the Act to the duty of 20l. The money secured by it is uncertain and without limit, notwithstanding the penalty be fixed; for that does not restrain the obligee from recovering, ultimately, on the condition, as much more than the penalty, as the amount of all the sums which may have been in the mean time advanced on the faith of the bond, and repaid; for the obligors might be called on as often as the money advanced amounted to a sum somewhat less than the penalty, to pay the obligees so much; and thus, in the end, the bond might have availed them as security for 20,000l. or a much greater sum; and it is therefore strictly the [32] kind of bond contemplated by the Legislature, as being intended to be subjected to the duty of 20l.

It is said, that if the limitation had been expressed in the condition, that would have taken it out of the class of bonds subject to the largest duty; but I should have doubted whether it would not then have been liable to that duty, if it had been given to secure a final balance on account current; but, at all events, in the present case, I am clearly of opinion that this bond is within the Act, and that therefore it could not be received in evidence, for want of a proper stamp.

RICHARDS, Baron, concurred; suggesting, that otherwise the revenue might be constantly defrauded, by having recourse to the evasion which this sort of bond, if available, would furnish.

Rule discharged.

THOMAS v. MATTHIAS. Friday, 24th November 1815.—Where an order for a messenger has been issued against a sheriff for contempt, in not returning an attachment against a defendant for not putting in his answer (other attachments having been issued before), it is peremptory: and the Court will not stay the order, although it go to affect a sheriff not in office at the time of the alleged original neglect: nor will they consent to enlarge the time allowed by the order.—The previous order to the High Sheriff, to return the process, may be served on his Under Sheriff, and such service will be good.—Nor will the Court enlarge the time limited by the order in such a case.

Dauncey moved, that the order made in this cause, for a messenger to bring up Morris Williams, Esq. High Sheriff for the county of Pembroke, to the bar of this Court, for contempt, in not returning an attachment with proclamations, which had been issued against the defendant might be [33] stayed in the hands of the plaintiff for ten days, the said Morris Williams submitting to pay all costs, and undertaking to file a return within that time. It was urged, in favour of the application, that the neglect complained of (if there had been any) was the neglect of his predecessor in office: and it was objected, that the original rule, for the Sheriff to return the attachment within a week, had been served on the Under Sheriff.

Stephens opposed it; stating that very great delay had arisen to the plaintiff's suit (which was a bill filed against the defendant in 1812, for tithes), in consequence of the Under Sheriff not returning the several attachments which had been issued against the defendant for not putting in his answer: that now, at length, an attachment against the Sheriff had been executed by the Coroner, and he had entered into the usual bond, in the penalty of 40l. conditioned, for answering the contempt

by the 21st June last : but that not being done, and the usual rule for the Coroner to bring in the body, having expired, the plaintiff had obtained the order in question, for a messenger against the Sheriff.

THOMSON, Chief Baron. The order does not require personal service : it is sufficient that it be served on the Under Sheriff. As to the application itself, he is in contempt, and therefore the Court will not interfere.

Motion refused, with costs.

Dauncey then applied to enlarge the time, which the Court also refused.

[34] IZON & WHITEHURST v. BUTLER & ANOTHER, Executors, &c. Monday, 27th November 1815.—A bequest by the obligee to one of joint obligors, of a debt due on the bond, in these terms : “I remit and forgive to T. W. the sum of 500l. which he stands indebted to me on his bond ; and I direct said bond to be delivered up to him and cancelled,” is merely a personal legacy to T. W., and lapses, by his death in the life time of the testator : for, notwithstanding the terms in which it is bequeathed, such a bequest does not operate by way of equitable release, or as an extinguishment of the debt. Therefore the surviving co-obligor, and the representatives of the deceased legatee, are not discharged from the payment of the money due on the bond.

The question in this case arose on a bill, filed by Izon, who had been the partner in trade, and Thomas Whitehurst, who was the son and executor of Thomas Whitehurst, the deceased legatee, against the executors of Catherine Abbott, to compel them to give up a joint bond to be cancelled, which had been entered into by the partners, Izon and Whitehurst, to the Testatrix, and by her remitted by will, in the way of bequest, to the said Thomas Whitehurst, the elder, who had died in the life-time of the testatrix. John Izon and Thomas Whitehurst (the father of plaintiff, Whitehurst), who were in partnership as founders, at Birmingham, had, in the year 1777, borrowed of Catherine Abbott 500l. for which they gave this their joint bond.

In April 1805 Catherine Abbott made her will, which contained a bequest in these words : “I remit and forgive to Mr. Thomas Whitehurst, the elder,” (the plaintiff Whitehurst’s father) “of Islington, the sum of 500l. which he stands indebted to me on his bond, and I direct said bond to be delivered up to him and cancelled.” She died in September 1810, and her executors possessed themselves of her personal estate and effects, which were considerable. Thomas Whitehurst, the legatee, died in September 1807, having appointed his son Thomas (one of the plaintiffs) [35] executor of his will. The interest on the bond had been duly paid by Izon and Whitehurst, the obligors, during Whitehurst’s life, and by Izon ever since his death, to Catherine Abbott, the testatrix, until her decease. Her personal effects, exclusively of the sum secured by said bond, was more than sufficient to pay her just debts, &c.

Under the circumstances of these facts, as stated in the bill, and admitted in the answer, the plaintiffs claimed to be discharged from the obligation of the bond, although the legatee had died in the life time of the testatrix : submitting, that the bequest took effect as an equitable release. On the other hand, the defendants contended, that the bequest, notwithstanding the direction that the bond should be delivered up to be cancelled, had lapsed ; and that therefore, they, as executors of the testatrix, were entitled to recover the money due on it from the plaintiffs.

Monday, 20th November Dauncey and Roupell, for the plaintiffs, urged that this was the case of a remission and forgiveness of the debt, and not a bequest or legacy of the money secured by the bond : and that, therefore, although in the latter case it would have lapsed as a legacy : in the former, it took effect as an extinguishment of the obligation. The intention of the testatrix was, as is evident, that the debt should be extinguished ; and, in equity, this bequest, being in the nature of a release, must, in its operation, extend to the co-obligor, a release to one being established to be in law, a release to all : [36] and a court of equity, adopting a legal construction, will give it all its legal consequences. The case stands on the peculiar wording of the will : The testatrix does not give and bequeath the sum or bond, but “remit and forgives” the debt ; and she directs the bond “to be delivered up to him and cancelled,” not “to be” cancelled ; all testifying an intention that the security should be destroyed : but the operative word is “remit,” which releases the obligation.

If so, the delivering up the security must follow of course, and that must be to the person interested in the cancelling it. The decisions are entirely in favour of this doctrine. The leading case on the point is that of *Sibthorp v. Morom* (3 Atk. 580), where the will was in these words: "I likewise forgive my son-in-law, Richard Chillingworth, a debt of 500l. due to me upon bond, and all interest that shall be due for the same at my decease, and desire my executor to deliver up the bond to be cancelled." The legatee died in the life-time of the testatrix: yet that bequest was held to be a discharge of the debt. Now the bequest in that case is not so strong as in the present, except that her direction here, as to delivering up the bond to be cancelled, has the words "to him," which, it will probably be contended, shews the bequest to have been personal; but to whom should the delivery be made? Certainly to the person to be benefited by it. There the Chancellor said, that equity would give it the effect of a release at law against an executor. And he adds; [37] "If, in the case of *Elliott v. Davenport* (1 P. Wms. 83), which had been cited, it had been said, I forgive my son such a debt, and the bond had been ordered to be delivered up to be cancelled, it would have been held a discharge." And afterwards his Lordship makes the distinction, where the words are penned as forgiveness or remission. Now here there are both words: and all the cases subsequent to that of *Sibthorp and Morom*, are cases of mere bequest and gift, without words of remission. These are the operative words which create the distinction, and being given their effect, the delivery of the bond becomes nugatory; and that objection affects the cases which otherwise would appear to incline against the construction for which the plaintiffs contend.

Martin, and Trower, for the defendants, adverted to the circumstance of the interest having been paid up to the death of testatrix, and after the death of Whitehurst, as shewing that the debt had not been extinguished during her life, and that she had not meant the remission to operate eo instanti, as it must have done, if it operated as a release; and also, that Whitehurst alone had been the object of her bounty. Against creditors, such a constructive release would clearly not have been good, and the situation, in particular cases, of parties, cannot safely, and therefore never should be permitted, to control the effect and operation of wills; the question here is, what would be the operation of such words as those used in this will in every case.

[38] In the case cited of *Sibthorp and Morom*, it is clear that Lord Hardwicke was struggling throughout, against a point of law, to give effect to a family arrangement with which it interfered, and that is a case of deviation from the rule of law, which should not be carried further. His words are, "The testatrix had in contemplation some benefit to all the branches of her family. The daughter of Richard Chillingworth's wife is the person who now applies for this benefit, and it would be hard to say that, because the son-in-law died in the testatrix's life-time, the grand-daughter, who was of her blood, should lose it." Now Izon was not in any way related to the testatrix, and can have no claim on that ground.

The case in this Court, of *Toplis v. Baker* (1st Cox's P. W. p. 16, 5 ed. in notes), but that it wants the word forgive, is wholly in favour of these defendants: and there is no decision cited in which the words remit and forgive have yet been held tantamount to a release. In that case, the reason given by Lord Chief Baron Eyre for the decision was, that the bond was directed to be given up to the legatee personally: so here the words are, to be delivered "to him."

But in *Maitland v. Adair* (3 Ves. 231) the words were fully as strong as these; they are, "I devise to my brother, the Reverend Mr. Adair, 2000l. I also return him his bond for 400l., with interest due thereon, which he owes me." And that [39] Lord Loughborough held to be distinctly a legacy: and, having lapsed, there was no foundation for delivering up the bond.

[Thomson, Chief Baron. But "return," in that case, is coupled by the word "also," with the immediately preceding bequest of a legacy.]

Then, as to the intention of the testatrix, (for it is on the probable intention that Lord Hardwicke founds his decision), it cannot be contended that she could design by this bequest a benefit to Izon, a stranger. In all cases where a lapse is meant to be guarded against, the will must be particularly and specially penned, otherwise the rule of law must take effect: and so it is held, even in the case of *Sibthorp v. Morom*. Now certainly there is no special penning here, which expressly or impliedly protects this legacy from lapse; and therefore this bill should be dismissed.

Dauncey, in reply. The express words of Lord Hardwicke in *Sibthorp and Morom*

are, that words of forgiveness and remission of debts shall operate as a release in equity; and this case must be governed by that authority. If special words are necessary to prevent lapse, those words being found here, are sufficiently so for that purpose, and so they are construed to be in the same case. It is true, the remission was not to operate till the death of the testatrix: she did not mean, probably, to lessen her income during her life, and its effect might well be suspended till her death: otherwise, that would be [40] an objection to every case of a will operating as a release in equity.

The case of *Toplis and Baker* resembles the present only in there being words used in the will, in this case, apparently directory of the personal delivery of the security to the legatee: but it differs from it, and that most materially, in the testator having employed the word give, and not forgive; and when the debt is forgiven, the instrument securing it becomes of small importance. In the case of *Madland and Adair* the word used is not of equal force; it is, I return the bond: now the term remit is the strict language of releases, and the Chancellor's attention does not appear to have been called to the case of *Sibthorp and Moxom*.

27th November. — THOMSON, Chief Baron. The question arises on the operation of the words "remit and forgive," as used in this will, under the circumstances. The money is stated to have been lent to Whitehurst alone, and in the will it is called the 500l. in which Whitehurst stands indebted to her: he died in her life-time, and she surviving him several years, continues to receive the interest on the bond. On her death, this Bill is filed by the plaintiffs, who contend, that the bequest should not be construed to amount only to a mere personal legacy, but to have operated in the nature of a release, which, if it discharged one co-obligor, would have also, it is said, exonerated the other: and it is therefore insisted, that, on her death, the plaintiff Izon became entitled to have the bond cancelled, on the ground, that the [41] bequest, in the present form, was not confined personally and solely to Whitehurst. In this case, no one stands in Whitehurst's situation, who could have sued on this bond, because, being joint, his executor could not have done so. It is contended that, if the debt be released, the co obligor would be entitled to the benefit of it, although not named in the will.

But it is difficult to consider this bequest as a release, and to distinguish this case so as to take it out of the general rule of law: and if this is a legacy, it must follow the rules of law respecting legacies, one of which is, that if the legatee die in the life-time of the testator, it shall lapse, whether pecuniary or specific, unless it appear clearly to be the manifest intention of the testator that it should be otherwise. Then, as to whether this ought to be considered as a legacy, and to be subject to the incidents affecting legacies: certainly, in case of a deficiency of assets of this testatrix, even if Whitehurst, the legatee, had survived her, this legacy must have abated proportionally, and Whitehurst could only have claimed a discharge, pro tanto. The great cases on this point have been discussed. In the first case, *Elliott v. Davenport*, there was an express direction that the executors should deliver up the bond into the hands of Sir Wm. Elliott, and execute releases to him, and the benefit was held to have lapsed. The word used in that bequest, however, was "give." In *Sibthorp v. Moxom*, Lord Hardwicke was struck with the hardship of the case, for there a benefit appeared to have [42] been intended to be conferred on the person, who would have been deprived of the legacy by the death of the intermediate legatee in the life time of the testatrix. He also relied much on the circumstance of there having been no direction requiring a delivery of the security to the son-in-law personally, which he considered as shewing that the testatrix meant it should be delivered absolutely. The case of *Toplis and Baker* is very much like this, and, as I think, not to be distinguished from it. The words there were, "I give to my kinsman, N. D. the sum of 100l., which he owes me, on mortgage of his estate in S.; and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at the time of my decease, together with all interest due thereon." That mortgage debt was further secured by bond: besides which, N. D. was indebted to the testator, on another bond, in 200l.: both bonds were in the custody of the testator at the time of his death. N. D. died in the testator's life-time. After great consideration, the Court held that to be a lapsed legacy. On that occasion, the Lord Chief Baron Eyre (that is, the Court) observed, that none of the circumstances which could be supposed (and that is an emphatical word) to distinguish the case of *Sibthorp v. Moxom* from

Elliott v. Duncroft, occurred in *Toplis v. Baker*. That the principal ground on which *Sibthorp v. Moxon* was decided was, that there was nothing in the will to confine the delivery of the bond to the person of the son-in-law; and that charge, therefore, was not ancillary to the former bequest to him, but amounted to a declaration that, in all events, the bond should be delivered up; and that, of necessity, would operate for the benefit of the representative—that, in *Toplis v. Baker*, the word used by the testator was give, and not forgive; and (what was more material) that the bond was directed to be delivered up to N. D. personally, and there was no direction whatever for the delivering up the mortgage; and for those reasons the Court saw no reason for departing, in that case, from the general rule, that a testamentary disposition must lapse by the death of the legatee in the life time of the testator.

Now, I have always been at a loss to understand the distinction between giving and forgiving a debt. Forgiving is the only way by which a debt can be given to the person from whom it is due; and there is nothing to be given, (that is to be handed over), except the security. The case of *Maitland and Adair* is certainly very material; and the point is plain, though the note is short. The term used there was, "I return the bond," &c.; an expression which led the Court to direct an inquiry of what was become of it, there being a probability that it might have been actually returned; but that was found not to be so, and therefore it was held that the co-obligor was not discharged.

For these reasons, we are of opinion, that the bequest to Whitehurst was a personal legacy, intended for his benefit only; and that it must follow the nature of legacies in general: and, consequently, that the party demanding the bond to be delivered [44] up, is not entitled to the prayer of the bill, the legacy having lapsed, by the death of Whitehurst, in the life-time of the testatrix.

Per Curiam. The Bill, therefore, must be dismissed; but without costs; because, as was intimated by

RICHARDS, Baron. The case of *Sibthorp v. Moxon* is sufficient to justify the parties filing the bill.

The end of Michaelmas Term.

[45] SITTINGS AFTER MICHAELMAS TERM, 56 GEORGE III. GRAYS INN HALL.

CHURCH v. LEGEYNT. 17th December 1815.—The time allowed defendant to answer amendments in a bill is eight days, or he must, within that period, apply for further time.—But, on a special application, to be allowed to answer an amended bill, even after the plaintiff has replied, and called on defendant to join in commission, the Court will permit it, on condition of filing such further answer, and joining in commission immediately.

Whitmarsh moved, that the Defendant might be at liberty to answer the amendments made in the complainant's bill; undertaking to put in such answer forthwith.

The bill was amended under an order of 3d May 1815. The Plaintiff had lately replied to the defendant's answer to the original bill, and called on the defendant to join in commission. It was stated that the plaintiff had never called on the defendant for a further answer; and that, if he had done so, the Defendant's Solicitor would have applied for the usual order for time. It might (it was said) make a material difference to the defendant in the consideration of costs.

Dauncey opposed the motion; stating that the defendant having replied, it was contrary to the course of practice, to be allowed to answer so long after the amendments had been made in the bill. [46] The rule is, that the defendant shall answer amendments in eight days.

[Richards, Baron. Or else he should apply for further time within that period.]

The motion, therefore, should be refused, with costs; but

The Court (defendant consenting to pay all the costs of the application, and undertaking to file his further answer, and join in commission immediately) granted the motion.

WATTLEWORTH v. PITCHER. Tuesday, 19th December 1815. — It is sufficient for the purpose of obtaining an injunction to restrain a plaintiff at law from proceeding in the action, that the defendant state in his bill and affidavit, that an unsettled account subsists between the parties, and the plaintiff would be found indebted to him on such account, in a greater sum than he is proceeding for; nor is such a bill demurrable on the ground that the plaintiff, in equity, stating a balance to have been acknowledged to be in his favour, might have pleaded it, at law, on notice of set-off.

The defendant had demurred, as to so much of the plaintiff's bill as prayed the injunction. It was filed for an account, and to restrain the defendant from proceeding in an action at law, which had been commenced on a bill of exchange for 300l. drawn by Plaintiff, and made payable to, and endorsed by the Defendant. The Plaintiff paid it away, and received the value. Not being honoured, it was ultimately taken up by the Defendant. The Plaintiff stated, that, at the time the said bill of Exchange was so taken up by the defendant, there [47] existed an account between them, on which the defendant had admitted a balance in favour of the plaintiff, to the amount of 1400l.; but which he contended amounted to 1600l. and upwards, so that the exact amount was not then ascertained; and that the defendant knew when he endorsed the bill, that it would not be accepted; and that he undertook to take it up, when due, in part payment of the balance by him acknowledged to be in favour of the plaintiff. The Bill was verified by affidavit.

Maddock, in support of the demurrer, submitted, that the Plaintiff, according to his own statement in the Bill, had shewn that he had an available defence at Law, and therefore was not entitled to the interference of a court of Equity. He has stated an acknowledged balance due to him, and that would be a subject of notice of set-off, under the statute; and therefore he was not entitled to the Injunction prayed.

Parker, for the Plaintiff, contended, that the balance, whatever it might be, being unliquidated, the plaintiff was entitled to an account; and that alone would be sufficient ground for the injunction. The Court, in these cases, proceeds on the defendant's affidavit, which would not serve him at law.

Per Curiam. This is a Bill for an account, charging that the Plaintiff, at Law, is indebted to the Plaintiff, in Equity, in more money than he is proceeding for. The Injunction must follow the prayer of the Bill.

Demurrer overruled.

[48] THE ATTORNEY GENERAL v. J. ELLIOTT, J. L. DES BARRES, & J. F. W. DES BARRES. 17th December 1815.—The Court will not make an order on a defendant, who has answered, in whose hands another of the defendants, who has not answered, has deposited boxes, in which certain specific articles, claimed by the plaintiff, are said to be believed to be—that he shall be restrained from parting with the subject matter of such deposit, unless the bill be supported by a positive affidavit that the contents of the boxes are actually in danger, however strong the inference may be, from the facts stated in the affidavit, that there exists ground for apprehension that it is intended to make an improper use of them to the injury of the plaintiff.—Nor will they make an order on such depository, requiring that he shall produce such boxes, to be left in the hands of his clerk in Court, for the plaintiff's inspection, in aid of a trial at law, wherein the question of property is in dispute, without a positive statement in the affidavit, that the object of search is, or was, contained in the boxes.—But although the bill do not contain the above requisite positive statements, held to be necessary on such motions, the Court will permit an affidavit to be read in support of the bill, on the ground that such affidavit may supply such omission in the bill, which if it did it appears would be sufficient.

The former application to the Court, in this cause, having been refused (a), the Bill was afterwards amended, by making J. F. W. Des Barres a Defendant, (so as to bring before the Court the party claiming the subject matter in question,) and, in some other respects: and now prayed an Injunction, and further relief.

(a) Vide, *Attorney General v. Elliott and Another*, ante, vol. i. p. 377.

Jervis and Wyatt now moved, according to the prayer of the information, for the production of the boxes, &c. as on the former motion; and that the two first named defendants might be restrained, by injunction, from selling or disposing of the charts, drawings or plans, plates and impressions, mentioned in the pleadings in the cause, and from delivering the same to the other defendant J. F. W. Des Barres, and from destroying or injuring the same.

The information, so amended, was filed 29th June; but neither J. L. Des Barres nor J. F. W. Des [49] Barres had yet been served with process, nor had defendant Elliott put in his further answer.

An affidavit, made by the Hydrographer of the Admiralty, was put in on the present occasion; which verified the facts of the information, as to the employment and remuneration by Government, of the defendant J. F. W. Des Barres, as therein stated; and stated, that he believed that the original charts, drawings, or plans, were never delivered by him to any person, for the use of his Majesty, but still remained in his (Des Barres') custody or power; and that they were those from some of which impressions had been published by him, in a work, under the title of the *Atlantic Neptune*; and that, among those so published, were many which had been prepared at the expense of Government, by other persons;—that previous to his departure from England, to take upon himself the appointment of Governor of Prince Edward's Island, he had deposited them with the two first-named defendants, and that they were now in their custody or power;—that since the Defendant Elliott, had put in his answer to the first information, the Deponent had received a letter from his (defendant's) solicitor, proposing, without prejudice to the question between the parties, to endeavour to obtain a surrender of the charts, &c. if the Board would agree to pay, as a consideration, the sum of 5000 guineas; which the Board had refused to do; and that he believed that, at the time of filing the defendant Elliott's answer, the said charts were contained in the boxes required to be produced, and left as prayed, and were still there.

[50] When this affidavit was proposed to be read, Heys objected to its being received; submitting, that this was not a case of irreparable waste appearing on the face of the proceedings, nor had they made out any right to either object of the present motion; and therefore such an affidavit was inadmissible.

[Richards, Baron. The affidavit may supply the deficiencies of the bill, in that respect.]

It was urged, that the present attempt was merely made for the fair purpose of facilitating the trial at law of the right of property, which, under the circumstances of this case, could not be done without the interference of this Court, in the way now sought.

[Richards, Baron. The affidavit does not state that there is any danger apprehended to the property; nor is there any reason stated for the belief that the charts are in the boxes required to be produced; and without such apprehension and such reason stated, there can be no ground for the motion.]

It is not necessary that probable danger should be sworn to; it is sufficient, in such cases, that it may be inferred, from the tenor of the facts stated, and that inference is unavoidable here. Another consideration for the Court is, that a property of this description, which is obviously of great value as well as utility, both in a mercantile and political point of view, cannot be replaced, if destroyed or injured.

[51] *The Earl of Macclesfield v. Waters* (3 Ves. & Beames, 16), (a case then depending before the Lord Chancellor), was cited, where, it was said, a similar motion had been granted.

In that case, John Blackall, one of the plaintiffs, was tenant in tail, under the will of his grandfather, Thomas Blackall, of certain real estates, of which his father, John Blackall, was tenant for life under the said will, and of certain plate, jewels, &c. devised as heir-looms, to accompany the said estate. John Blackall (the tenant for life) obtained possession of said plate and jewels on the death of testator, all of which were locked up in an iron chest. The tenant for life being dead, having made a will, of which he constituted the defendant Davis and two other persons, who renounced probate executors, the tenant in tail became entitled to the said estate, and the plate and jewels, &c. The bill further stated, that defendant Davis, during the life of the tenant for life, had possessed himself of said iron chest, containing the said plate and jewels, for securing an alleged demand which he had on the tenant for life; and that

he had pledged the same to Edmund Waters, another of the defendants, as a security for money advanced to him in discounting bills, who lodged it with Messrs. Vere and Co. his bankers, the other defendants, in whose custody the said chest, and all its contents, then were.

The bill then charged, that defendants had refused plaintiff all access to the said chest; and that [52] it was the intention of defendants, particularly of Waters, to sell the contents, and apply the produce to their or his use.

Vere and Co. the bankers, answered acknowledging possession, and submitting to the Court. The Defendant Davis answered, that he had deposited said chest with Waters, as a security for money advanced by Waters to him, and expended on the account of John Blackall, the tenant for life, for whom, through his means, Waters had discounted bills; and that Vere and Co. were Waters's bankers, and not defendant Davis's. He admitted, that before the said plate, &c. had been delivered to him, he had seen a copy of the will of said testator, Thomas Blackall, and knew that the same was thereby given as heir-looms; but submitted, that the tenant for life had a right to dispose of them as he had done; and insisted on his own and defendant Waters's lien. Waters's answer insisted on a lien, in respect of the circumstances, and denied knowledge of the interest of tenant for life, and of the contents of the chest.

Under these circumstances, a motion was made by the plaintiffs, that the defendant Davis might be ordered to deliver to the plaintiffs the key of the iron chest, admitted by the answer of Vere and Co. to have been deposited with them by Waters, and to be in their custody; and that they may be ordered to permit the said box, with its contents, to be inspected by the plaintiffs, or any person they should appoint, at all reasonable times, upon request. In support of the motion, it was observed that, without [53] the inspection now applied for, no action of trover could be maintained by the plaintiffs, from their inability to identify the property; and Blackall had been one of the executors.

The Lord Chancellor said, This bill aims only at another mode of discovery, in a way less expensive than by answer; and if the plaintiffs had filed a bill of discovery, in aid of an action of trover, they must have had it. It is now too late, since the case of *Fells v. Read* (3 Ves. 70), following *Pusey v. Pusey* (1 Vern. 273), to discuss whether this Court will interfere for the specific delivery of a chattel; and if it will in such a case, a fortiori, the restitution of heir-looms must be decreed; upon which there never was any doubt. By granting this motion, the interest of the defendant Waters is not affected; the plaintiffs, only desiring to know what is in this box, have a right to have from him the information, what those articles are, the specific delivery of which they seek by their bill*.

The counsel for the Crown then adverted to what had fallen from the Court on the former motion. On that occasion it was said, that there might be confidential communications with other persons in the boxes, which it would be injurious to expose; but submitted that a defendant is not to be allowed to create a privilege to himself, on such occasions, by mixing the things sought to be forthcoming, with such communications.

[54] Two of the defendants being abroad, the Crown has no means of enforcing their answer; and that is a reason why this application should be granted on the affidavit which has been filed.

Heys, for the defendants, objected, that the Hydrographer's affidavit was altogether insufficient to induce the Court to listen to this application. There is no reason stated for his belief, and no foundation for his knowledge; nor is there any statement of apprehension, that the charts, &c. are in danger. Indeed, nothing that it contains is direct and positive, but all is deduction and implication; and if this motion be attainable, the Court might be called on to enjoin the party with that which has never been possessed by the person restrained. It is at all times going far, to control prima facie rights; and in all such cases the allegations in a bill should be very strong, and supported by the establishment of the facts, on conclusive affidavits: whereas here, there is nothing more furnished to the Court, than the belief of an individual unconnected with the transaction.

* It was observed, by the Court, that the admissions in the defendant Davis's answer, in the case cited, furnished the plaintiff with good ground for the application.

Jervis, in reply, pressed, that the inspection required might at least, in all events, be granted, if the Court should ultimately think that an injunction ought not to be ordered.

It is said, that the Crown is not entitled to the interference of the Court, because danger to the property has not been positively sworn : now the affidavit states, that the possession has been already changed, and that, after disputes had arisen as to [55] the right of property, between Des Barres and the Crown. Now that alone is indicative of imminent danger : but some of these plans have actually been published in the *Atlantic Neptune*, and that is precisely the danger to which literary property is subject, and to prevent which, Courts of Equity always interfere. This is very much analagous to that species of property : and the question between the parties here is, to whom the copyright in these plates and impressions belongs. If, indeed, the defendant, Des Barres, has a lien on the property, he may substantiate it by pleading. In that case, the inspection of the subject in dispute will be indispensably necessary ; and therefore it is, that the Crown now seeks it of this Court.

[Richards, Baron. There is an important passage in defendant Elliott's answer, which states, that certain disputes having arisen respecting the plates and impressions since deposited with, and now in the possession of the defendant, it was referred to the Secretary of the Treasury, who declared them, in his award, to be the property of Des Barres, and not of his Majesty.]

That relates only to the plates and impressions, and not to the charts.

THOMSON, Chief Baron. In whosever possession these charts and plans are, they are unquestionably the property of his Majesty, inasmuch as they were executed at his expense. This application supposes some of them to be in the possession of some of the defendants, and particularly of Elliott. [56] It assumes also, what is not in proof, that there exists an intention of disposing of, and parting with them, having first assumed, that they are in the possession of Elliott. In fact, the whole proceeds entirely on belief, without stating any reasonable foundation even for that belief. There is merely suspicion stated, and no evidence, that the objects sought are contained in the boxes proposed to be inspected. Now, even supposing that that had been proved, I think, that on such an application, it should have been distinctly sworn, that the defendant intended to make an improper use of what had been so committed to his care : but that not being expressly sworn, the foundation of the application fails.

GRAHAM, Baron. However strong the inference may be, that these boxes contain the original plans, as well as plates and impressions, there is no positive statement that it is so. The inference, indeed, may be so strong, as that, personally, one may have no doubt ; but judicially, the Court expect positive facts : and without, they ought not to proceed, particularly where the effect of the interference sought, goes to compel the party not to part with what he may not have in his possession ; or if he has, the person who placed it in his hands, has also a sort of lien and property in it, and that too to be granted on a summary application.

As to the latter part of the motion, for an inspection of the boxes, that would be an unusual order to make in this stage of the cause ; and there [57] is no very distinct account made out, of what it is asked to have an inspection of, or whether it is in the possession of the party against whom it is applied for. Neither the affidavit now put in, nor the amendments in the bill, carry the case so much further than on the former motion, as to induce the Court to grant the motion.

WOOD, Baron, of the same opinion

RICHARDS, Baron. This motion ought clearly not to be granted. In every case for an injunction, such as is now prayed, the affidavit should state strong grounds for apprehending danger, which has not been done here, although it may perhaps, as has been ably argued, have put sufficient before the Court, to raise a strong inference of such danger, and particularly from the circumstance of the publication of some of these plates in the *Atlantic Neptune*, in 1784.

That, however, seems to have been submitted to for thirty years, which may go far to induce the Court to think that it was justifiable : particularly as, in the mean time, the party now complained of has been appointed by the Crown to a situation of high credit.

He certainly did not put the boxes into Elliott's hands for the purpose of publishing these charts : nor is it attempted to be insinuated, that a further publication has

been contemplated. The affidavit read does not fully adopt the allegations of the information.

[58] It is therefore impossible that an injunction should be granted under these circumstances: for it would be destroying the principles on which the security of property is founded. Nor, for the reasons already stated, does there appear to me to have been a sufficient case made out, to warrant an order for the production of the boxes for inspection.

Motion refused.

THE KING v. FREME AND OTHERS, Assignees of Whitehead and Co. 22d December 1815. —It, —on an extent issuing against the acceptors of bills of exchange (drawn in favour of officers of the Crown, for public money received by the drawers, and remitted by them to the acceptor) for the purpose of levying the Crown's debt, the drawers, after the execution of that process, take up and pay the bills, they are not liable to pay the Sheriff's poundage on the levy. And the Sheriff, having retained, under an order of the Court, a sum for poundage in his hands, will be ordered to restore it to the assignees of the bankrupt acceptor's estate. Semble. Whatever be due to the Sheriff for poundage, in such a case, should be paid by the Crown.

Martin moved, at the sittings after last Trinity Term, that the Deputy Remembrancer might be directed to deliver and pay to the defendants, the two several exchequer bills, for 7000*l.* and 200*l.*, purchased by him, with the money paid into Court in this cause; and also the sum of 61*l.* 1*s.* 3*d.* cash, standing to the credit of this cause; and that the Sheriffs of London might be directed, within a week, to pay over to the defendants, or one of them, the sum of 388*l.* 7*s.* 1*d.* (retained in their hands for their poundage, without prejudice), the debt for which the said extent issued having been satisfied.

The affidavit of the agent of Messrs. Harford, Davis, and Co., on which this application was made, [59] stated, that the Solicitor for the Crown (Customs), had applied, through him, to Messrs. Harford, Davis and Co. requiring their undertaking in writing to pay the expenses of prosecuting this writ of extent, which they refused to do. That they were advised to, and did take up the three bills of exchange which remained unpaid, amounting to 3858*l.* 18*s.* 4*d.*; the other bill, for 3858*l.* 3*s.* 3*d.* having been before paid shortly after it had become due: the amount of such four bills, being the debt for which the said extent had issued: all which bills were then in the hands of the deponent, for the use of the defendants. The affidavit further stated, that the bills were all drawn by Harford and Co., on Whitehead and Co., and became due severally on the 20th and 27th November, and 3d and 10th December, 1814. It was also sworn that on 16th November 1814, Whitehead and Co. were declared bankrupts; and that the defendants had been advised by counsel, to defend the said extent, and believed that they had good ground of defence, if it had proceeded to trial.

The Court granted, on this motion, an order to shew cause.

28th November.—Abbott now appeared for the Sheriff, and Dauncey for the Crown. They stated, that the bills in question had been drawn by Harford and Co., who were bankers at Bristol, on Whitehead and Co., their agents in town, in favour of Gordon, the collector of customs at that port, and by him endorsed to the receiver general of the customs in London (this was [60] his usual mode of remitting the money collected by Gordon to town). By the Receiver General, the bills were paid into the Bank of England, who procured them to be accepted, in due course, by Whitehead and Co. The extent issued, on an affidavit, that Whitehead and Co. were indebted to the Crown in 7717*l.* 1*s.* 7*d.* for money had and received to the use of his Majesty. It was contended, that the debt having been levied under the extent, the Sheriff was therefore entitled to his poundage, notwithstanding the drawer of the bills had taken them up when they became due: for if he were not allowed to retain it, he would have no means of getting it, except by petition to the Crown, to which course he ought not to be driven.

Fonblanque and Martin, for the assignees, contended, that the money having been paid into Court by the Sheriff, did not entitle him to poundage from the assignees, who had no interest in the extent, but were losers by it, from whomever else he might

have been entitled to claim it. The foundation of the extent was questionable, the bills not being due when the writ issued; and it had been intended to traverse the inquisition, on the authority of the case of *The King v. Bebb* (Hughes's Report), but Harford and Co. having paid the bills, of course it could not be tried, for on that payment the proceedings were at an end. If the debt had been paid out of the money levied on Whitehead and Co., the poundage would have been paid by the Crown, and would have been deducted out of the debt.

[61] No one appearing on the behalf of Harford and Co., the Court directed the order to be enlarged, and notice to be given to them, that they might have an opportunity of being heard.

22d December.—The matter was now brought on again; and it having been answered to a question from the Court, that the bills had been endorsed after acceptance, and Wingfield and West having submitted, on the part of Harford and Co., that they ought not to be in any way affected by this motion;

Dauncey, for the Crown, in addition to what had been urged on the former occasion, now observed, that the object of this attempt was to throw the poundage on the Crown, by concert between Whitehead and Co. and Harford and Co.; but that the Crown ought not to pay poundage on a debt so recovered, by which the drawers of the bills (Harford and Co.) were benefited. But for the extent, this sum might have been lost to the Crown, to the prejudice of Harford and Co., by reason of the insolvency of Whitehead and Co.; that debt was, by its operation, rescued from the bankruptcy; and the rule is, that the party who is interested in the extent, and who derives a benefit from it, shall pay the Sheriff's poundage.

[Thomson, Chief Baron. It does not appear that Harford and Co. had the permission of the Crown, to use this process for their benefit.]

But a third person coming in, and being benefited, should pay a proportion of the poundage due [62] on the levy; and whatever might have been the result of the traverse to the extent which had been talked of, if it had been tried, no good objection to the finding under the inquisition yet appeared. With regard to that question, this extent had not issued for the debt arising on the bills in question, but for money had and received by Whitehead and Co. for the use of his Majesty; for Harford and Co. having received the money from the collector, paid it to Whitehead and Co., who accepted the bills for the amount, as agents: with which bills the Crown had nothing to do. This, therefore, was by no means a parallel case with that of *The King and Bebb*, but was analogous with that of *The King v. Boltero*.

[Thomson, Chief Baron. That question could only have arisen, if the traverse of the inquisition had been proceeded in.]

It is not the object of this motion to be allowed to proceed with the traverse; but that the money levied should be repaid, the Crown's debt having been satisfied.

Abbott, for the Sheriff, insisted on the same topics; and contended, that this was not a case in which the Court would interfere, to take out of the hands of the Sheriff the poundage which he had been permitted to retain by the order of the 4th March, which was his remuneration for having done his duty, in executing, for any thing that at present appeared, a valid process. If he were ordered to [63] pay back the poundage, he would have no remuneration; for he has no means, either in law or equity, of obtaining it from the Crown. If the extent had been afterwards overthrown, there would have been an *amoveas manus* ordered: that has not been done, and, in point of form, all is regular. It is said, the Crown's debt has been paid. Now suppose an extent had gone against two persons, and the Sheriff, having levied on one of them, the other chuses to pay the debt; in that case, the Sheriff should not be deprived of his poundage on the levy because the debt has been satisfied by other means. Nor can it be said to be necessary, to entitle a Sheriff to poundage, that a judgment should have been obtained; but the Sheriff, armed with sufficient authority, having levied, must be considered a stranger to all matters taking place between the parties, and should not be deprived of his remuneration on a case made out by affidavits.

Fonblanque, in support of the order, admitted that the Sheriff might be entitled to poundage; but the question in the present case was, by whom it was to be paid. He denied that the extent had issued to recover a debt for money had and received; and submitted that, from the exact coincidence in the amount of the bills, and the debt found by the inquisition, it was so obviously the sum secured by the bills which was the object of the extent, that the defendants ought not to have been driven to

the inconvenience and expense of a formal traverse, to shew that the proceedings on the part of the Crown were premature. The Crown has eventually received from Harford and Co. the [64] amount of the bills; and on that sum, if it had been received from out of the property of Whitehead and Co., seized by the Sheriff, the poundage must have been paid by the Crown. There is, therefore, no hardship in the case; the question should be altogether between the Sheriff and the Crown; otherwise the bankrupts estate will have been made to pay the amount of the poundage, ultra the debt due: which is what by law the debtor by simple contract is not liable to pay.

[Dauncey observed, that the coincidence was easily accounted for, because the amount of the bills had been previously due from them to the Crown, for public money received by them from the Collector of the Customs, through the medium of Harford and Co.]

THOMSON, Chief Baron (having stated the circumstances and question arising thereon). This inquisition has found Whitehead and Co. indebted to the Crown in the sum of 7717l. 1s. 7d. for money had and received to the use of his Majesty; on the other hand, it is said that the debt, so found, was due on these bills; and that the assignees might and would have successfully traversed that finding, inasmuch as the bills were not due at the time of the issuing of the writ. Now there certainly is a remarkable coincidence between the sum sought to be levied, and the amount of the bills, which goes, I think, to shew that it is really one and the same debt; and that the amount of the bills was the money so found to be due by the inquisition, though said to be due for money had and [65] received. The Crown would have had great difficulty in maintaining the extent as for money had and received, supposing it really to have been so, which is scarcely credible.

Under the extent, the Crown has received all that the exigency of the writ required the Sheriff to levy, that is, the whole debt. No poundage was levied; and whatever might have been due, must have been paid out of the sum levied. Let us suppose that the assignees had satisfied the Crown, and then applied for an amoveas manus; the Court could certainly not have refused such a motion; and, therefore, by paying the sum due, the assignees might have been relieved in that way.

It will, perhaps, be hard that the Sheriff should lose his poundage; but one cannot entertain such an opinion of the officers of the Crown, as to imagine that they would suffer that.

The question is, whether the sum claimed by the Sheriff for poundage, should be retained out of the sums now sought to be refunded. I think that it should not; and, therefore, the whole of this order ought to be made absolute.

GRAHAM, Baron. I agree with the opinion of my Lord Chief Baron, but cannot refrain from expressing my wish also, that the Sheriff should not suffer; though he was, perhaps, somewhat to blame, in not interposing when Harford and Co. paid the bills, he having only enough to pay the Crown's debt. [66] But we must be guided by the circumstances before us, and under which the money has been paid into Court. No more than the debt was to be levied, and that has been satisfied; therefore all that has been levied beyond that, must be restored. In all respects, therefore, the order must be complied with.

WOOD, Baron. I am of the same opinion. Here are two parties indebted to the Crown, one as drawer, the other as acceptor, of bills of exchange. An extent issues against the acceptors. The drawers, to exonerate themselves, pay the whole; but being so paid after the extent was executed, I consider it as so much levied for the Crown, and, therefore, the Crown ought to pay the Sheriff his poundage; and it then follows of course, that what has been retained by him out of the money levied, must be restored to the assignees.

RICHARDS, Baron. I am also of the same opinion. Unless this order is made absolute, we make the estate pay what is really due from the Crown. No doubt the Crown ought to pay the Sheriff.

Per Curiam. We make the
Rule absolute.

[67] THE KING v. MAINWARING & OTHERS, Assignees of Boyd and Others. 29d December—3d March, 1815. The Crown is not entitled to interest on the whole sum liquidated by the Deputy Remembrancer's report, made on reference to him,

to ascertain what is due to the Crown for principal and interest on a forfeited bond, where the funds in Court, out of which it is to be ultimately paid, are the produce of the sale of real estates, seized under an extent at the instance of the Crown.—A debt due to the Crown, although originally merely a simple contract debt, if it have been brought into Court in the shape of the produce of a sale under an extent, held by a majority of the Court to carry interest, from the time when the debt shall have been ascertained by the Deputy Remembrancer's report, notwithstanding there should be no specific appropriation in the report, the money being appropriated by law on the confirmation of the report, and therefore bears interest, as being from that moment the proper money of the Crown. Richards, Baron, dissentiente.

Boyd, and his co partners, had been found indebted to the Crown, by an inquisition taken under a commission, 12th March 1799, in the sum of 100,000*l.*, being money paid to them, in pursuance of his Majesty's warrant of the 4th December 1797, for the supply of his Majesty's forces at the Cape of Good Hope. They had also been found indebted to the Crown, by another inquisition, taken on the same day, in the sum of 100,000*l.* on bond to his Majesty, for the due performance of a contract with the Navy Board. On those inquisitions extents, tested 23d January 1800, issued into the counties of Herts and Dorset, under which the Sheriff seized the defendants real and personal estates in those counties. By order of the 29th May 1800, the real estates were sold, before the Deputy Remembrancer, to whom it was ordered that it should be referred, to take an account of principal, interest, and costs, due to certain claimants under mortgages; with the usual directions; and that the Deputy Remembrancer should pay the Solicitor of the Treasury, the costs, to be taxed, and the expenses of the Crown in enforcing the [68] payment of the said debts, out of the purchase money, and pay the remainder into the receipt of the exchequer, in reduction of the Treasury debt of 100,000*l.* In February 1801, certain other persons, interested in various ways in the property of the defendants, by mortgage and otherwise, appeared and claimed: when it was referred to the Deputy Remembrancer to ascertain all those claims,—the priority of the respective incumbrances—of all other claimants, and of the debts due to the Crown, with regard to each other; which was reported, and confirmed.

The Deputy Remembrancer certified, by a subsequent report of the 16th of July 1801, that the defendants had entered into a bond, dated 7th February 1798, to his Majesty, in 100,000*l.*, for the performance of a contract with the Commissioners of the Navy, to furnish, for the naval service in India, star pagodas to the amount of 50,000*l.*, which he afterwards failed to perform: that the Lords of the Treasury, by warrant of 4th December 1797, directed the Paymasters General to pay the defendants, Boyd, Benfield and Co. 100,000*l.*, to be by them remitted to the Deputy Paymaster at the Cape, for the supply of the troops there: which was accordingly paid to them on the 9th June 1798, but had not been by them remitted to the Cape: that extents (as above mentioned) had issued, under which the estates in Hertfordshire were seized: that the indentures of lease and release, (the mortgage), bearing date the 3d and 4th July, had been executed to Wall and [69] Hoare, for securing the sum of 80,000*l.*: that a commission of bankruptcy issued against Boyd and Co. 25th March 1800: and that defendants were chosen assignees of their estate and effects, to whom a bargain and sale, and assignment thereof, was executed, 5th April 1800. He then found that the charge of his said Majesty, in respect of the said contract and bond, of the 7th February 1798, was first in point of priority: that the said charge of his Majesty, in respect of the draft, bearing date 9th June 1798, issued in consequence of the said warrant of 4th December 1797, was second: the charge of the said Wall and Hoare, in respect of their said mortgage, was third: and that the charge of the assignees of the bankrupts, under the bargain and sale, was last in point of priority.

The claims on the Dorset estates seized, and their respective properties, were also referred and reported: but the money produced by that sale was insufficient to satisfy the navy debt, which stood first.

And he certified, by the same report, that he found there was then due, in respect of the said contract or bond, the whole of the said sum of 50,000*l.*, mentioned in the said contract, together with the sum of 23,852*l.* 14*s.* 3*d.* for interest: and he found that his Majesty had received and retained, in respect of the said sum of 100,000*l.*,

issued on the treasury warrant, sums amounting to 43,334l. 1s. 3d.; reducing that debt to 56,665l. 18s. 9d., which he found to be the balance then [70] due; that 80,000l. was still due to Wall and Hoare, the mortgagees, with 40,131l. 10s. for interest, from the said 4th July 1798 to the said 16th July 1808, amounting together, to 120,131l. 10s. due on the mortgage.

That report was excepted to, on the part of the Crown, because the interest had been computed from the time when the bills given by Boyd and Co. had become payable; whereas it should have been computed from the date of the contract and bond; and it was ordered, that the Deputy Remembrancer should amend his report accordingly.

On the 2d March 1809, an order was made, on the motion of the Solicitor General, that the purchasers of the estates seized under the extents, and all claimants thereon, should shew cause, on the first day of the next Easter Term, why the Deputy Remembrancer should not pay, out of the funds and cash in Court, in trust in these causes, the sum of 50,000l. due on the Navy bond, and also the 26,102l. 14s. 9d. for interest up to the 16th July 1808, (the date of the Master's report), making together, the sum of 76,102l. 14s. 9d., to the Treasurer of the Navy; and also why it should not be referred to the Deputy Remembrancer, to compute interest on the said sum of 76,102l. 14s. 9d. from the said 16th July 1808, to the time of paying the said sum out of Court; and why he should not pay to the Solicitor of the Admiralty his taxed costs; which order was enlarged, and in the mean time (9th June 1809) it was referred to the Deputy [71] Remembrancer to inquire of Mrs. Benfield's claim of dower, and other subjects, on which he afterwards made his report.

3d March. — Jervis and Wyatt, on the part of the Navy Board, and Dauncey and Abbott for the Treasury, now moved, in pursuance of notice, that the Deputy Remembrancer's report, of 23d February 1815, might be confirmed; and that it might be referred back to him, to compute subsequent interest on the sum of 78,102l. 14s. 9d. by his report of the 4th of May 1809, certified to be due to his Majesty, for principal and interest on the contract and bond therein mentioned; and that it should be paid out of the sum of 70,337l. 17s. 11d. 3 per cent. consols. now standing in the name of the Deputy Remembrancer, to the credit of this cause, and arising out of the purchase money of the estates seized and sold under the Dorset extents, (after certain deductions paid to other claimants), to the Treasurer of the Navy; and to pay out of the proceeds of the estates sold under the Hertfordshire extents, what may afterwards remain due of the Navy debt, and costs; and that, after such payment, he should, out of the funds in Court, arising from the sale of the Hertfordshire estates, pay the sum of 56,655l. 12s. 9d., due to the Crown in respect of the money issued on the Treasury warrant; and that he should compute interest on that sum, from the said 16th July 1808, to the time of payment.

The Counsel for the Crown contended, that the Deputy Remembrancer's report operated in the [72] nature of a judgment; and that the debt found to be due, should therefore carry interest from the time of its confirmation. With respect to the Navy debt, there could be no doubt, as that was a specialty debt. The only question there would be, whether the interest was to be computed on the original debt of 50,000l. alone, or on the aggregate sum of 78,102l. 14s. 9d., to which it had increased by the subsequent accumulation of interest, and to which it had been found to amount, by the Deputy Remembrancer, at the date of his report.

This claim is on a bond, in a penalty of 100,000l., and the Crown has a right to interest up to the amount of the penalty. It is clear that, in the case of a mortgage, the whole sum liquidated by the report carries interest, as was held in *Crown v. Hunter* (2 Ves. 159); and it cannot be contended, that a subsequent incumbrancer should be put in a better situation than the Crown, which is reported to have the priority.

As to the Treasury debt, although originally, perhaps, a simple contract debt, yet when, by the exertions of the Crown, the debt has been recorded and recovered, (for the inquisitions were not traversed), and the money paid into Court, it became the property of the Crown; and if certain claims which were then made, prevented the Crown from receiving the money, that share of the fund to which it was afterwards ascertained, by the report confirmed, that the Crown was justly entitled, ought to carry [73] interest from the time when that right had been so established, and was formally acknowledged; had it not been for those claims, the Crown would have actually received the money, and then it would have been made productive, and

when the difficulties which stood in the way of the payment to the Crown are removed, the sum due should carry interest, as being the property of the Crown, vested by the effect of the confirmation of the Deputy Remembrancer's report.

[Thomson, Chief Baron. Your proposition is that, if not entitled to interest as such, and eo nomine, yet that you are entitled to interest on so much of the fund as was purchased with the Crown's money.]

It is certainly not, strictly, interest on the debt due to the Treasury, which the Crown is now seeking to have computed; but merely that, in the mean time, until the rights of other claimants are adjusted, the settlement of which delays the actual payment of the money to the Treasury, the sums reduced, as it were, into possession by the Crown, and ultimately declared by the Deputy Remembrancer's report, (which, in this Court, is in the nature of a judgment), to have been recovered by the Crown process, as constituting the Crown's debt, may carry interest, to be invested with the principal, for the benefit of the Crown, until it shall be paid. From the return of the inquisition, the debt was no longer a simple contract debt.

[By the Court. The debt is on record at the [74] return of the inquisition, and becomes a specialty debt. It could not otherwise bind the lands; were it still a simple contract debt, the Crown could not resort to the real estates.]

The Treasury only require interest from the time that that part of the funds in Court which was claimed by the Crown, was finally declared by the Court, through the medium of the Deputy Remembrancer, to be the right of the Crown. That part of the fund has, among the rest, been made productive; and the Crown claims the interest made by that principal which has been declared to be its property.

Martin and Abercrombie appeared on the behalf of two of the vendees, under the sale of the estates seized.

Shadwell, for the unsatisfied mortgagees, and

Forblanque, and Phillimore, for the assignees under the commission, opposed the motion; insisting, that the Crown had no title to interest on the present entire amount of the Navy debt, as augmented by the subsequent accrual of interest, nor on the Treasury debt at all: that being a mere simple contract debt, and therefore not carrying interest pending proceedings in courts of equity, in diminution of the general fund: and if it were allowed in the present case, there would be no surplus left. The report could neither give a new character of principal, to the interest on the Navy debt, in the first case: or alter the original nature of the [75] Treasury debt, in the latter. As to the debt having become recovered money, from the date of the report, that is not so, for there must have been a specific appropriation of so much of the fund by the report, to have enabled the Crown to claim interest on that ground: and there was no such appropriation here. There has been, indeed, an order to shew cause, why the money should not be paid to the Crown: but that order was enlarged, and has never been made absolute. If the Treasury debt has a priority, (as it has been reported to have), it is from its prior date, and that is the 7th June 1798, when the Crown's money came to the hands of the bankrupts. The mortgage to Wall and Hoare, bears date the 9th June 1798: therefore, the priority found by the report, is the priority of a simple contract debt which did not carry interest, and that debt was not found by inquisition till the 12th March 1799. In the case cited, the main question was, whether certain annuitants, and legatees were entitled to interest, upon what was due to them, from the confirmation of the report; and the chancellor held, that they were not. Perhaps they rely on what was there thrown out as to the case of a mortgagee; and certainly, the chancellor said, where the owner comes to redeem a forfeited mortgaged estate, and the Court orders that on payment on such a day, he shall redeem, and he lets the day elapse, of course he must pay interest: But the Crown is not in the situation of a mortgagee: it is not a specific incumbrancer; and the claim of interest, as now made, is not on the ground of the debt having been found by the inquisition, but by the Deputy Remembrancer's [76] report. If what is sought by the present application were practicable, it would be established by numerous instances of its occurrence. Yet the Crown has not been able to find, among the records of the Courts of Equity, one case in support of this novel and extraordinary motion, which is as little founded in principle as in practice. There can be no difference between the Crown and a subject; and, hard as it may seem, the cases are all against giving interest to simple contract claimants, even where the reference ordered may have been pending for many years, as was the case with the legatees of

the Duke of Queensbury, who were not permitted to have the stock appropriated. In the case cited, of *Cicuz v. Hunter*, it was observed, that the funds being productive makes no difference. A similar question was brought before the Court on a former occasion, in *The King v. Rumbold*, and failed.

It was objected to the mode of the present application, that it should have come on in the form of exceptions to the Deputy Remembrancer's report; otherwise, the Court would be discussing points which it is the duty of that officer to settle between parties.

The Court, considering it a question of great importance, took time to give their opinion.

22d December.—The question was this day again brought before the Court on minutes proposed, in the form of an application for further directions on the report. The admiralty having, in the mean time, abandoned [77] the claim for interest on the whole liquidated sum found to be due to the Board, the only remaining point was, whether the claim of interest by the Crown, on the Treasury debt, could be supported as a legal or equitable right. The general tenor of the arguments was much the same as on the former occasion. As there existed a difference of opinion, the Court delivered their opinions, *seriatim*.

THOMSON, Chief Baron. The Crown's debt having been brought into Court by the proceedings under the extent, must necessarily form a part of the funds standing in the Deputy Remembrancer's name, to the credit of this cause. It seems to me, therefore, that the single inquiry which we have to institute, on the present occasion, is, what part of the fund belongs to the Crown, as representing the debt found to be due? When that is once ascertained, all the interest and dividends that have accrued on it from that time, follow the principal, and is as much the property of the Crown as the principal itself.

GRAHAM, Baron. I do not recollect this question ever having been considered before; but there is a principle in this Court, that the Crown's debt being ascertained and put on record has, to all intents and purposes, the effect of a judgment: and if, in the execution of that judgment, the money is brought into Court, from that moment, it appears to me, that the claim of the Crown attaches; and though it is not specifically appropriated, the Crown [78] having that money in Court, on its seizure by the hands of the Sheriff, it is from that moment applicable to the discharge of the Crown's debt. If, therefore, when it is brought into Court, though mixed with funds applicable to other debts, and that compound fund is invested, you involve in the investment, that part of the fund which is the Crown's, and is only not in the Treasury, because, from the natural delay which takes place in the investigation of certain claims, it could not be immediately paid in. I conceive it is the duty of the Court to uphold the Crown's remedy, and follow up the money of the Crown, when once brought into Court, though not specifically appropriated: and when the Court perceives that the money is actually made a productive fund, I do not see that it should be less beneficial to the Crown, because it is involved with other sums applicable to different purposes. Therefore, with deference to my learned brother Richards, whose being of a different opinion should excite much doubt in my mind, I should have thought I saw clearly, that the Crown had a right to the money, and to take it, as well as what it produced, as appurtenant to the principal sum. On that view, it appears that the course is plain and distinct: the money is the property of the Crown, and the Crown is as much entitled to the produce of it, as to the principal sum.

WOOD, Baron. I must own, I am of the same opinion; an extent has issued at the suit of the Crown, and the money has been actually levied under it. From that time it becomes the property [79] of the Crown; but it happens there are some claims made on it by other people, which prevents its immediate appropriation: and, therefore, it is said, it cannot be made productive to the Crown. But the King was entitled to it the instant it was levied, and if it had then been paid over, might have been made a profit on it. In the mean time, it is invested in the funds, and produces a profit. Now, I am of opinion that the money having been once levied, is appropriated by law at the return of the execution, for the benefit of the Crown: and that it being from that moment the property of the Crown, the Crown is consequently entitled to the interest and dividends accruing from it.

RICHARDS, Baron. It gives me great pain to differ from Judges of so much more experience, especially on a case which has been so little before my notice.

I have inquired anxiously, whether there is any difference in law, between the case of the Crown and of a subject. No authority has yet been cited, to shew that any distinction at all exists. I am therefore left to consider, whether there is any distinction in principle; and I cannot discover any. It appears that the Crown has, by its execution, done that which a subject might have done by execution on a common judgment. The money is brought into Court by the levy on the part of the Crown, it is true; but when it is there, it is the money of the Crown, certainly, but only so far as it has priority of the other persons who have claims on that money: and the Crown, as it appears to me, is in the same situation here as any other claimant. The [80] Crown, it is true, is to be paid first; but, if this were the case of a common suitor, every man's experience, I think, goes with me in saying, that he would have no immediate title to the fund itself. You are only to take the fund as a security, to be turned into money, to pay that which is due for principal and interest. Now, in this case, if the Crown had a charge upon the estate, which was clear and beyond all doubt, the Crown might have applied for an appropriation. If an appropriation had been made, there is no doubt the Crown would have been entitled to the sum set apart, but only as a common suitor would be who has a charge made distinct by the Court, by an appropriation, which is a very common case. Nothing of that sort takes place; and, at this moment, the fund is, in Court, applicable to the payment not only of the Crown, but of all the other incumbrancers, equally, without any priority in point of time of payment, provided the fund is sufficient to pay all the claims on it.

The case of *Tow v. Lord Winterton* (1 Ves. 451, and 3 Br. C. C. 489) must be in every one's recollection. There, after a very long delay in the Court of Chancery, and the Master's Office, the fund (which was not at first nearly sufficient to pay the creditors, and whose fund it was at that moment, because no one else could make a claim to any part of it, there being at first no residue likely to remain after payment of the debts), increased so considerably during the discussion of the questions which arose in that case, [81] that the creditors were paid all that was due, and the family received a very large surplus, in consequence of a rise in the funds. Now, that case I conceive to be an authority, with respect to suitors in general; and, as nobody has shewn me that there is a difference between the case of the Crown and any other suitor, I cannot see any difference between that case and this; nor can I see that, because the Crown's execution sells the estate, that confers such a present title to its share of the fund, as to give a right to the produce arising from it from that time: but that all other claims are to be equally considered, as well as that of the Crown.

IVATT AND OTHERS *v.* WARD. Saturday, 23d December. 11th November 1815.

—The Examiners of this Court have no authority to examine witnesses at a greater distance from London than ten miles, unless by consent; & such consent must be express.—They may examine witnesses brought up to town from any part of the kingdom: sed quære, whether a subpoena lies, to bring the witnesses to London.

Dauncey, and Parker, moved, to suppress the examination of witnesses taken on behalf of the Plaintiff, before J. Elderton, one of the Examiners of this Court, at Cambridge, on the 25th September last: and that, in the mean time, publication might be suspended.

The motion was founded on the affidavit of the defendant's solicitor; which stated, that notice had been served on their clerk in Court, by the plaintiff's solicitors, of the examination, now sought to be set aside, being about to take place at Cambridge, [82] on the 25th September, "when and where (the notice added) "the above-named defendant, and an Examiner or Commissioner on his behalf, may be present, if it is thought proper;" but that they having been advised that such examination would be wholly irregular, gave notice that they would not attend, but should move the Court to suppress any such depositions as should be taken, for irregularity, with costs—that the plaintiff's clerk in Court, afterwards called and informed deponent, that the intended examination would be regular, but that the notice of it should have been accompanied with an undertaking, on the part of the plaintiffs, to be at the charge of the witnesses coming to, and returning from London, for the purpose of cross-examination, if required; that that undertaking he then proposed, which this deponent

declined to accept,—that, on the 21st September, such an undertaking was sent to deponent, who, not being satisfied with the terms of it, returned it to plaintiff's solicitors, on the 23d, with a draft of such an undertaking as deponent would consent to receive, (the material alteration in which, from the one already tendered, consisted in the introduction of a stipulation, that "no person to be examined should be owners or occupiers within the parish * of Cottenham, or be in any manner interested in the decision of this cause")—that that undertaking was returned [83] to the deponent on the 25th, signed by the plaintiff's solicitors, with an omission of that part of it only, which excluded the owners or occupiers of lands from examination, accompanied with a notice of the names of the witnesses intended to be examined.

The examination of the witnesses took place; and the plaintiffs obtained an order, on the 6th November, that publication should pass, unless cause should be shewn on that day se'nnight.

In support of the motion it was insisted, that the examination was irregular, and contrary to the established practice and rule of the Court. In *Fowler's Practice* (vol. ii. p. 62), it is said, that "By the 25th general rule of this Court, no commission to examine witnesses is to be executed in London, or within ten miles thereof, without leave of the Court first had upon an affidavit, of the inability of a witness to travel, or other special cause; otherwise, depositions so taken, are to stand, ipso facto, suppressed. The Lord Chief Baron, and the rest of the Barons of the coif, have each of them a sworn Examiner, duly authorized, whose office it is to examine all witnesses in causes arising in London, or within ten miles thereof."

There is no instance of an Examiner ever having exceeded that distance; and, in so doing, he exceeds his authority.

[84] [Thomson, Chief Baron. There must necessarily be some restriction. An Examiner has no power to administer an oath; he is merely an officer appointed to examine witnesses for the Baron whom he represents.]

In this instance, the witnesses had been sworn before the Lord Chief Baron, on the circuit, at Cambridge: but, at so great a distance from London, the Examiner had no right to examine without a special commission.

[Thomson, Chief Baron, (having referred to the officer). There is no instance of an Examiner examining on a commission. It always goes to special commissioners; and, if an Examiner should be named as one, the other party would have a right to strike him off.]

This mode of proceeding would preclude him from so doing; and the Examiner, having examined in chief at Cambridge, would have had no right to cross-examine the witnesses here in London, for both examinations must take place concurrently. Nor was there any consent given on the part of the defendant which might be said to justify this departure from the rule; for the undertaking required by his advisers was not signed, as drawn up by them, by the plaintiff's agents. There can be no pretence, therefore, for allowing these depositions to pass publication.

Foulblanque, Martin, and Meggison, on the [85] other side, contended, that even if it were admitted that there existed, in point of fact, such a rule as that the Examiner could not exercise his function beyond ten miles from London, yet, his office being founded on considerations of convenience to suitors, the rules which govern his official proceedings should not be treated as so strict and inflexible, as not to bend to the object of its institution, particularly where both parties, to save expense, and for mutual accommodation, agree to depart from the regular course. It is not shewn, that there is any such rule or practice limiting the extent of the Examiner's power, and the next sentence in *Fowler's Practice* to the passages quoted, is, "But witnesses may be examined before a Baron, though the cause may arise in the most remote part of the kingdom. And, in page 133, is this passage, (after adverting to the power of each of the Barons to appoint a sworn officer to examine witnesses brought before them): "And though the 25th general rule of the Court directs, that a commission to examine witnesses shall not issue within ten miles of London, it does not prescribe any limits to the examination of witnesses before a Baron, in causes arising in any part of the kingdom, where it is for the convenience or

* The bill was filed against the rector of the parish of Cottenham com. Cambridge, for a discovery, to aid the defence of the plaintiffs in a suit of the rector against them, for tithes.

accommodation of any of the parties that their witnesses should be examined before a Baron in London." Now, the examination before the officer is precisely the same thing. The course is, to prepare the interrogatories, then the witnesses are sworn before a Baron truly to make answer; and counsel are responsible that the interrogatories [86] contain nothing improper; and the witnesses are then examined by the Examiner.

In any point of view, there has been no such irregularity here as to entitle them to call on the Court to suppress the depositions; for even if there should have been any irregularity in the form of the proceeding, all the material requisites established by the Court have been observed and complied with. The Examiner was as ministerially competent to examine at Cambridge, as to have examined here. It is the constant practice to bring up witnesses to be examined; and what irregularity is there, where convenience arises, in the Examiner going to the witnesses? The cause too, (it should be observed), now stands within thirty of being heard.

[Richards, Baron. Is there any instance to be found, either in this Court or the Courts of Chancery, of such an examination having been proceeded on without consent?]

Then the question will arise, whether there has not been a consent here, or at least, that which may be considered equivalent to a consent. The undertaking proposed was adopted, certainly with an alteration, but such an alteration as could make no substantial difference in effect. The words occupiers of land, were struck out, because there might be some who, though occupiers, might nevertheless not be interested; and they would have been necessarily admissible, or, if interested, their depositions would have been suppressed, of course. Two or three [87] instances were produced of cases where the Examiner had acted beyond the limit now contended for, but these were by consent.

Dauncey, in reply, submitted that the practice, according to Fowler, was clearly with the defendant. It is expressly stated, that an Examiner's office is to examine witnesses in causes arising in London, or within ten miles thereof; but (it is added) witnesses may be examined before a Baron, where the cause arises in the most remote part of the country, making an express distinction.

[Thomson, Chief Baron. That is an improper distinction: there is an incorrectness in so attempting to distinguish the officer from the Baron. The examination of an Examiner must be taken to be the examination of the Baron, before whom the witness was sworn.]

On the other side, in point of practice, no instance can be produced of its ever having been done; in the cases cited, the distance has been within ten miles, or there has been an express consent: but it is even doubtful, whether consent would cure the irregularity. Parties are not entitled to dispense with the rules of Court on the score of convenience; all they can be entitled to do, would be to bring it before the Court. There is not even convenience here, or a saving of expense, to excuse it: for it seems, if the witnesses might be examined in chief at Cambridge, they must be cross examined here. The question is, whether there is [88] any rule; and whether it must prevail, or may be dispensed with?

THOMSON, Chief Baron, now delivered the opinion of the Court. His Lordship took a succinct view of the object of the motion, and the mode in which it had come before the Court. On the terms of the first notice which had been given of the examination intended to take place, his Lordship observed, that he could not understand that part of it which related to the attendance of an Examiner or Commissioner, on behalf of the defendant, as such examinations were always proceeded in *ex parte*, and one Examiner was sufficient; nor could any other be necessary or proper: and as to the attendance of a Commissioner, there certainly could have been no such person.

On the proposed amendment of the undertaking, which required that no occupier, or other person interested in the event of the cause, should be examined in support of the *modus*, he observed, that that would render it necessary to inquire what species of *modus* it was intended to set up; for, if it should be a parochial *modus*, then, undoubtedly, a parishioner would be interested. That amendment, however, was not acceded to; the examination was taken, and it is now moved to suppress it.

The question, therefore, is whether the examination so taken was, under these circumstances, regular, and according to the practice of the Court? There was no consent, in this case, that the examination [89] should take place; and its regularity

depends on the question, whether an Examiner of this Court can go into any part of the kingdom, for the purpose of examining witnesses.

Now the rule certainly is, that the Examiners shall not have power to take examinations beyond ten miles from London; and there does not appear to have been any instance, where an Examiner has ever examined witnesses at a greater distance.

The Examiners have authority, certainly, to examine witnesses in town, when brought up from any part of the country; but as to whether a subpoena would lie, to procure the attendance of witnesses, we do not at present give any opinion.

We think, that the objection of the Examiner's having exceeded his authority in this instance is well-founded; and that this examination is such as the practice of the Court does not warrant. The depositions, therefore, must be suppressed; and, as the ground is irregularity, with costs, of course.

End of sittings after Michaelmas Term.

[90] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF
EXCHEQUER, HILARY TERM, 56 GEO. III.

FISHER v. HODGKINSON. Wednesday, 24th January 1816.—A defendant having moved for costs, for not proceeding to trial according to notice, may afterwards, and in the same term, move for judgment, as in case of a nonsuit, in this Court: but the Court, on a satisfactory affidavit, will discharge the latter rule, on the terms of the plaintiff giving a peremptory undertaking, and paying the costs.

Owen shewed cause against a rule obtained by Richards last term, for judgment, as in case of a nonsuit, for not proceeding to trial. The objection made was, that the defendant had previously, in the same term, obtained an order for the payment of costs, for not so proceeding; and therefore, it was now submitted, that, according to the case of *Ogle v. Moffit* (Barnes, 316), in the Common Pleas, the present rule ought not to have been granted, and should be discharged. It is true, it is laid down in *Tidd's Practice* (*Tidd's Practice*, p. 773), that the [91] Court of Common Pleas have since overruled that case, by the decision in *Dorant v. Rouvellet* (2 N. R. 247); but in fact, there has been, in the same Court, a more recent determination, in the case of *Clarke v. Simpson* (4 Taunton, 591), wherein the doctrine in *Dorant v. Rouvellet* is expressly held not to be law; and the Court, therefore, refused to grant the motion for judgment, as in case of a nonsuit, after a motion for costs for not proceeding to trial; and one of the reasons given is, that a defendant might thus put the plaintiff to the costs of two motions, to obtain what the defendant might have had on one application.

An affidavit was then read, on the part of the plaintiff, stating that the reason of the plaintiff's not having proceeded to trial in this cause, was the absence of a material witness, who could not be found, after due diligence, so as to be served with a subpoena; and that, therefore, he had countermanded the notice, that before, and after notice of trial, he had received applications on the part of the defendant, to settle the cause by arbitration; and that the defendant had no just defence.

Under these circumstances, it was submitted, that the defendant was not entitled to have the rule made absolute.

Jones, D. F. in support of the rule, relied on the practice in the Court of King's Bench, where those motions were not only always made as they [92] had been in the present instance, but their object could be obtained in no other way. That Court considered these as motions *diverso intuitu*; and although, whenever the defendant obtained judgment, as in case of a nonsuit, he is considered entitled to costs: yet there might be cases in occurrence, where the Court might think proper to give him costs, although they should refuse him the judgment; and it is clear, that costs cannot be moved for, even in the Court of King's Bench, for not proceeding to trial, after having moved for judgment, as in case of a nonsuit (*Tidd's Practice*, p. 773).

The Court, after referring the question of practice to the Deputy Clerk of the Pleas, who reported, that it was the usage of this Court to allow both these motions as now made; and having required from the plaintiff a peremptory undertaking to proceed to trial at the next assizes, and that he should pay the costs of this application, Discharged the rule*.

* Vide *Morgan v. Belgood*, ante, vol. i. p. 61, where the like motions were made

[93] KIDWELLY CANAL COMPANY v. RABY. Friday, 26th January 1816.—One of several persons, who have subscribed an agreement, inter se, to promote a joint undertaking, or common purpose, cannot withdraw his name, and discharge himself from the engagement, without the consent of the rest of the subscribers. And if an Act of Parliament have been passed, for effectuating the purpose of the undertaking, by which certain obligations are created, such original subscriber is not exonerated from the liabilities imposed by the Act, by having, during the progress of the bill, renounced, before the Committee, all further connection with the undertaking, and desired that his name might be, in consequence, omitted in the Act; nor can the circumstance of his name so being omitted, have the effect of disengaging him.

An action had been brought, to recover the sum of 165*l.*, the amount of six calls on the defendant, who was alleged to be a proprietor of three shares, of 100*l.* each, in an undertaking, for the purposes of which the plaintiffs had procured an Act of Parliament. On the trial of the cause before Mr. Baron Wood, at the last assizes at Hereford, the plaintiffs recovered a verdict, under the direction of the learned judge, reserving to the defendant, liberty to move to set it aside, and enter a nonsuit, if the Court should be of opinion, that, under the circumstances of the case, as proved on the trial, the defendant could not be considered as having such an interest in the shares of the concern, as rendered him liable to the calls of the Company on him, as a proprietor of those shares.

Jervis having obtained the rule, on the ground that the defendant was not, at the time of the calls made on him, a proprietor, his Lordship read his report of the evidence, which proved,—that the defendant had been one of the original subscribers to the first proposals of uniting for the purpose of effecting the objects of the Company, and to the intended measure of obtaining an Act of Parliament, as the foundation of the undertaking; that [94] he had signed his name to a paper, purporting to be a list of subscribers to the plan, and worded thus:

“22d August 1811.

“A List of Subscribers, to a fund for carrying into execution a plan for the improvement of the harbour of Kidwelly, and making proper communications therewith, from the several collieries in the neighbourhood, by a canal, or rail-roads.”

That the Act was obtained in June 1812:—that during the progress of the Bill, which was opposed, the defendant having attended some of the meetings of the committee, expressed a wish at one of them, that his name might be withdrawn from the subscription, and his name was therefore not inserted in the Act,—that he had attended various meetings as chairman, and had voted, and otherwise taken an active part there: but that, at a meeting of the Committee of the House of Commons, held in London, during the progress of the Bill, the defendant, disapproving the proceedings, signified, that he should withdraw his subscription, and desired that his name might not be inserted in the Bill, to which the Chairman of the Committee assented: and that when the Act passed, his name was, in fact, omitted:—that he had attended a meeting of subscribers in November following, and seconded a motion for the appointment of a clerk. On this evidence, his Lordship held, that the defendant was not at liberty to withdraw his name, without the consent of the other subscribers. It had been proved, also, that three shares had been subsequently assigned by another subscriber (Brogden), to the defendant, [95] which were held to be void, not having been entered in a transfer book, as the Act directed.

Dauncey and Abbott now shewed cause. They contended, that the defendant still continued to be a proprietor of three shares in the undertaking, notwithstanding his declaration of a determination to withdraw his subscription. He appeared to be an original subscriber to the undertaking, and he took an active part in the execution of it, both before and after passing the Act. That what he had done after the Act

in the same course, and granted. In the note to that case, will be found the reason why these applications are made the subject of distinct motions, although costs, for not proceeding to trial, are always given in this Court, on obtaining judgment, as in case of a nonsuit, on the same ground.

had passed, could not have been in virtue of any pretended transfer of shares by another proprietor to him, (which, not having been bona fide, and regularly entered, in pursuance of the Act, were a mere collusion and nullity); but in virtue of his original subscription. If the undertaking had turned out to be profitable, there was nothing in the supposed withdrawing, which could have precluded him from a participation of those profits as a proprietor, under the original subscription: and from that subscription he could not withdraw, to the prejudice of those who had embarked with him.

Jervis, and Taunton, in support of the rule, submitted, that the defendant was at any time competent to abandon the project, previous to the passing of the Bill; and that having declared himself no longer a subscriber, at a Committee of the House, when the Solicitor for the Company, who must be presumed to represent them, was present, the chairman of the committee assenting to it, he had become completely discharged. In [96] consequence of that declaration, his name had not been inserted in the Act, when the name of no other subscriber was omitted, except those of subscribing peers, which had been omitted in consideration of their rank; and that, whatever he had done since, had been done by virtue of the shares assigned, whether the assignment of them was legally valid or not. This action depends altogether on the Act of Parliament, and that he was no party. To make out the plaintiff's case, the defendant must be shewn to be a proprietor; and, after such a declaration of having withdrawn, on his part, would this Court have permitted him to come and claim a share of the profits? and, if not, he should not be considered as liable to calls. The subscribers alluded to in the Act, are those subscribing after the Bill passed.

THOMSON, Chief Baron. The form of this action has been rightly adopted, under the direction of the Act. It was incumbent on the plaintiff to shew that the defendant was a proprietor, and the question is, whether the evidence, in fact, does. It is said, that he became a proprietor by signing a paper, by which certain persons agree to unite for the purpose of carrying the undertaking into execution. An Act of Parliament, to enable them to effectuate their intention, was passed, incorporating certain persons, by name, as proprietors, for carrying the undertaking into execution, (among whom that of the defendant does not occur), together with such persons as shall hereafter be possessed of any shares in the [97] undertaking. No doubt, the defendant was one of the parties agreeing to undertake the execution of the projected plan, and the Act which was obtained, proceeded on the footing of that agreement. It seems, that while the Bill was in progress, the Defendant objected to being longer considered as one of the subscribers, and requested his name might be struck out. But, in fact, the Act passed, and not only all were incorporated who had subscribed, but all who should thereafter be possessed of any share or shares in the undertaking. There is no way of becoming possessed of shares but, by subscribing; and subscribers were not possessed of shares till the Act passed, but on being passed, it had reference to every person who had before that time subscribed, without rejecting any, and they then became entitled to profits.

As to the defendant's withdrawing, on which so much stress has been laid, he could not discharge himself by any declaration to that effect, nor was the Committee competent to consent to such withdrawing. It cannot be said to have been the intention of the Legislature to have discharged him, for that would have required an express clause, excluding him by name. Now he answers the description of persons enumerated in the Act, down to the time when he is said to have assumed the character of proprietor, by means of fictitious assignments, when he had in himself a much better title than Brogden, by this assignment, could give him. The words are, "those who have subscribed, or shall hereafter subscribe;" therefore, the Act [98] includes all who had subscribed, and he has done no act to discharge himself from the effects of his subscription. And being within the terms of the Act, he would have been entitled to a share of the profits of the undertaking, as a proprietor, he must also be considered liable, as such, to losses.

GRAHAM, Baron. As to the defendant's voting as assignee of Brogden, that is out of the case. The main question is, whether he was bound by his original subscription; and if so, whether he was subsequently released. The agreement he subscribed was binding, nor can a man renounce by such means as Raby adopted. Lewis, the Solicitor, did not represent the proprietors; he was merely employed in conducting the Bill through the House, and had no power to consent to the defen-

dant's withdrawing. Nor did the omission of his name by the Committee, discharge him, more than Lord Cawdor and Lord Dynevor. There must, for that purpose, have been an explicit consent of the other adventurers. If he could have discharged himself at any time, when the application had been made to Parliament it was then too late.

WOOD, Baron. The two questions in this case are, 1st, whether the defendant was an original subscriber to the undertaking, intended to be carried into effect by that Act; and 2dly, whether, if he were so, he has discharged himself by what has been done.

It is immaterial to ascertain whether the defendant [99] voted in respect of his original subscription, or of his assigned shares. The heading of the instrument differs only in words, but not in substance, from the Act. They are called subscribers, in each.

Then is he discharged from his subscription by what he has done? Wherever there is an agreement between several, one party cannot withdraw without the consent of the others, as in the case of creditors having agreed to take a composition, one cannot retract without the consent of all the rest. Here, it is admitted, there was no consent; and his declaration of abandoning, amounts to nothing. — Lewis, the Solicitor, could not control the Committee, or their acts, if there at the time; and had he expressly consented to such withdrawing, it would have been without authority, and it would be absurd to suppose him authorized.

It has been said, that the defendant does not bear the character of a proprietor of shares, and is therefore wrongly sued, as such; but I think he is, in fact, a proprietor, although not included by name in the Act of Parliament: for the Act says, "who shall be possessor of shares," not who shall subscribe. Now, did Raby possess shares? He did not till after the Act had passed; but then he became entitled. The words of the act are retrospective, and all subscribers are made entitled. He is, in fact therefore, one of the corporate body, although not named in the Act. By the 31st section, it is provided, that the Company shall not be authorized to proceed [100] with the undertaking till a sufficient number of subscribers shall have been obtained, who will undertake to raise the sum of 20,000l., including the money already subscribed, it is clear, that the Legislature considered all who had subscribed before the passing of the Act, to have been entitled to shares, as well as those who subscribed afterwards; the words "including the money already subscribed," includes the persons who had subscribed that money. So also, the 69th and 70th sections, describing the persons liable to calls; "every person or persons who hath, or have already subscribed;" and such person being called on, must pay. The defendant, then, not having legally withdrawn his subscription, is a proprietor, and as such, liable to calls, and must therefore pay them when made.

RICHARDS, Baron. One of the necessary means for carrying into execution the plan, towards which the persons whose names appear to this paper have subscribed, was the procuring an Act of Parliament. That was a necessary step, and must therefore be upheld. Raby was a subscriber to this paper, and is bound by its terms, to adopt every measure necessary to its execution. If Raby had not endeavoured to withdraw, there would have been no doubt of his liability: then the question becomes, whether he has in fact withdrawn; and I think he has not, inasmuch as he could not do so, without the consent of all those with whom he had become engaged in the undertaking.

[101] As to what passes before a Committee, it is in great part, sub silentio, and any assent of Lewis's there, would be nugatory. It is admitted, that till he had withdrawn, he was bound.

Rule discharged.

SMITH v. SMITH & OTHERS. Saturday, 3d February 1816.—To make title to an allotment, under an Inclosure Act, of a sixteenth, to be set out for the person claiming to be Lord of a certain manor, it is sufficient, on the trial of an issue under the Act, to shew that he is owner of the soil. It need not be proved that there is such a manor existing in law, or that the claimant is Lord, properly so called.

The point, in this case, arose on the trial of an issue, under an Inclosure Act, tried at the last assizes for Chester, before Sir Wm. Garrow and Mr. Justice Burton; when the Jury, under the Judge's direction, found a verdict for the defendants.

The Act of Parliament, amongst sixteen allotments on the inclosure, had, after reciting that certain persons were joint Lords of the manor of Wallasey, and that Richard Smith, Esq. (the plaintiff), was, or claimed to be, Lord of the manor of Poulton cum Seacombe; and that James Mainwaring, Esq. claimed some right or title thereto, or interest therein, &c., directed, that the part or share of the commons and waste lands in the said township of Wallasey, to be allotted to the Lords of the said manor; and also, that the part or share of the commons and waste lands in the said township of Poulton cum Seacombe, to be allotted to the Lord of that manor, should be [102] equal to one-sixteenth part in value of such commons and waste lands to be inclosed. It contained the usual saving clause, as to the right of all persons interested.

By the report of the evidence, it appeared, that the plaintiff attempted to prove, both by documentary and parol evidence, the existence of the manor in question, and the exercise, by his predecessors, of manorial rights. The first (in point of date), of the former, was the will of Mr. Smith, in 1774, in which it was called a manor.

The proof of exercise of rights, consisted in evidence of plaintiff's predecessors having built a ferry house, and let it;—that he possessed the fishery; that he had taken gravel and stone for ballast, from the spot in question, and had built a lime-kiln there; and an instance was adduced, of an acknowledgment taken from a person building a cottage on the waste, and other acts of ownership.

On the part of the defendants, the evidence was negative: tending to shew, that Poulton cum Seacombe was not a manor, and had no qualities of a manor; that, in a succession of inquisitions, post mortem, it was not mentioned as a manor; that it neither had courts or steward, no waifs, strays, &c., or pound, till 1774.

It was the opinion of the Chief Justice, that there should have been proof given of the actual existence of a manor; and as that had not been shewn, he [103] directed the Jury to find a verdict for the defendants: who found that there was no such manor; which, the Court said, was a verdict for the defendants.

Jones, D. F. now moved, to set aside that verdict, and that a new trial should be awarded, on the ground, that the question to which the attention of the Jury was directed by the Court, was not the question in the cause: the inquiry was not whether this were or were not, to all intents and purposes, a manor; or whether the plaintiff was, strictly speaking, Lord; but whether, under the circumstances, he stood in the situation of the person designated by the Act, as he to whom the allotment, in respect of the property, was to be made. And, on that question, the verdict was against evidence; for he was proved to be the owner of the soil, and to be the only person who could have or claim any right (for Mainwaring had withdrawn his claim); and he was therefore, the only person to whom the allotment could be made. But even admitting that this was a question of manor or no manor—this was such a manor, by reputation, as the Courts would recognize; for it is not necessary that all the incidents of a manor should exist, to confer on it that denomination; and if it might be called a manor, as the Act had called it, it would be sufficient for the purposes of the act.

He cited the case of *Curzon v. Lomax* (3 Espinasse, N. P. 60), where, in trover, for trees claimed by the plaintiff as belonging to the waste of the manor of Wild, on [104] an objection taken to evidence of its having been so described, in an old deed and in a private Act of Parliament, as proof of the place called Wild being a manor, Lord Ellenborough expressed himself of opinion, that it was not necessary to prove the holding of Courts, to shew that the place was a manor; and held it to be sufficient, if it was a manor by reputation. In *Some v. Ireland* (10 East, 259), which was an action for a false return to a mandamus, the second count of the declaration stated a seizure in fee of the manor of Frome Selwood. The evidence proved it to have been once a legal manor, but that it had ceased to be so for want of freehold tenants, though, in other respects, the right was proved as laid; and the plaintiff recovered. And, on motion for a new trial, Lord Ellenborough held, that it preserved its prescriptive right, although its manorial rights might have been severed. It would still be such a manor by reputation, as would satisfy the allegation, and it was not necessary to prove it a continuing manor for all purposes. So here, the question was, not whether Smith was entitled to a manor, but whether he had such an interest in the locus in quo, as would give him a right to the allotment under the Act; and he urged, that as what the plaintiff claimed, had been declared to be a manor by the Act itself, that would be sufficient for the present purpose.

3d February. Williams, J. and Spence, shewed cause. They observed that, in the cases cited, the places mentioned had once been manors: whereas, in this [105] instance, Poulton cum Seacombe had not been shewn to have ever been a manor, and was therefore not entitled even to the appellation of a manor. On the contrary, as far as negative evidence could do so, it is proved never to have been reputed a manor. The rights, of the exercise of which, acts had been proved, might all have existed independently of an existing manor. The fishery might have been an exclusive grant; such a right may exist in alieno solo: so also the ferry: the landing-place was in the highway: the gravel taken might have been from between the high and low water-mark, which would have been the property of the Crown (Siderfin, 149): all of which rights might have proceeded from the Crown, without necessarily having any reference to an existing manor. The Act itself distinguishes the manor of Poulton cum Seacombe from the other manors, by carefully avoiding terms of certainty. It says that Smith claimed to be Lord of the Manor: but when speaking of the Lords of the other manors, it says, "are Lords of the said manors." If, indeed, the designation had been positive, such a recital, in a private Act of Parliament, would not have conferred on this plaintiff what was not his before. A recital, repugnant to the fact, is nugatory. In the case of *The Earl of Leicester v. Hogdon* (Plowd. Rep. 396), a recital of an attainder was held not to be equivalent to an attainder de novo: nor does such a recital operate as an estoppel (Br. Abr. tit. Estoppel passim), and cannot estop the Jury. The affirmative proof was clearly on the plaintiff, at the [106] trial: and they made the attempt to prove as much but wholly failed. The verdict could not, therefore, be against evidence, for they did not prove the affirmative of that on which alone their cause rested. If there existed no manor, the plaintiff could not be Lord. The Chief Justice was therefore warranted in leaving the whole case to the Jury: and their verdict for the defendants should not be disturbed.

Holroyd, and Jones, in support of the rule. They insisted, that the inquiry of whether there existed a manor, or Smith was Lord of that manor, was beside the question. The allegation in the declaration, on which the issue had been taken, was that the plaintiff was entitled to the allotment in dispute, which the plea denied. On that issue, the main and only question which arises was, whether the plaintiff had such an interest in the soil as entitled him to the allotment: and that he proved by the acts of ownership and of exercise of rights, given in evidence. If the commissioner had allotted this sixteenth to any other person, the plaintiff, in an action to recover possession, would have averred, that he came within the description in the Act of Parliament, of Lord of the manor of Poulton cum Seacombe; and, if he had not allotted it to any one, the plaintiff might have moved for a mandamus, as Lord of the manor. If the plaintiff really had had no right, because there should have turned out to be no such manor, none could have taken it. Such a description of the plaintiff was sufficient for the purpose of allotting the share with certainty. He was sufficiently Lord to answer that description, for [107] that purpose. In *The King v. The Bishop of Chester* (Skinner's Rep.), it is held, by Holt, Chief Justice, that every manor consists of demesnes and services; and a fine, sur grant and render of the services, destroys the manor, yet it remains a manor by reputation. In 2 Roll. Abr. 712, pl. 7, it is laid down, that if, in ejectione firme, (where, being on a point of pleading, great strictness is observable), a lease of a manor, &c. be pleaded, of which manor the tenements in the lease be parcel, and issue be joined, quod non demisit manerium; and the Jury find, by special verdict, that there was no frank tenement, but divers copyholders of the manor: and that it was not known by the name of a manor, for that it was not a manor in law, for default of frank tenements, although it was alleged in pleading, by learned men, to be a manor: yet, being an adverse action, and triable by lay agents, whether, in fact, the tenements passed by the lease, the verdict must be considered as for him who pleaded the lease of the manor; for the substance of the issue was, whether there was a demise or not. Having again adverted to the modern cases already cited, it was submitted, that enough had been put in proof to shew, that the plaintiff was owner of the soil: that that was really the only question in the cause: and that it was not touched by the finding of the Jury, for which reason it was insisted there ought to be a new trial.

GRAHAM, Baron. I cannot help thinking it fit that this question should be presented to the Jury [108] under a different view. This is a case where the verdict is for the defendant generally. If the Court had nothing to go on but this answer of

the defendant, one might have a difficulty in considering how to deal with the case. It is alleged, and the argument proceeds on this, that the verdict went for the defendant, inasmuch as the plaintiff did not prove that this was a manor, or reputed manor. Notwithstanding that, according to the view I have, it does seem to me, from the Act of Parliament, that, of necessity, there is strong evidence that the plaintiff is the person who sustains the character of Lord of the manor of Poulton cum Seacombe; for see what is the object of the Act; it is to inclose certain commons, with some of which we have nothing to do; and, among others, those of Poulton cum Seacombe, the common waste lands, containing about eighty-two acres. Then the Act goes on to state, the rights of the different persons, always looking to who the person is who has a right to the soil. It states those rights in a general way; and it appears, from the Act, to be doubtful whether this is properly called a manor. When it states the rights of the other Lords, it states them as clear: but, with respect to the right of the person who is to have this allotment, it states it as matter of doubt. The Act of Parliament only means to point out the character of the person by whom the allotment is to be taken. In this case it plainly intimates, that the person in contemplation is the owner of the soil. Pursuing this idea, the Legislature, leaving it matter of doubt whether it was a manor, goes on to ascertain what shall be [109] the shares and proportions allotted to each. It then says, that the several other Lords shall have a sixteenth; and, in the same clause, expressly declares, that the Lord of the manor of Poulton cum Seacombe, assuming that there is a Lord, shall have a sixteenth. Then the Act of Parliament gives no power to set apart the several sixteenths, reserved to those properly called Lords: but it gives the commissioners power to deal with the residue only. Then what can be more clear and distinct, than that one-sixteenth part is given to the person who can sustain, and who does sustain the substantial part of the character of being owner of the soil? This sixteenth would remain unallotted, if this person is not within the operation of the Act of Parliament. If the sixteenth is not given to this gentleman, who has endeavoured to establish his claim, it is given to nobody at all: for no other person assumes the character of owner of the soil. I lay aside the little doubt from the conflicting claim of Mr. Mainwaring, for he does not interfere. At one time, he claimed some portion, but he has fairly relinquished his claim, and says he has no right to any share: and the commissioner has allotted to this plaintiff a sixteenth. If there were any other persons who were entitled, in case he did not get it, they would be entitled to have their aliquot part of his share; but that cannot be, for he is to have this sixteenth, and no other person can take it, if he does not. Does he approach to the character of Lord of a manor? You go to Doomsday Book, and you bring no evidence of a manor. Indeed, there is no mention of this as a manor, till 1770. There is a total [110] destitution of evidence to prove it a manor. From the nature of the case proved, it is not difficult to see that this is a kind of mutilated manor, *membris disjectis*. It appears that there is a market: then, as to the plaintiff's being owner of the soil, he has a ferry, and a landing place to set down the passengers. Did he exercise any other rights? There never was an instance where the Crown ever granted the spot of land, between high and low water-mark alone: therefore he must have been the owner of the land adjacent, at those periods when he exercised rights, by digging gravel, and doing other acts. All this imports that he had a grant from the Crown, co-extensive with his own manorial rights. In the North of England, there is nothing more common than to have these rights, that at one time were in the Crown. Under these circumstances, it appears to me, that he has proved himself to sustain the material part of the character which the Act of Parliament had in contemplation, when it enacted that those who had the right of common should be compensated,—that they should receive the given compensation of a sixteenth share, before their land should be touched. It does strike me, that this case has not, by the learned persons who tried it, been seen in the proper point of view; for I think the weight of the evidence is in favour of the plaintiff, and that he sustains the character the Act of Parliament describes.

WOOD, Baron. There are two questions here,—The one is, whether there is a manor of Poulton cum Seacombe; and the other, whether the plaintiff is [111] entitled to this allotment of the waste. Now I think, from the Act of Parliament, it is pretty clear, and must be taken for granted, that there is a manor of Poulton cum Seacombe. It begins by reciting, that Mr. Smith makes a claim to be entitled to the manor, and to be Lord of the manor; that is an admission, in the Act, that there is

such a manor; and in all the rest of the Act, it considers Poulton cum Seacombe as being a manor, and having commons and waste lands; then, in the saving clause, at the last, it is particularly mentioned as a such manor. It must be taken, therefore, on this Act of Parliament, that there is a manor. Now the meaning is not, that it shall be a manor, to all intents and purposes; for if it is a manor by reputation, that is sufficient. It may be, that nothing remains but the waste; but being a manor by the waste, it belongs to the Lord, and the person entitled to the waste, may be called Lord of the manor. And, therefore, this plaintiff comes within the meaning and letter of the Act of Parliament. That he is the owner of the waste, there is not a tittle of doubt, for he has exercised every act of ownership that is generally exercised.

First, it is proved, that the ferry-house is built on the waste; next it is proved, that he gave Farlow a bit of ground on the waste, which he inclosed: it is also proved, that he built a lime-kiln. All these are strong acts of ownership. Thomas Harrison proves that, thirteen years ago, he inclosed lands from the waste, and paid 2s. 6d. per year. It is said, he also asked leave of the freeholders, who had a right of common [112] That does not militate against the right of the Lord: therefore, it seems to me, the Jury were wrong, in going on the idea of this being no manor. Consider the reason of the thing: why is it given? In general, it is expressed to be given in right of the soil. Why is it given to the Lord of the manor? It is given to him in right of his soil; for the Lord has an interest in it. In the character of Lord, he always has a share given to him under every Inclosure Act. Considering it every way, there is no doubt there should be a new Trial.

RICHARDS, Baron, concurred.

Rule absolute.

DOE EX DEM HERVEY v. ROE. Wednesday, 7th February 1816. After several ineffectual attempts made to serve a tenant in possession, with declaration in ejectment, on occasion of the last of which, his servant admits that he is in the house, but refuses to permit the person applying to see him, if the declaration be then delivered to the servant, the Court will make an order that such service shall be sufficient.

Dauncey had, on a former day, obtained an order to shew cause, why the service of the declaration in this cause should not be held sufficient, now moved to make the rule absolute.

It appeared by the affidavit, on which the rule was applied for, that the deponent had called several times on the tenant in possession, for the purpose of serving him personally. On some occasions he was told by the servant that he was not at home; and the last time, the same person said, that his master was then in the house, but would see no [113] person, unless he first sent in his name and message. On that information, which was an admission that the tenant in possession was then in the house, the deponent delivered the declaration to the servant, as service on the master.

The Court, under these circumstances, made the

Rule absolute.

THE ATTORNEY GENERAL v. SMITH. Same day.—A defendant, in an information at the suit of the Attorney General, is not entitled to a change of venue, without his consent.

Raine moved, to be allowed to change the venue in this case; which was an information, filed by the Attorney General against the defendant, who was a tanner, on the 48th Geo. III. ch. 60, § 7, for exercising the trade of a leather-cutter.

The venue was sought to be changed from Middlesex to Lincoln, on an affidavit, that the defendant and the witnesses resided wholly in Lincolnshire.

The Court refused the application; holding, that the venue cannot be changed in an information at the suit of the Attorney General, without his consent.

Motion refused.

[114] SMITH v. BULKELEY. Friday, 9th February. 31st January 1816.—On declaration in covenant running to great length, this Court will grant an imparlance, although the declaration has been filed in time to entitle the plaintiff to a plea.—It is the practice of this Court to file the original draft of declaration, and deliver the copies to each party, on stamp.

Abbott moved for a rule to shew cause why the defendant, in this action of covenant, should not, under the circumstances of this case, have an imparlance till the next term.

In the affidavit of the town agent of the defendant's attorneys, it was stated, that the subpoena ad. resp. was returnable the 8th November last: that on the 20th of January, (the 19th being the last day of the time within which, by the practice, the declaration should have been delivered, to entitle the plaintiff to a plea of this term), a draft of a declaration in this cause, only (not on stamp) had been delivered at the office of his clerk in Court, or had been filed: and that it was very long, and special.

The question therefore was, whether what had been done amounted to a due delivery of a declaration before the essoign day of the present Hilary Term. If it were a good delivery, the defendant would be obliged to plead; if not, he would be entitled to an imparlance till the next term.

Jones, D. F. shewed cause; and submitted, that the Court would not now, for the first time, decide, that the practice objected to by this motion (which the Deputy Clerk of the Pleas, and all the practitioners of the Court, would certify to have been the established usage of the Court beyond [115] memory), is contrary to what it ought to be. It has been the constant practice to put the draft on the file; and it is the business of the defendant's clerk in Court, to take a copy out of the office before he pleads, which ought always to be done on stamp, as it has been in the present instance: and the defendant has been served with a notice to produce the declaration, so taken out of the office, to enable the plaintiff to shew that it is stamped. The plaintiff also receives a copy on stamp; so that, in fact, there are two stamped copies delivered. Such is the peculiar usage of this Court; and therefore, what has been done is perfectly regular in practice, and correct in point of time.

[Wood, Baron. Can it be a perfect declaration, till it has been engrossed on stamp; and may it be filed before?]

By the practice of this Court, it certainly may. It is stamped before the defendant receives it, because he cannot take it out of the office, but on stamp.

Dumcey, on the other side, contended, that what had been called the practice of the Court, was nothing more than an arrangement at the office; that without proper stamps, it was not an authenticated declaration, and the defendant was entitled to consider and treat it as no declaration; and if so, this declaration has not been delivered in time to entitle the plaintiff to a plea of this term.

[116] [Wood, Baron. The copy which is engrossed on stamp is, in fact, the only declaration.]

[Graham, Baron. There being two copies of the declaration delivered on stamp, by the practice, it seems, that in this Court the draft is really the declaration; and that is all that is put on the file in any case.]

THOMSON, Chief Baron. In the present instance, independently of the question as to the practice, the declaration being in covenant, and running to great length, that alone would entitle the defendant to an imparlance; therefore, let him have it. If there is any thing in the objection to what is called the practice, the Court will take that into consideration, and give their opinion at a future time.

For the present, we will, on the first ground, only make the Rule absolute.

THE ATTORNEY GENERAL v. THACKER. Saturday, 10th February 1816.—If there have been any delay in the interval between the first process issuing against a defendant, and the filing of the information against him, and, during that interval, he has gone abroad on his duty, as well as some of his witnesses, the Court will postpone the trial, on motion.

It was moved by Scarlett, that the approaching trial of this information, of which notice had been [117] given for the ensuing sittings, should be postponed till the revenue sittings after next Easter Term.

The object of the proceeding was, to recover the penalty imposed by the 17th Geo. III. ch. 41, § 1, for clandestinely unshipping goods at sea from a homeward bound East Indiaman.

It was stated in the affidavit, that the defendant was mate of the ship, on board which the offence was charged to have been committed; that though he had been held to bail in October, the information had not been filed till the present term: that the said ship had sailed again for China on the 23d of December, and the defendant had also gone thither on board. That he had a good defence, which could not be supported, but by witnesses, many of whom had also sailed as part of the ship's crew. The necessity of his doing so was much pressed, for that, otherwise, a defendant might thus be ruined on a mere charge of an offence against a statute.

Issue was not joined.

Dauncey opposed the application, on the part of the Crown: submitting, that the defendant having been arrested, was aware of the proceeding going on against him, and might have provided for his defence before the ship sailed; and that thus a defendant, by withdrawing himself and his witnesses, might avoid trial in all such cases.

Per Curiam. The gist of the application is, [118] that the information was not filed before the defendant had sailed; and it is not to be expected that he should give up his voyage.

Motion granted,

With liberty to the Crown to examine any witnesses then in attendance who cannot attend afterwards: and the defendant to cross-examine—the interrogatories to be exchanged before examination taken.

USHER (*QUI TAM*), &c. *v.* LYON. Monday, 12th February. Saturday, 27th January 1816.—A plaintiff (*qui tam*) in an action on the statute for not receiving a licensed pilot, demanding to be taken on board and put in conduct of the vessel, not proving production of his license by the pilot, at the time of such demand, will be non-suited: although it was in evidence that the pilot had it in his personal custody at that time, and that the master did not require the production of it.—Coasting vessels, not within the 52d Geo. III. ch. 39, or compellable to take a pilot on board, on entering rivers within the limits of a jurisdiction having authority to appoint and license pilots; and the exemption in the Act is not confined to coasters using the navigation of the river Thames alone.

The plaintiff (suing on behalf of himself and the guild or brotherhood of masters and pilot seamen of the Trinity House of Kingston-upon-Hull), brought the present action of debt under 52d Geo. III. ch. 39, sec. 34, whereby it is enacted "That it shall be lawful for any licensed pilot to supersede any person not licensed as a pilot in the charge of any ship or vessel within the limits of his license: and every master of any ship or vessel who shall continue to act himself as a pilot, or who shall continue any unlicensed person, or any licensed person acting out of the limits for which he is qualified as a pilot, after any pilot licensed to act within the limits in [119] which such ship or vessel shall then actually be, shall have offered to take charge of the ship or vessel: and every person assuming or continuing in the charge or conduct of any ship or vessel without being duly licensed to act within the limits in which such ship or vessel shall actually be, after any pilot duly licensed and qualified to act in the premises shall have offered to take charge of such ship or vessel: shall respectively forfeit, for every such offence, a sum not exceeding fifty pounds, nor less than twenty pounds," against the master of the sloop "Hope," for not superseding an unlicensed person, by giving up the conduct of his vessel to a licensed pilot, who had offered himself to take charge of her, when within the limits of his license. It was tried at York, at the last summer assizes, before Mr. Justice Bayley. The declaration consisted of twelve counts, charging breaches of the pilot acts on two several occasions, varying the description of person acting as pilot, to meet each case in the section.

From the report of the evidence, it appeared, that the defendant was master of a coasting vessel (the "Hope"), trading between the port of Bridlington, in the east riding of the county of York, and London; that he was, on entering Bridlington Harbour, piloted by Robert Burton, an unlicensed seaman; that, on bearing up for

the harbour, his vessel was boarded by Robert Hutchinson, a pilot, duly licensed by the corporation of the Trinity-House of Kingston-upon-Hull, who demanded the charge of the vessel, which the defendant refused to give him. The pilot did not produce his license, [120] when he demanded to be put in charge of the vessel, or tell the master that he was licensed: that he had the licence in his pocket, and that the master did not require to see it; that the defendant knew Hutchinson, having lived in the same town with him, and knew him to be a licensed pilot.

On that evidence, it was objected by the counsel for the defendant, 1st, That, as the pilot had not complied with the terms of the 46th section of the Act, which enacts, "That no person shall take charge of any vessel, or in any manner act as a pilot, or receive any compensation for acting as a pilot, unless he shall be authorized thereto by some lawful license, nor until such license shall have been registered by the principal officers of the Custom House of the place, at or nearest to which such pilot shall reside, (which officers are hereby required to register the same without fee or reward), nor without having his license at the time of his so acting, in his personal custody, ready to be produced, and which he shall actually produce to the master of any ship or vessel, or other person who shall be desirous of employing him as a pilot," the action could not be maintained; and 2dly, That this being a coasting vessel, came within the exemption, which is in these words, "And also save and except as well all colliers, as also all ships and vessels trading to Norway, and to the Cattegat and Baltic, and likewise round the North Cape, and into the White Sea; and save and except all constant traders inwards from the ports between Boulogne inclusive and the Baltic, such ships and vessels [121] having British registers, and coming up the North Channel by Orfordness, but not otherwise; and likewise save and except all coasting vessels, and all Irish traders using the navigation of the river Thames as coasters," was not compellable to receive a pilot on board at all. The learned Judge having put it to the Jury to find, whether the defendant knew the person applying for the conduct of the vessel to be a licensed pilot; and whether, by refusing to employ him, without demanding to see his license, he had not dispensed with the production of it, both of which they found in the affirmative. —His lordship then nonsuited the plaintiff, on the first objection made at the bar, notwithstanding the finding of the Jury; reserving the points, at the same time, by giving liberty to the plaintiff to move to set aside the non-suit, and take a verdict for 20*l.*, being a single penalty, taken at the lowest.

Topping having obtained a rule in Michaelmas term;

Saturday, 27th January.—Dauncey, Holroyd, and Raine, now shewed cause. They turned the main part of their attention to the objection, that the license should have been produced. This is an Act highly penal; and the plaintiff should not only, for that reason, be held strictly to the letter: but the masters of these vessels, being placed in a hazardous situation, in point of responsibility to their owners, the exercise of great caution in the reception of pilots on board should be allowed them. Placed, there-[122] fore, between their responsibility to their owners, on one hand, for accidents happening to the vessel, and the penalty, on the other hand, for not employing a pilot, clear proof of the production of the license by the person demanding the charge, ought to be held to be in all cases indispensable. His knowledge that Hutchinson was a pilot, is not proved: though by the Jury it is so found. Even if it were so, it would be no ground for dispensing with his producing the license. He might have been a pilot at one period, and discharged at a subsequent time for gross misconduct; but the master had no right to waive the production of the license, for that is a duty wisely imposed by the Act on the pilot; the words are, "and which (license) he shall actually produce."

[Wood, Baron. The subsequent words are, "to the master of any ship or vessel, or other person who shall be desirous of employing him." The master, in this case, was not desirous of employing him.]

It would be useless to shew it to persons who were desirous of employing him. Those words must be taken to mean, persons required to employ him, or to apply to persons other than the master, to whom it is, in all events, actually to be produced, and who is, by the Act, obliged to employ him.

Then, as to the question of exemption.—It is to avoid that provision, that they have not chosen to found their claim to the right of appointing pilots on the statute, but have preferred to go upon the usage. That, however, could not avail

them here: [123] for such a right cannot exist by prescription. Usage in pais, not founded on record, would not support this action. It can only be founded on charter, or matter of record, as allowance in a Court of Record (a). The express objects of the exemption are coasting vessels generally. It is not confined to vessels navigating the river Thames alone, but is general, as appears by the addition of the words, "as coasters," following "Irish traders navigating the river Thames." The words between "coasting vessels" and "as coasters," omitted, the two last words would be absurdly redundant. Those final words must have been employed to qualify the exemption of Irish traders using, &c. lest all Irish traders should be included.

Topping, Littledale, and Thompson, in support of the rule. They observed, that this question had been raised merely with a view to try the right of the Trinity House to appoint pilots in exclusion of unlicensed persons. To dispose of the objection as to usage;—whatever might have been the doctrine in ancient times, it was now become such settled law, by a series of modern decisions, that evidence of long usage was unanswerable, that that may be left for the more immediate subjects of discussion. In this case, a licensed pilot demands the conduct of the vessel: he has his license about him, but does not produce it. Now the plaintiff contends, that it is not necessary he should produce it till demanded [124] of him. He is expressly required to have it ready to be produced: if he were peremptorily, and, in all events, required by the Act to produce it, whether demanded or not, his being required to have it ready would be nugatory, because it is involved in that requisition. In truth, he is actually to produce it only to the person desiring his assistance as a pilot, and that, to shew that he is the person named therein, (for his description is endorsed) (sec. 44), which would be totally useless, if the master should refuse to employ him.

Then the question of exemption occurs. According to the grammatical construction of the words in which that exemption is expressed, it must be taken to be confined to such coasting vessels as navigate the river Thames, and as coasters. A coasting vessel might be used on other occasions than as a coaster, as a vessel other than a coaster (such are the Irish traders), may proceed on a coasting voyage; or, if the words, "as coasters," are to be confined to the effect of qualifying the words Irish traders, *quâcunque viâ*, the words "navigating the river Thames," are, it is obvious, equally referable to the words coasting vessels, as to Irish traders, qualifying all their antecedents.

Monday, 12th February.—THOMSON, Chief Baron, this day delivered the opinion of the Court. The questions arising on this motion are, whether the defendant, in such circumstances was, by the Act of the 52d Geo. III., under the necessity of taking a pilot on board his [125] vessel: and whether (if he were) the pilot applying for the conduct of the vessel had complied with the provision of that Act, requiring the production of his license. That Act, which would otherwise have repealed the local Act, has, in the 21st section, an express reference to the privileges enjoyed by the port of Kingston upon Hull, relative to the appointment of sub-commissioners, to examine and license pilots within their jurisdiction. The general Pilot Acts, as well as the Hull local Act, which must also form part of our consideration, contain an express provision, excepting from the necessity of taking pilots on board all coasting vessels. And that we think a general exemption, extending to all vessels in the coasting trade: and that it is not to be construed, as it has been contended it should be, to have been restricted by the subsequent words, to such coasting vessels only as navigate the river Thames as coasters.

Therefore, without entering into the question, whether the pilot, in this case, should have produced his license,—for our opinion on the other point, renders it unnecessary to do so,—we are clearly of opinion, that this, as being a coasting vessel, was not under the necessity of employing a pilot.

Rule discharged*.

(a) Foster, Cr. L. 266. 9 Coke, 27 b. 28 a.—Case of *The Abbott of Strata Marcella*.

* Notwithstanding the Court discharged the rule on the point of the vessel being not within the Act, as a coaster, the arguments on the question of the necessity of producing the license, on which the nonsuit proceeded, to which nearly the whole of the discussion, on the defendant's part, was directed, are preserved.

[126] AGAR v. MORGAN AND OTHERS. Monday, 12th February, Friday, 10th November, 1816. A separate notice to each of several persons intended to be sued in trespass, is sufficient to found a joint action against all of them, for acts committed in pursuance of an Act of Parliament, which provides, that no plaintiff shall recover in an action for any thing done in pursuance thereof, without notice to the defendant or defendants, of such intended action, although none of the other persons, who are afterwards joined in the action, are named in the notice to either of them.—In such an action a deviation from the line described by the Act of Parliament as the course of an intended canal, does not deprive the defendants of their right to notice, before action brought, on the ground that what has been done by them was not done in pursuance of the Act.

A rule had been obtained by Clarke, calling on the plaintiff to shew cause, why the verdict obtained by him at the last nisi prius sittings of this Court, should not be set aside, and a nonsuit entered, or new trial granted, on several points of objection; one only of which was finally insisted on:—that the several separate notices of the action about to be brought, which had been given previously to the commencement of the suit, conformably with the directions of the Act of Parliament, were not notices of the joint action which was subsequently proceeded in.

The action was trespass, against the Engineer, the Solicitor, and others, employed by the Regent's Canal Company, for having deviated from the line described in the plan which had been adopted by the Act of Parliament, and deposited with the clerk of the peace, wherein the plaintiff recovered a verdict of 500*l.* damages.

By the 215th section of the Act incorporating the Company, it is enacted, "that no plaintiff shall recover in any action, for any thing done in pursuance of the Act, unless notice in writing shall have been given to the defendant or defendants, or left at his, her, or their last or usual place of abode fourteen days before such action shall be [127] commenced, of such intended action, signed by the attorney for the plaintiff or plaintiffs, specifying the cause of such action; nor shall the plaintiff or plaintiffs recover in such action, if tender of good and sufficient amends shall have been made to him, her, or them, or to his, her, or their attorney, by or on the behalf of such defendant or defendants, before such action brought." The plaintiffs to pay treble costs if nonsuited: and all actions limited to six calendar months after the fact committed.

The notice of action given by the plaintiff was delivered at the residence of each of the defendants, and addressed to him by name; the material part of which was as follows:—

"I do hereby, as the attorney of and for William Agar, of Elm Lodge, in the parish of Saint Pancras, and county of Middlesex, Esquire, give you notice, that at or soon after the expiration of fourteen days from the time of your being served with this notice, or from the time of this notice being left at your place of abode, I shall commence an action against you, at the suit of the said William Agar, and proceed thereupon, according to law, for that," &c. (transcribing the declaration).

It was objected, at the trial, that as the notice was in all respects several, and purported to apprise each of the defendants, of a separate action being intended to be commenced against him, individually; and the action brought being joint, in form and effect, it could not be maintained, as not being [128] the action of which notice had been given, which must tend materially to embarrass the defendants, and render exceedingly difficult, if not wholly impracticable, the object for which it had been provided, the tender of sufficient amends, and that, therefore, the plaintiff should be nonsuited.

Saturday, 10th February.—Dauncey, Searlett, and Richardson, shewed cause. They contended, first, that no notice was necessary in this case, because the trespasses had not been committed by the defendants, acting under the Act, but in violation of it, as they were expressly restricted to the line prescribed, in passing over the plaintiff's land. They were, therefore, acting colore and not virtute officii; and in so doing, they were not entitled to the privileges or protection of the Act. In the case of *Alcock v. Andrews* (2 Esp. 512), the defendant, a constable, so acting, was held not to be within the statute. There, Lord Kenyon said, the distinction was, between the extent, and the abuse of the authority. But had they kept within the line, and had then done an injury to the plaintiff's house, they would have been entitled to notice. A

constable acting in discharge of his duty, is entitled to notice of actions to be brought against him; but, if acting out of his district, though not wilfully, or *malâ fide*, he loses that protection, as was held in *Blatch v. Kemp* (*b*). So, also, would a constable who should [129] maliciously arrest B, having a warrant against A. Now here the defendants have trespassed out of the limits within which they were directed to confine themselves, and have thereby forfeited their right to notice. Nor could there have been any mistake of the plan to be pursued, for it was in evidence, that they followed neither plan; and the Jury found that they had deviated from both, and that after repeated notice. As to the difficulty of making a tender of amends, the action of trespass is joint, and several; and each is liable for the trespass of the rest. This action must necessarily have been brought against individuals, because, as a Corporation, the Company could not be sued. Had a tender of amends been accepted, it would have destroyed the plaintiff's right of action; and acceptance by him of such tender from one, might have been pleaded in bar by the rest; and if he had received satisfaction from either of the others afterwards, it would have been a fraud, and the money paid would be recoverable by action. Had it not been accepted, then the question would have been, whether the tender was sufficient. This trespass was wilful, and after repeated notice; and a distinction should be made between the protection and privilege extended to public men, acting officially in public duties, and private individuals, pursuing an object of gain and advantage. In the former case, the construction should be liberal on the part of the defendant; in the latter, the inclination should be with the plaintiff. Then, as to the sufficiency of the notice given, if the defendants should be held to be entitled to notice. If any difference could arise from joining several together, [130] in this action of trespass, it must operate in favour of the defendants, whose advantages are enlarged, and not diminished, by such a mode of proceeding; were any one of them prejudiced, indeed, by being sued with others, the argument would be entitled to some consideration. The objection would have been obviated, if all the defendants had been named in the addressing part of the notice; it is, therefore, an objection to the heading only, and merely formal. To try the sufficiency of this notice by analogy, with those which are required to be given by the 24th Geo. II. ch. 44. Under that Statute, if a justice of peace should be sued, jointly with a constable, after notice given to him alone, of an action about to be brought against him, the notice having complied with the exigency of the statute, would be good. That statute did not contemplate any distinction between joint and several actions. Had the action, indeed, been joint against four, and the trespass had not been proved against all, that might have afforded a colourable objection; but as a trespass proved against several, is a trespass in each and every one, the joinder of the defendants cannot be an objection to such an action available to either; for in actions of trespass, all the defendants are principals, and each is liable for the whole damage proved.

A case was mentioned, from recollection, of an action of trespass against two persons, for sporting on the plaintiff's lands, one of whom had suffered judgment to go by default; and damages, assessed on a writ of inquiry, had been recovered against [131] him, which the other defendant pleaded in bar, and was held a good plea. It was contended, that the notice which had been given was, in all other respects, most full and explicit, and amply apprised the defendants of the action brought; and it was finally urged, that if the present objection were allowed to prevail, the plaintiff would lose the benefit of the verdict he had obtained, and be left without remedy, inasmuch as he would not now be in time to resume the suit, because the period limited for bringing actions on this Act had expired.

Monday, 12th February.—Clarke and Pollock, F. in support of the rule, contended, that notice was necessary; and that that which had been given was insufficient. On the first point, they took a distinction between acts done in virtue of the Statute, and acts done in pursuance of it; submitting, that that distinction was recognized by the Act; as in the former case, the remedy given was by the summary intervention of a Jury, to be summoned for that purpose; and the plaintiffs would then have had no right of action: whereas, in the latter, it was by action, wherein, without previous notice, the plaintiffs must be noursuited on the trial. Nor can the circumstance of the caution given not to deviate, alter the nature of the action, or deprive the defendants

(b) 1 H. Bl. in notis. — *Milton v. Green*, 5 East, 233.

of the privileges given by the Act, for any thing done in pursuance of it. Then, as to the sufficiency of the notice. So strict are the Acts in that respect, that on an action commenced against magistrates, under the 24th Geo. II., although the notice may be, in all respects, sufficiently full, and effectually apprise the defendant of every thing [132] necessary to furnish him with the means of defence, yet, if the exact address of the attorney be not endorsed, although his residence be well known to the defendant, the notice would be bad. The substantial objection to the notice, in the present case, is, that it is not a notice of the joint action brought: and, unless a joint action be not distinguishable from a separate one, that objection is valid. Now it would have been clearly fatal, if, after notice of a joint action, they had brought a separate one. There might have been both joint, and several trespasses, committed by each and every one of these defendants, on various occasions, and of greater or less magnitude; and how could they, or either of them, tender amends for a joint trespass, on a notice of an action intended to be commenced for a separate one? They could not confer for that purpose: for, until the declaration was delivered, they could not know the ground of complaint, nor who were to be joined with them. It might happen, too, that an individual might conceive he had a good defence to such an action, and would therefore make no tender: but finding that his witnesses are joined with him in the suit, he then, when his defence is taken away from him, and when it would be too late to avoid expense, might be disposed to tender amends. Had each of these defendants tendered satisfaction amounting to the whole damage, which had been accepted, they would have had no means of recovering the overplus, for the tender would have precluded them. In this case, too, an argument arises from one of the defendants being an attorney, who, if a separate action had been brought against him, might have availed himself of his privilege.

[133] THOMSON, Chief Baron. We are certainly not struck with the answer given to this objection, of want of sufficient notice of the action,—that none was necessary to have been given in this instance: for I incline to think, that the defendants may be said to be acting in pursuance of the Act, although they may have so far deviated from the line of the canal prescribed by it, as to render themselves liable to this action of trespass.

Then the question which remains to be considered is, whether the notice which has been given is sufficient to found the present action, and has complied with the terms of the Act (here his Lordship read the 215th section). Now I do not understand this Act as requiring, that notice shall be given of the nature of the action intended to be brought, as to its being joint or several; but of the cause of such action, that is, what it is that is charged to have been irregularly done, in executing the powers of the Act. There is considerable inaccuracy in the expressions used in this section: because there can be no plaintiff before action brought, neither can there be a defendant.

As every trespass is in its nature joint and separate, it seems to me not to be necessary to give notice of a joint action. If it were necessary to give notice to every person intended to be made a defendant in the action, that has been done in this instance: and this notice is, in its terms, fully sufficient to apprise each of them of the cause and ground of the action, so as to enable them to have tendered [134] amends; and if any one of them had made a satisfactory tender, whether it had been accepted or not, that might have been insisted on in exoneration of all the rest, when the joint trespass had been proved: just as effectually as a recovery against one, might have been pleaded in bar to the action, with the proper and common averments, that the trespasses alleged to have been committed were one and the same.

I was of that opinion at the trial: and though much research and ingenuity have been employed on the behalf of the objection, in the discussion, I still remain of the same opinion.

GRAHAM, Baron, concurred. The notice was certainly necessary; and notwithstanding the difficulties objected by the defendant's counsel, with much ingenuity but which I think, for the most part, rather imaginary than real, I am of opinion, that that which has been given in this case was sufficient. The view of the Legislature in requiring it, is the true criterion of its sufficiency, which was, that an opportunity might be afforded of tendering amends before action brought. Now there was no danger of the defendant's mistaking the object of this notice, as has been suggested: nor could they have thought that it was an action intended to be brought for indi-

vidual damages; and, at least, the notice might have set them to make the due inquiries.

WOOD, Baron. The two questions here are, 1st, whether any notice was necessary; and 2dly, whether that which has been delivered is sufficient. [135] On the first, I give no opinion, because I think that the notice is sufficient. In all cases of trespass, the action is joint and several, and the plaintiff is not obliged to confine himself to trespasses committed individually; for the act of one is the act of all, and the act of all is the act of each. Then, the language of this notice is sufficiently explicit; it is, "I give you notice, that I shall commence an action against you," and it may mean either alone or with others. As to the danger of the plaintiff's receiving a two-fold satisfaction, one cannot suppose that such a thing could happen from separate tenders; and if they were all to tender satisfaction, the plaintiff would have no right to accept it. A tender by one, if accepted, would be a satisfaction for all; and it is a frequent plea, that the trespass was committed with others, who have made satisfaction. You could not plead the not joining of others, in abatement. Therefore, I think, the notice is good. The same notice has been given to every one of the defendants, and is therefore, in effect, a joint notice, because you might give in evidence, joint trespasses in an action founded on it.

RICHARDS, Baron, of the same opinion. I am materially guided by the consideration, that a constable may be joined in an action against a justice of peace, (who is entitled, under the 24th Geo. II., to notice of the writ and cause of action), although the intention of joining the constable be not expressed in the notice.

Rule discharged.

[136] HOPKINS v. BARNES. Same day—25th November, 1816.—The question of apportionment of costs between plaintiff and defendant, on the several issues in trespass, *quare clausum fregit*—of not guilty—right of way by prescription,—by grant,—and on new assignment, *extra viam*, on other occasions, and for other purposes—the 1st and 3d issue, and the new assignment (as to slight trespass only) being found for the plaintiff; and the 2d issue, and the other questions on the new assignment, for the defendant,—having been brought fully before the Court, who took time to consider it: it was decided, that the defendant was only entitled to the disallowance to the plaintiff, of the costs of the issues found for him (the defendant), and was not entitled, beyond that, to have the costs of those issues deducted from the costs allowed to the plaintiff, which latter object was what was sought by the present motion; and that, although the plaintiff traversed the defendant's plea, of the right of way: the Court considering itself bound by the long established practice of the Court of King's Bench in such cases.

An order had been obtained by Abbott, last Trinity Term, calling on the plaintiff to shew cause, why the master should not review his taxation of the plaintiff's costs, in this cause; and allow the defendant costs for his briefs, witnesses, &c. upon the issues which had been found for him, and deduct them from the amount of the costs which had been allowed to the plaintiff.

The action, which had been tried before a special Jury, at the Summer Assizes at Gloucester, in 1806, was trespass, for breaking and entering the plaintiff's close, and damaging the fences. The defendant had pleaded the following several pleas: 1st, not guilty: 2dly, a justification of a right of way, by prescription: and 3dly, a grant of the road. The plaintiff took issue on the plea not guilty, traversed the two special pleas, and new assigned, *extra viam*: on which issue was joined. The Jury found for the plaintiff, on the plea of not guilty: for the defendant, on the first plea of justification; for the plaintiff on the grant of road; and, on the new assignment, for the plaintiff, as to trespass by sheep, with 4d. damages, and 4d. costs; and for the defendant, on the rest of the new assignment.

[137] On the taxation of plaintiff's bill of costs, the master disallowed the plaintiff, costs of the issues found for the defendant, including a rateable proportion of the charges for briefs, fees, and subpoenaing witnesses: but refused to allow the defendant costs on the issues found for him.

Abbott, on obtaining this rule, had submitted, that as the practice in the other Courts differed, and the question had never been decided here, where it therefore

remained doubtful, it was open to him to make the present motion. He urged, also, that as the application had great appearance of reason on its side, arising from an apparent hardship in what was usually done in similar cases, and had been adopted in this: (although that might perhaps be consistent with the practice of the other Courts, at least so far as to justify the Deputy Clerk of the Pleas), this Court might, therefore, think the defendant entitled to the rule, that the question may be brought fairly forward.

The plaintiff, it was observed, had compelled the defendant, by traversing the right of way by prescription, to bring his witnesses to prove his right at the trial: although that might and ought to have been admitted. Therefore, the defendant ought to have the costs of that issue found for him. The verdict, on the second plea, of justification, was found for the plaintiff, merely because it was inconsistent with the former plea. On the new assignment, the plaintiff obtained a verdict, only for a trifling trespass by sheep, but that verdict had no reference to the right of way claimed: and the evidence of the fact was a surprise on the [138] defendant: but on the rest of the new assignment, the Jury found for the defendant. The main question in the cause certainly was the right of way, and on that the defendant succeeded. The trespass by sheep was quite collateral. The plaintiff, therefore, was not entitled to judgment on the whole record (11 East, 263 (not cited)).

There are several cases on the point, in both the other Courts; those in the Common Pleas are in favour of the defendant, while those in the King's Bench are, perhaps, rather the other way. The first case in the Common Pleas, is that of *Brooke v. Willet* (2 H. Bl. 435), where the defendant had pleaded a prescription, for common for twenty sheep, on the locus in quo, and common by cause of vicinage. The first issue was found for the plaintiff: the second for the defendant: and it was moved, that the costs of the issue found for the defendant, might be deducted from the costs of that found for the plaintiff, and also from the plaintiff's general costs of the cause, to which the first issue entitled him. And the Court, after taking time, observed, that it not being the settled practice in the King's Bench to confine the statute of 4th Anne to the costs of the pleadings in all cases, decided, that, on the words and spirit of the statute, and on principles of justice, the defendant was entitled to the costs of the issue found for him, and not to the costs of the pleadings alone. That case was afterwards confirmed by that of *Vallan v. Simpson* (2 B. and P. 568). The case of *Martin v. Vallance* (1 East, 350), and those on [139] which that was founded, will perhaps be relied on for the plaintiff: but there are distinguishing circumstances in the cases.—No part of the issue on the new assignments was there found for the defendant: and even then, the master had deducted the costs of the issue found for him, and the only reason given for the decision in that motion was, the settled practice. It was moved, in that case, too, that the plaintiff should have no more costs than damages: now all that is sought by the present application is, that the costs of the issue found for the defendant, might be deducted from the costs allowed to the plaintiff, on the issues found for him.

The Court having granted a rule to shew cause, on what had been thus urged, Taunton, W. E. and Puller, now shewed cause: grounding their opposition to the rule on the long settled practice on such occasions, in the Court of King's Bench, first determined in the case of *Asser v. Finch* (2 Lev. 234), then in *Higgins v. Jennings* (2 Lord Raym. 1444), and acted on in all the subsequent cases, down to that of *Martin v. Vallance*, and which are there cited. Those cases are precisely in point, against the present application. Here the master taxed the plaintiff his full costs, deducting the costs of the issue, found for the defendant. The word deducted, there, which has been noticed on the other side, [140] does not imply, that they were deducted from the costs allowed the plaintiff, but from the general costs in the cause. Those cases go to establish a rule, that where a plaintiff succeeds on a new assignment, he will be entitled to full costs, though the issue on the defendant's plea of justification may be found for him. It is quite sufficient to entitle the plaintiff to general costs, that, on the trial, he so far succeed as to establish his right to bring the action: and that he does, by obtaining a verdict on any part of the new assignment. Such appears to be the result of the case of *Porter v. Standway* (5 East, 261), where costs were refused to the defendant, on the express ground, that, there having been separate issues joined, and tried, on different parts of the plaintiff's demand, on one of which he obtained his success on that issue, that should be considered sufficient to prevail against the defen-

dant's application for costs. (A note of a case of *Cassin v. Hassel* was cited, as an instance in this Court of the same course of taxation having been adopted before.) It is a common practice with pleaders not to plead to a new assignment, and to allow a verdict to be taken against them for nominal damages, which was not done here. The cases which have been cited of the practice of the Common Pleas, in favour of the application, were both cases in replevin, wherein costs are given to the defendant by the statute. There have been many cases in both the other Courts, not depending on the statute of 4th Anne, ch. 16, where, there being several counts in a declaration, on one of [141] which only the plaintiff has obtained a verdict, it has been decided, that the defendant shall not have the costs taxed in his favour, on such counts as shall have been found for him. On the whole, the application for this rule being an attempt to found a new practice in this Court, contrary to that established in the others, it ought to be discharged. It might otherwise happen, that a plaintiff succeeding in part, at the trial, might ultimately, by the practice now contended for, have costs to pay to the defendant.

Abbott admitted the practice, as to costs on the several counts in a declaration: but contended, that that ought not to be extended. It induced a hardship, and that was a consideration favourable to the present application, against which, this Court had never yet decided, whatever might be the course of taxation adopted by the Master in his office.

[The Deputy Clerk of the Pleas, on being referred to, said, he had followed what he considered as being the usage in the King's Bench.]

This motion does not raise the question, whether the defendant is to be allowed costs at all: that has been done, and what is now prayed is, that the defendant's costs on the issues found for him, may be deducted from the amount of the plaintiff's costs, taxed against the defendant. The damages recovered, were only 4d. Yet the defendant does not ask, that the plaintiff may have no more costs [142] than damages, on that account. The breadth of the road has not been certified to have been brought in question at the trial; nor in fact, was it so.

[Wood, Baron. Suppose the expenses of your witnesses, &c. to prove your issue at the trial, had amounted to a larger sum than has been allowed for the plaintiff's costs, would the plaintiff have had to pay the defendant extra costs?]

We should, in that case, have asked only for so much as would have balanced the plaintiff's costs. But it would be no answer to such an application as this, if well founded, that a defendant should not have his costs to the amount of those taxed for the plaintiff, as far as they might go, because the costs, as taxed for him, (the defendant), amounted to a greater sum.

The cases in the Common Pleas cited for the defendant, were, it is true, cases of replevin: but the Court did not proceed wholly on the statute, as appears by the case. And the cases quoted for the plaintiff have all been decided on the principle, that costs ought to be commensurate with success, and that is all that is applied for by the present motion: but whatever may be said to be the practice elsewhere, if there be justice in this application, this Court may, without regard to the usage of the other Courts, especially where they are not uniform), make this rule absolute.

The Court, intimating that they thought the reason of the case in favour of the defendant's [143] application, ordered the rule to stand over: directing inquiries to be made, in the mean time, as to the course of practice adopted in such cases by the other Courts.

The Master having now reported, that the taxation which had been already adopted by him, consisted with the practice of the Court of King's Bench: it was therefore ordered, that the rule should be discharged.

Rule discharged.

——— v. ———. Same day.—The Court will not, generally, grant a rule to shew cause, on the last day of term, where it would operate to stay proceedings. [But see the next case.]

An application was made for a rule to shew cause, in a matter now pending, but the Court refused to hear the motion: for they said, that they would not grant such a rule on the last day of the Term, as it must operate to stay proceedings.

M'PHEDRON v. FITHERINGTON. Same day. An order will be granted, although applied for on the last day of Term, to set aside and stay the proceedings on a bail-bond assigned, if the motion could not have been made before.

Dauncey applied for a rule to shew cause, why the proceedings on the bail-bond, assigned in this cause, should not be set aside, and be stayed in the mean time. In consequence of what fell from the Court, in the preceding case, he stated, [144] that the application could not have been made before this day. The motion was founded on the fact of the bail having justified before the assignment of the bail-bond : and the Court granted the motion.

PARNELL v. NESBITT. Same day.—The Court will grant an injunction to stay proceedings at law, before answer, even where the defendant having obtained time for the return of a Commission sent abroad to take the answer, is not in contempt for not putting it in, if it is shewn that, in consequence of the necessary intermediate delay, the action at law would be tried before the expiration of the time allowed for its return.

The plaintiff (an orange-merchant) had agreed to purchase of the defendant (a planter of fruit for exportation, residing in the island of St. Michael's), 2000 boxes of oranges, at market-price ; and, in consequence, a cargo of 850 boxes were sent from thence to London, consigned to the plaintiff.

On receipt of the invoice, the plaintiff found that the defendant had charged for the said cargo at the rate of 24s. per box : the current price in the island, at that time, being, as the plaintiff stated, only 15s. a box : and he, therefore, refused to accept the defendant's bill on him for the amount, (1020l.), of which he gave notice to the defendant's agents in London, whom he requested to take the cargo, tendering them the bill of lading. They having refused either to receive the oranges or reduce the price, the plaintiff gave them notice, that he would take the oranges, to prevent their total loss, without prejudice.

[145] In the mean time, the defendant brought an action at law, to recover the amount so charged by him for the cargo : to which the plaintiff pleaded, and afterwards filed a bill in this Court, to restrain further proceedings in the action, and for a discovery, and general relief. To that bill the defendant had appeared ; and had obtained an order, for a commission to go out to St. Michael's to take his answer, with three months' time allowed for its return.

Stephens now moved, on an affidavit of the above facts, for an injunction. He stated, that the defendant having obtained an allowance of three months' time for the return of the commission, the suit at law which was pending would come on, in course, in the mean time ; and, therefore, unless the plaintiff should obtain the order for an injunction, now applied for, the object of his bill would be frustrated, and the plaintiff would then, perhaps, be placed in the disadvantageous situation of having a verdict found against him, in the mean time, greatly to the prejudice of his suit in this Court.

The plaintiff was not in contempt for want of answer, because the order had extended the time usually allowed for putting it in, which had deprived the plaintiff of the usual ground for the present motion.

The Court said, that this was certainly a case altogether new ; but they thought the application [146] founded on good reason, and therefore, (the bill praying relief, and there having been an affidavit of merits filed), they ordered the injunction.

Motion granted.

The end of Hilary Term.

[147] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER.

SITTINGS AFTER HILARY TERM, 56 GEO. III. GRAY'S INN HALL.

GRAVES v. HOULDITCH AND OTHERS. Monday, 26th February 1816. An injunction will not be granted to restrain a defendant from taking out execution on a

judgment being suffered by default, on a case made by bill, and answer that the bill of exchange on which the action had been brought, was given in consideration of defendant's delivering up a former bill, which had been endorsed in consideration of a gaming debt.

The facts on which the present motion, for an injunction to stay proceedings at law, was founded, as disclosed by the bill, (which had been filed for a discovery), were, that Captain Wallace, having won a sum of money at play, from a gentleman of the name of Neville, drew a bill on him for 500*l.*, and prevailed on the plaintiff to endorse it. Wallace afterwards paid it to Houlditch and Co., who sued the plaintiff on the bill, but failed in the action, which was in the Court of [148] King's Bench, on the defence, that it had been accepted in consideration of a gambling debt;—that, afterwards, the plaintiff accepted another bill, in favour of the defendants, on their undertaking to give up the former one for the same sum and interest, and for no other consideration. The answer admitted the material facts of the bill; and alleged, that Wallace having become indebted to defendants, in their business as coachmakers, paid them the first bill, which they believed to be endorsed without consideration; and that, after their failure in the action, the plaintiff expressed his regret that it had not been paid, as he owed Wallace money, and accepted the second bill, for 565*l.* 13*s.* 6*d.*, drawn by the defendants for the said Captain Wallace, and that the first was destroyed; but denied that it was given in lieu of the former bill, or that they knew whether plaintiff ever received any consideration for accepting that bill: and alleged, that they had commenced an action, and had recovered judgment.

Under these circumstances, Martin moved for an injunction to restrain the defendants from suing out execution; but

The Court were of opinion, that, but for judgment having been suffered by default, (as was the case), the plaintiff would have had the same defence at law on this, as on the other bill; and that, therefore, he had now no equity.

Motion refused; but no costs given.

[149] PARNELL v. NESBITT. Friday, 27th February 1816.—The Court will not order a plaintiff, who has obtained an injunction to stay proceedings at law, on a bill filed for a discovery, by which he seeks to establish a case of the goods being charged at a much greater price than the one agreed on,—to pay even the price acknowledged to be just, into Court, to abide the result of the action.

Dumcey moved, on the part of the defendant, that the plaintiff might be ordered to bring into Court the sum of 1020*l.*, in the pleadings mentioned, or such other sum as the Court should think proper, in trust, in this cause.

This was the cause in which a motion had been made, last Hilary Term, for an injunction (a); and the circumstances under which this application was made, are stated in the report of that motion.

It was submitted, that as the plaintiff had taken the fruit, and had obtained an injunction, which would prevent the defendant from recovering the value, whatever that might be, for some time, at least, he ought to pay into Court, for the security of the defendant, the sum charged for the goods: or, if the Court should think that sum too much to ask for, under the circumstances, that the defendant should be ordered to pay into Court, the money which he had himself, by his bill, admitted the goods to be worth, and which he had offered to pay for the cargo.

Stephens opposed the application. He insisted, that an order for paying money into Court, on having obtained an injunction, was never granted but in cases where the sum proceeded for, had been found to be due by a verdict at law. If, when the injunction is dissolved, and the action tried, the [150] plaintiff at law should recover, the plaintiff in equity will be obliged to satisfy that verdict, before he can take the money out of Court again, if the Court should not then be sitting: so that he would, in that case, have to pay it twice over. His original engagement, too, was to pay by a bill at sixty days: it would, therefore, be altering the nature of the contract. In this case, the plaintiff has only taken the goods with a view to prevent their irreparable loss to all parties, and that with a protest against being bound by that act: and if the

(a) Vide ante, p. 144.

defendant recover in the action, it will only be the amount of the clear produce of the sale of the fruit

Dauncey. The admission of the smaller sum being due, and the offer to pay so much, the plaintiff having possession of the goods, places the defendant in the same situation as if he had recovered a verdict at law, when it is admitted he would have been obliged to have paid the money into Court; and the inconveniences now complained of are no more than he would have been put to in that case.

[Richards, Baron. Does a Court of Equity ever, where it is not made one of the terms which induce the Court to assist him, order the plaintiff to pay money into Court? The plaintiff may alter his case to-morrow.]

[Graham, Baron. The plaintiff is rectus in Curia, and seeks nothing of the Court.]
Per Curiam. Motion refused, with Costs.

[151] THE KING v. MARES. Thursday, 29th February. Saturday, 3d February 1816.—Creditors of a defendant in extent in aid, have not such an interest in the property as to entitle them to move to set it aside for their benefit, though joined in the application by the defendant, sed qu. if they had obtained judgment. —An extent in aid against the body of a defendant, may be issued, although not applied for in open Court. A rule obtained to set aside an extent in aid, should, in all cases, be served on the Crown officers of the department of the Revenue, to which the prosecutor of the extent is indebted, to give them an opportunity of coming before the Court.—If a party, proceeding by extent in aid, on such a debt due to the Crown as does not authorize that process, be at the same time really a debtor by bond also, that does not operate to remove the objection.—An extent will not be set aside for irregularity, unless the person objecting apply before the sale, under a venditioni exponas of the effects which have been levied. —The rule to claim is not, per se, notice of the intended sale.

On Extent in aid of Gardner.

Owen had this day obtained a rule to shew cause, why the extent issued in this case, and all the proceedings thereon, should not be set aside, with costs; and that, in the mean time, all further proceedings should be stayed. It was moved, on the ground that the prosecutor of the extent was a person not in a situation to employ the prerogative process in his behalf, according to his own description of himself, in his affidavit to ground the extent; which stated merely, that he being a brewer, was indebted to his Majesty in the sum of 900*l.* for excise duties, payable in respect of beer made between the 23d day of August then last and the 16th November. That Joseph Mares, of Stow-in-the-Wold, in the county of Gloucester, was indebted to deponent in the sum of 222*l.* 9*s.* 6*d.*, the balance of accounts for goods sold and delivered at various times, between the 18th May then last and 1st November then instant; that said debt was bona fide due to him, and not in trust, and had not been sued for in any other Court; and that, unless a more speedy method than the ordinary course of proceedings be had [152] against said J. M. to recover, &c. the same would be in danger of being lost, whereby, &c. From that affidavit it appeared, that the prosecutor was only indebted to the Crown in a manner in common with almost every other subject, and not in any special character, as Collector or Receiver of the Revenue, or otherwise entitling him to this Crown process.

Affidavits of the defendant, and of George Banaster, one of his principal creditors, were also put in. The defendant's affidavit stated the issuing of the extent against his body, lands, and tenements, goods and chattels, and that the Sheriff of the county of Gloucester had put his bailiff in possession of the defendant's goods and chattels, for the debt; that it was due for beer sold to defendant only, and not for any debt due to his Majesty; and that he was indebted to Vernon and Banaster, of Tewkesbury, wine merchants, in the sum of 104*l.* 17*s.* 3*d.*, for wine bought of them long before the issuing of the extent. The affidavit of Banaster confirmed the last statement, and that their debt remained unpaid and unsecured; and proceeded to state, that Mares, having declared himself to him to be in a state of insolvency, applied to him to prevail on the rest of his creditors to accept a composition; that deponent had applied by letter to Gardner, amongst the rest, stating the circumstances and proposal, and requesting that he would accede to it; but that he, without noticing that letter,

sued out the extent, in consequence of such communication; and added, that, unless the Court should interfere on [153] the behalf of deponent and the other creditors, the whole of the defendant's property, or nearly, would be exclusively applied to the satisfaction of Gardner's debt, to their injury.

Under the circumstances, as disclosed by these affidavits, it was submitted, that there were two other grounds for the interference of the Court in this case. One was, that this being an extent in aid against the body of the defendant*, could not, according to the rule, be issued, unless by special order, made on application in open Court.

That objection the Court over-ruled; saying, that it had become the customary and common course so to issue the extent as it had been issued in the present instance; and that it was now the usual practice, authorized by the discretionary powers vested in the Court by the statute 33d Hen. VIII. ch. 39, whatever might formerly have been the rule †.

The other ground was, that there had been a breach of faith on the part of the prosecutor, in so abusing the communication made by Banaster, with a view to the adoption of measures for the common benefit of the defendant's creditors at large.

The Court granted a rule to shew cause; observing, that the question would be, whether Gardner [154] was to be driven back to the proceeding by *seire facias*, or had become entitled to this extraordinary process, by means of the extent having procured his simple contract debt to be converted into a debt of record.

Tuesday, 27th February. — Dauncey now shewed cause; which, he observed at the commencement, he did not do on the part of the officers of any department of the Revenue, but solely on behalf of the party suing the extent. The Court, on a former but recent and similar occasion, having directed, that notice of the rule which had been then granted, should be given to the solicitors of taxes, in this case the excise should have been served.

[Chief Baron. The Crown should have notice, on all occasions, of intended discussion relating to extents. They are properly, and in fact, suits on behalf of the Crown, which has an interest in the process in every instance.]

Dauncey then insisted, that the rule ought to be discharged, with costs, as being unduly obtained, the defendant, in this instance, having been negligent of his right, if he had any, in not having entered any claim. The present application had been made, after an actual sale, under a writ of *venditioni exponas*, in which case there had never been an instance of interference by the Court. That alone, he contended, was a complete answer to the present rule. The defendant had therefore been guilty of gross laches. The extent was returnable on [155] the 28th of November, — the rule to claim expired on the 7th of January, — the *venditioni exponas* issued on the 8th, and was returnable on the 23d; whereas the affidavit on which the rule had been applied for, was sworn on the 27th of January, and the application made only on the 3d of February, two months after the inquisition; yet now, after having so long lain by, they required that the extent, and all the proceedings thereon, should be set aside for irregularity, and that with costs.

[To questions put by the Court, as to what had become of the money levied, and whether notice of the sale had been given to the defendant, it was answered by the register, that the money arising from the sale remained in the hands of the Sheriff; and that the rule to claim, bore date on the return of the extent: but they determined that the rule was not, *per se*, notice of the intended sale.]

Affidavits of Gardner, and the officer who made the levy, were then read; by which it appeared, that Gardner had actually given a bond to the Crown, long previous to the inquisition, which was still in force; but it appearing to be for malt duties, the Court held, that it was out of the present case, as the prosecutor had not proceeded on it. As to the breach of faith, as the proposal in the letter had not been acceded to, there was none; and an unanswered letter of such import, ought not to operate to defeat a party of his right to use this prerogative process.

Owen, in support of the rule, relied on his original objection, of the party proceeding on it, in [156] this instance, not being entitled to the Crown process. He explained

* The Register stated, that in many cases the *capias* clause of the writ was omitted.

† Vide *Re v. Mowbray*, ante, p. 13.

the apparent tardiness of the application, by stating, that the affidavits sent up to found the motion, had been originally sworn in November; but that having been wrongly intitled, by being expressed to be in a cause of *Gardner v. Mares*, they were returned to be resworn, and that, under those circumstances, the 3d of February had been the earliest opportunity: that, as to the venditioni exponas having issued before the application was made, if the writ of extent had been in the first instance improperly issued, that, and all subsequent proceedings, would of course fall with it. The Crown possibly might have had a right to proceed for the recovery of this debt, but it was not necessary to discuss that point on the occasion of the present motion.

In the mean time, notice was directed to be given to the Crown officers, that they might attend if they thought proper.

29th February.—The Court (having been apprised that the officers of the Crown had declined interfering), adjudged, that the application, if there were any ground for it, had been made too late. And they added, that there was a preliminary objection to the motion, which was conclusive,—that the application was made by and on behalf of creditors who had not obtained judgment, or shewn that this proceeding had defeated their right of execution.

Rule discharged, with costs.

[157] THE KING (IN AID OF RICKETTS) v. SLY. Thursday, 30th February 1816.—

The surety in a bond to the Crown by a maltster, for securing the payment of duties on malt made by him, is not such a debtor to the Crown as is entitled to prosecute an extent in aid; because, by the special condition of such bonds, the duties are not payable till four months after the maltster shall have made entry, according to the 48th Geo. III. ch. 74, § 23.—It is not necessary that the bond on which the inquisition proceeds, should be actually produced.—The process of Extent, issues of common right, if well founded.

It had been moved, by Fonblanque, on behalf of the assignees of the defendant, that the prosecutor of this extent should shew cause why the extent (commission) to find debts, should not be set aside, and the inquisition taken thereon quashed; and why the extent, and all proceedings founded on it, should not be set aside, with costs.

The process had been issued in behalf of Ricketts, who had, with another person, (as sureties), entered into a bond to the Crown, in the penalty of 1000*l.*, conditioned, that the principal, Daniel Cripps, (a maltster), should pay the duties of excise on malt made by him in his business.

The inquisition found, that the defendant, Sly, was indebted to Ricketts, by bond of the 8th May 1815, in 600*l.*

The affidavit of Ricketts, on which the commission issued, stated that he, together with two others, had, by bond dated 7th December last, become jointly and severally bound to his Majesty in 1000*l.*, payable at a day past, conditioned, for the payment of duty on malt made by John Cripps, which bond remains in force, and undischarged; that Sly was indebted on bond to him (Ricketts) in 300*l.*: that said Sly was greatly in debt, and much decayed in his credit, and embar [158] rassed in his circumstances, with the usual suggestion of the necessity of the process. There were counter affidavits filed of the solvency of John Cripps, and that the debt due to the Crown was less than that due to the pursuer of the extent: but those objections were disposed of by citing the cases of *The King v. Blatchford* (1 Austr. 162) and *Rea v. Burrow* (1 Price, 394).

9th February. The application was made on the part of the assignees of the defendant, who were considerable creditors, and had taken out a commission against him, under which he had been declared bankrupt, on the ground, that the rule of Court (14th Nov 1691), which requires the production of the bond, had not been complied with; and that no existing debt was due to the Crown from the prosecutor of the extent, at the time of the teste of the process, as would (it was said) have appeared by the bond, if it had been produced in conformity with the rule, the condition not having been broken.

The Court granted an order to shew cause; directing, at the same time, that it should be served on the officer of the Crown.

30th February. This day the Solicitor General attended, on the part of the

Crown, and stated, that the Crown would, in all cases, oppose an extent in aid, where the object of it was the private advantage of an individual merely, unconnected with the public interest. The extent in question, he submitted, had [159] been issued, without observing the formality required by an express rule of Court, of producing the bond on which it was founded, at the time of applying for the process. That rule had been made for the best purposes, with a view to give the officers of the Crown, with whom such bonds were deposited, a controlling power and discretion, as to the right and propriety of permitting the process to issue: for the bond, being in their custody, could only be by them produced, unless it were surreptitiously obtained. The bond, in this instance, does not appear, by the fiat, or any other of the proceedings, to have been produced: and, therefore, the fiat may now be properly revoked, and the subsequent proceedings set aside. In this case, too, the affidavit, dated 26th December, states, that Ricketts entered into the bond to the Crown on the 4th of the same month. Now that bond is founded on the 48th Geo. III., ch. 74, sect. 23 (*d*); [160] by referring to the condition of which, it will be seen that no duties could be, at the time of the date of the affidavit, payable to the Crown: for the surety could not be called on to pay the penalty till the expiration of four months after entry ought to have been made by the maltster, according to the provision of the statute. The Crown itself, therefore, could not have sued out a *seire facias* on this bond against the surety, until the expiration of that time: for not before, could a breach of the bond be alleged as against Ricketts. He concluded by submitting, that whatever right the subject might have to sue in general, without the interference of the Court, that, in the case of extents in aid, the Court might exercise a controlling power, and should not permit the process to be used as a matter of mere right: but that they ought, whenever they should be satisfied that there was no proper foundation for it, either to refuse it in the first instance, or subsequently to set it aside: and that, as this was a case of an unauthorized use of it, all the proceedings should be superseded.

Dauncey, and Wingfield, in support of the extent, contended, that, as the law at present stood, [161] the prosecutor of this extent had a right to issue the process, in the first instance, and was, therefore, now entitled to proceed on it: that he had given a bond to the Crown, had not been denied, and it has been decided, that that was sufficient to support an extent in aid. *The King v. Mainwaring* (Price's Exch. Rep. vol. i. p. 202) is an authority that, in case of a bond given to the Crown, the condition need not be broken. Then it is objected, that the rule of Court has not been complied with, by the production of the bond. Now it not only does not appear, and is therefore only assumed, that the bond was not produced, but the inquisition finds, that the defendant was indebted to the prosecutor by bond, so that it appears, that it must either have been produced, or shewn to have been in existence and force.

[Thomson, Chief Baron. The inquisition certainly alludes to the bond; and it is stated to be the foundation of the debt. The affidavit states, that the bond was not lodged in the Remembrancer's office, nor produced to the Sheriff on the inquisition, nor to the Baron who granted the fiat.]

[The Solicitor to the Exchequer, explained the customary course to be, that the bond

(*d*) Whereas the above bounden (the principal) hath become and is a maltster and maker of malt for sale: and the above bounden (the sureties), as his sureties, have agreed to become bound in the above penal sum, being double the value of the duties which the person employed by the Commissioners of Exchequer for that purpose, hath judged likely to arise, be charged on, and become due from the said maltster or maker of malt, within five months, for the due payment, at the end of every four months, from and after the day on which the above bounden, &c. so being such maltster and maker of malt, as aforesaid, shall or ought to have made such entry, as in the statute in that case made and provided is mentioned, of all the malt by him made, of all such sum and sums of money as shall arise, or be charged on and become due from the said maltster and maker of malt. Now the condition of this obligation is such, that if the above bounden (principal) do and shall make due payment at the end of every four months, from and after the day on which the said, &c. shall or ought to have made such entry, as in the statute in that case made and provided is mentioned, of all the malt by him made, of all such sum and sums of money as shall arise, or be charged on and become due from the said maltster and maker of malt, then this obligation to be void, or else to be and remain in full force and virtue.

is obtained from the collector, (in whose custody it usually is,) and produced, when it is returned to him again.]

Our proposition is, that the production of the bond was not necessary; it was sufficient to prove its existence, and that it was unsatisfied, which must now be taken to have been done. It is said [162] that, if it had been produced, it would have appeared that nothing was then due on it; that, we contend, is no objection, for the bond being a debt of record, binds immediately; nor is it necessary the condition should be broken; those points are established by the case cited. Another answer to the objection is, that a necessity of actually producing the bond, would often deprive the person entitled to the process, of the advantage of it. It might be refused by the collector without good reason, of which he ought not to be made the judge; and the gist of this proceeding consists in its expedition. It was said by Eyre, Chief Baron, in *Her v. Blatchford* (1 Anstr. 162), that the Crown's debtor has a right to this priority; and the Court cannot refuse to let the extent go. Such objections as these are rather matter of pleading; they go to traverse the inquisition. As to the prosecutor not being entitled to proceed on the bond till four months after the forfeiture, it cannot be supposed that the Legislature intended to delay the Crown's pre-existing right to issue extents instantly.

THOMSON, Chief Baron. The sole point here is, whether a person, debtor to the Crown as surety in a bond, the period not having arrived at which he could be called on to pay, if the condition had been broken, is such a debtor to the Crown as to be considered entitled to the Crown process. That is the single question; and the Court may confine itself to the inquiry, whether there was such a debt due from Ricketts to the Crown, at the time of issuing this extent, as warranted the fiat. The affidavit on which it was obtained, was sworn on the 29th of [163] December 1815, setting forth the bond by which the prosecutor was supposed to be constituted a debtor to the Crown. That bond is dated on the 7th of December; so that advantage is very soon taken of it, supposing he might do so. The affidavit does not disclose the condition of the bond, nor is it usual, in such affidavits; but it is stated, as was necessary, to be a bond given pursuant to, and under the statute, and we may fairly take it, that such was the bond so given in this instance. That bond would not have become payable till four months after the condition should be broken. (Here his Lordship read the condition, as set out in the note in pages 159 and 160.) Now the Crown could not, at that time, have proceeded on the bond against the surety. Then can it be said that Ricketts shall be considered as in a better situation than the Crown? The defendant, on a *seire facias*, would have been entitled to oyer, and, on the bond being set out, it would have appeared that the time was not yet arrived when the money was payable; and therefore, the Crown could not have recovered. How, then, could Ricketts? That is the broad line, in this case; without noticing the other arguments which have been pressed, it is sufficient for setting aside the proceedings on this extent, that there was not, at the time when it was sued out, a debt due to the Crown, from the person at whose instance it was issued, so as to entitle him to make use of the Crown process.

GRAHAM, Baron. I am not prepared to say, whether persons in the situation of the prosecutor [164] of this extent, would not have a right to the process generally; but the question here is, whether, at the time that the extent was issued, there was such a debt due from him to the Crown, as entitled him so to proceed. If he had had a right to the extent, I think he should have been permitted to sue it out without previous application to the officers of the Crown in the particular department. This was a debt due on bond, and it might be a prudent rule that he ought, on occasion of applying for an extent, to have produced it, yet that might sometimes go to defeat the efficacy of the proceeding; and, in practice, there are many instances where parties have been permitted to have extents, where they have been unable actually to produce the bond. I do not mean to say that, in this case, the extent ought to be set aside, on the ground that the party applying for it did not, at the time, produce his bond. But every person sued has a right to come forward, to shew that the party suing the extent had no privilege to use it. In this case that is shewn conclusively. The condition of these bonds is, that the surety shall not be affected by it till four months after forfeiture. Independent of the bond, Cripps might have been liable to an immediate extent; but that does not affect Ricketts. As to the bond not being a procrastination of the remedy, I lay that aside. The surety could not have been entitled to proceed under it till he had actually become liable to pay the debt. We

were pressed with the case of *The King v. Munnearney*, but there is a wide distinction between the cases, arising from the peculiar condition of this bond. [165] That does not, it is true, specifically appear: but it is incumbent on the party making the application, to shew that the objections which have been taken to it do not stand in his way.

WOOD, Baron. I think that the extent, in this case, has been improperly issued. It is an abuse of the process, when it is used by a party not indebted to the Crown. In this case, Ricketts was not indebted to the Crown: he was merely a surety for a person who might have become indebted to the Crown for duties: and those duties not becoming payable till after a certain period, no action or proceeding by extent could have been instituted against him as surety before that period by the Crown: and had Oyer been prayed of the bond, on such an occasion, it would have appeared, that the duties were not then payable. The prosecutor of this extent is in a very different situation from the maltster himself. This proceeding being, therefore, an abuse of the Crown process, ought to be set aside.

RICHARDS, Baron. I am of the same opinion. Ricketts was only liable to be called on by the Crown, under this bond, on a forfeiture by the principal. The principal obligor could not have been proceeded against by the Crown under the bond, at the time of this extent. It follows, of course, that the surety could not. He would, if permitted to use this process, be in a better situation than the Crown.

Order made absolute.

[166] THE ATTORNEY GENERAL v. LARAGOTTY. Saturday, 11th February 1815. — A defendant, in an information for breach of the Navigation Laws, is not entitled to a Commission to examine witnesses abroad, on motion made to this Court under the 13th and 14th Ch. 2d, pending the progress of the proceedings under the information.—Nor will the Court grant an order to restore a vessel seized on such charges, where a question of identity may be raised on the trial of the cause, although the defendant offer approved security for re-delivering her if a verdict should be recovered against him, p. 172.—Those different objects cannot be blended in one motion, p. 168.

The present motion arose out of the seizure of the ship "San Juan Baptista," by the officers of the Customs, charged with having been found armed for resistance, contrary to the statute, whilst belonging wholly or in part to a British subject, and with various other breaches of the Navigation Laws, some of which were laid to have been committed previously, and others subsequently, to the alleged transfer of her to the foreign subject who was the present claimant, under a purchase from the late British proprietor.

In Michaelmas Term 1814, an information was filed against the plaintiff by his Majesty's Attorney General, in the regular course, as the first step in proceeding to the condemnation of the vessel. It consisted of four counts.—The first was founded on the 24th Geo. III. ch. 47, sec. 4, charging that the ship, whilst belonging wholly or in part to his Majesty's subjects, between the 1st December 1811, and the day of exhibiting, &c. within four leagues of the coast of this kingdom, to wit, &c. was then and there armed for resistance, and had on board more arms, &c. than, &c. (sec. 5), not being licensed, &c. (sec. 7), that is to say, having on board, &c. contrary to the form, &c. by reason whereof the said ship or vessel became forfeited, according, &c.—The second count proceeded on the 47th Geo. III. ch. 66, sec. 5, for "being found [167] in a part of the British channel, having on board, and being navigated by, a greater number of men, officers and boys included, than her proportion, according to her tonnage," contrary, &c.—The third count was on the same statute, for being discovered in a part of the British channel, having on board, and being navigated by, a greater number of men, officers and boys included, than her due proportion of eleven, the said ship being of the burthen of 168 tons. And the fourth was on the 33d Geo. III. ch. 2, reciting his Majesty's proclamation or order in council of 17th July 1812, prohibiting the exportation of arms or ammunition, without permission of his Majesty or his privy council, according to the 29th Geo. II.: and charged the lading of arms and ammunition on board the said ship, by certain persons unknown, for the purpose of exportation, without such permission, &c. contrary, &c. wherefore,

&c. The defendant pleaded the general issue, and notice of trial had been given for the then ensuing Hilary sittings.

8th February, 1815.—Campbell now moved, (the Attorney-General having countermanded his notice of trial, to afford an opportunity for this motion), to postpone the trial, on the ground of the permanent absence of material witnesses resident in Spain, and for a Commission to examine such witnesses; and also, that the vessel might, in the mean time, be liberated, and restored to the claimant, so as to be enabled to pursue her voyage, on her owners entering into sufficient recognizances, to be approved of by the Attorney-General, for her being again delivered up [168] to the Customs, in the event of a verdict being found for the Crown. The Court intimated, that the different objects of the application now made should, in point of form, have been the subject of separate motions. The application was then confined to the postponement of the trial, and that a Commission might be issued in the mean time, to examine the defendant's witnesses residing abroad. The case of *Jenkins (qui tam) v. Larwood* (Bunb. 13), was much pressed on the Court, as an authority in point. There a similar motion was made, founded on the 29th section of the 13th and 14th Ch. II. ch. 11*; and it was urged, that though the jurisdiction seemed to be given to the Court of Chancery alone, yet, as a remedial law, and though it mentions only one instance, it should extend to others within the same equity. Lord Chief Baron Bury, and Baron Price, were of opinion, that such Commission should go, not on the Act, but by virtue of the original jurisdiction: Baron Fortescue Aland thought it might go, even upon the statute: [169] Baron Montague dissenting in both. Between subjects, in an action of trover, such a motion would be almost of course; the only question in this case was, whether, against the Attorney-General, it would be granted.

THOMSON, Chief Baron. This is a case of great novelty and importance, and demands much consideration. There can be no harm in granting the rule, which we will do without giving any intimation of our opinion. Diligent search should, in the mean time, be made in the office, for precedents. I fear we shall not be able to decide it this term.

The Court, therefore, granted a rule to shew cause; which.

Saturday, 11th February, 1815.—Dauncey now opposed. He objected, on the part of the Crown, to the principle of the motion altogether; for that, if this singular, and as yet unprecedented attempt, should succeed, similar applications might and would be made, in every case of information, against persons charged with any species of the offence of smuggling, which would, in all cases, greatly embarrass and protract the proceedings of the Crown officers in enforcing the revenue laws. He contended that, as the provision of the 13th and 14th Ch. II. (whereby the Legislature had interposed to give defendants, in informations founded on the Navigation Act, a right to apply specially to the Court of Chancery, for Commissions to examine witnesses abroad,) was introduced expressly to afford that privilege, it was obvious that such a right could not have previously existed; and that, as an express enactment had been [170] found necessary to confer that right, in those instances so must it be equally necessary in all other cases of proceeding to forfeiture under subsequent Acts, and in no one of them had such clause been introduced. It must therefore be confined to proceedings instituted for offences against that Act alone, and be considered as operating to exclude the privilege in all other cases. The practice of the Court furnishes the law, and no case has been cited in favour of the motion, except the one from Bunbury, which was a motion made on the Navigation Act; and in this information the charges are founded on offences against other Acts. The only mode of obtaining the indulgence sought is by consent of the Crown, which,

* "That in case the seizure or information shall be made upon any clause or thing contained in the late Act, intituled An Act for the encouraging and increasing of Shipping and Navigation, that then the defendant or defendants shall on his or their request, have a Commission out of the high Court of Chancery to examine witnesses beyond the seas, and have a competent time allowed for the return thereof before any trial shall be had upon the case, according to the distance of place where such commission or commissions are to be executed, and that the examination of witnesses so returned shall be admitted for evidence in law at the trial, as if it had been given viva voce by the examinee in Court; any law, statute, or usage to the contrary in any wise notwithstanding."

in such a case as the present, would not be likely to be granted. It was also objected, that the names of the witnesses intended to be examined, were not stated in the affidavit*, nor the points to which they were to be interrogated: and that the affidavit on which it was moved was not positive, but merely stated the deponent's belief, that there were witnesses abroad whose testimony was necessary to the defence.

Campbell, in support of the rule, called the attention of the Court to the new and peculiar circumstances of this case: the defence being, that the defendant, a Spanish subject, had become the *bonâ fide* owner of the vessel seized, having purchased it of a Spanish merchant, to whom it had been previously sold by the British proprietor. It would be in evidence that the vessel was armed, manned, and documented as a Spanish privateer, and cruized under [171] Spanish colours. The case would be, therefore, a mere question of property and flag, and would materially depend on the proof of a legal transfer having been effected, which could not be done without the testimony of the witnesses proposed to be examined on the part of the defendant. Nor, if the present rule should be granted, would it afford a precedent for similar applications in informations of smuggling, for there could be no sort of analogy between such cases and the present, which was distinguished from those, by the circumstance of the defendant being a foreign subject, claiming exemption from penalties inflicted by the British Legislature. It was denied, that it was necessary to set forth the names of the witnesses intended to be examined, or the points to which they were to be examined (b); and if it were, in this case it was expressly stated, that the evidence of the British consul at Corunna was necessary, to establish the proof of the sale relied on, as he had not transmitted the certificate of registry, and Mediterranean pass, which he ought to have done: but his neglect should not prejudice this defendant: and as to the imperfection imputed to the affidavit, nothing further could have been deposed to in this case, from the nature of the transaction.

Per Curiam. It would be departing from the common usage of the Court, to grant the present application. Such motions might, in future, be made in every case, on a suggestion, that material witnesses resided abroad: nor does it make any difference, that the witness be a British consul, or any [172] other public officer; the Crown has, in all cases, a right to a *viva voce* examination of a defendant's witnesses. There is, indeed, a case in *Bunbury*, of a Commission having been granted by this Court, but that was made on the Navigation Act.

Rule discharged.

On the other part of the application, as it was originally made, the Court intimated, that as a question as to the identity of the vessel might be raised on the trial, which would be a conclusive reason for not suffering the ship to sail, and as no delay had been created by the conduct of the officers of the Crown, it was not probable that they would make an order of restoration, on any security being given.

LARAGOITY v. THE ATTORNEY GENERAL. 1st March 1816. Friday, 26th May 1815.—Where a vessel has been seized by the officers or the Customs, on charges of offences against other Acts of Parliament than that usually called the Navigation Act, if, on the trial of the information filed thereon, the question be likely to turn on the fact of the ship belonging to a foreign subject, the Court will, on motion, (a bill having been filed against the Attorney-General for that purpose,) grant the defendant a Commission to examine persons residing abroad, and make it part of the order, that their depositions shall be received in evidence on the trial.—The affidavit of the solicitor for the defendant will be received in support of such a motion; and it will be sufficient if he swear, that he is informed of, and believes the statements in the bill, if he also add, that his belief is founded on documents in his possession, and that, from the nature of the defence, involving the question of what country the ship belongs to, he considers the Commission necessary.

The plaintiff, having failed in his application, (which is the subject of the preceding report), made to the Court in a summary way by motion, to stay the proceedings

* The substance of the affidavit is given in p. 176.

(b) *Rougemont v. Royal Exch. Ass.* 7 Ves. 304.—*Oldham v. Carleton*, 4 Br. C. C. 88.

on the information at the suit of the Attorney-General, and to grant him a Com-[173]-mission to examine witnesses abroad, then held the present bill, to effect the same object, by obtaining an injunction and commission, under the Equity jurisdiction of the Court.

The plaintiff's case, as made by the bill, was this :—It stated, that the vessel which had been seized by his Majesty's Revenue officers, and was now claimed by the plaintiff, had been purchased by him of her former British owners, under the following circumstances: she was originally an English brig, and had, in the month of November 1812, been the property of A. B. French, of London, merchant, and was then called the "William Pitt." In the course of that month, she had been freighted by him with a cargo of merchandize for sale, to some port in Spain or Portugal: and, on that occasion, he obtained from the Custom House, a license, as was usual with such merchant vessels, to carry out a certain quantity of arms and ammunition. On her arrival in Portugal, in December, he offered her for sale: and, in January, he formally commissioned John French Burke, of London, merchant, who was then about to go to Spain, by power of attorney, authenticated by all due ceremonies, both in England and Portugal, to sell the vessel, on his part: and he (Burke) accordingly did proceed with her to Vigo, in Spain, and there sold her, with all her tackle, apparel, furniture, &c. [174] for 45,000 reals, to F. M. Menendez, a natural-born subject of the Spanish Government, and a merchant, then resident at Vigo: which sale was completed, with all the minute formalities required by the laws of Spain, and ultimately recorded in the proper office at Vigo. Menendez, having then procured her tonnage to be ascertained, and having made an affidavit (as usual on such occasion), that the said vessel had been purchased with his proper monies, and that no foreigner, either alien or naturalized, had any share or interest therein, caused her to be registered, under the name of the "General Porlier." The British certificate of register, and Mediterranean pass, belonging to the said vessel, was subsequently delivered up to the British vice-consul at Vigo, and by him transmitted to Richard Allen, Esq., the British consul-general at Corunna, (in whose possession they were stated then to be). In the following March, Menendez sent the vessel to Corunna, where, with equal authenticity and observance of forms, he sold her again, at a profit of 2500 reals, to the present plaintiff, a merchant, residing at Corunna, and a natural-born subject of the Crown of Spain, who appropriated her, by the same solemnities as had been observed in the former transfer, and who again changed her name, for that of the "San Juan Baptista." The plaintiff, having so become possessed of the vessel, equipped and fitted her out as a privateer, and, for that purpose, duly obtained from the Spanish Government, a letter of marque and sea pass, for the seas of Europe. Those documents were officially endorsed by the competent authorities on the 23d of May 1813, [175] (from which time only they would be valid), and, in the same month, the vessel was sent to sea by the plaintiff: and he, at the same time, appointed the said J. French Burke his agent in London. In the course of her cruize, she captured the Danish merchant vessel the "Carlotta," bound from London, with a cargo of colonial produce, and carried her into Portsmouth harbour, in July 1813, as prize: as, it was alleged, he lawfully might, the Spanish nation then being at war with Denmark. On that occasion, an inquiry was set on foot as to the legality of the capture, and the truth of the captor being a Spanish vessel, when her letter of marque, and all her other papers, underwent a strict investigation, by the Spanish consul general resident in this country, who finally declared them to be authentic: and, in consequence thereof, the Judge of the Court of Admiralty, the Secretary of State, and the Lords of Council, refused an application, made to them by the persons interested in the captured vessel, to liberate the prize, and detain the privateer. She then sailed again from Portsmouth, leaving her prize in that port, whither she returned in August following: but being about to proceed to Corunna with her capture, both vessels were arrested by the officers of the Customs,—the "Carlotta" on a charge of having gunnias on board, and the "San Juan Baptista," on the offences imputed to her by this information, in breach of certain statutes and of the orders in council. The bill then stated the

From the novelty and importance of this special application, it is thought right, that no material fact in the peculiar circumstances of the case in which it was granted, should be omitted: and therefore the whole transaction is succinctly related in the report.

proceedings in the suit, down to the time when it was filed, and charged, that the plaintiff was able distinctly to prove, by witnesses residing in Spain, that when the [176] vessel sailed from England she was not turned contrary to her licence, (as was charged in one of the counts of the information): and that, at the time of her seizure, she was actually and bona fide a Spanish vessel, and the property, by purchase for a valuable consideration, of a subject of the Crown of Spain, and, consequently, not amenable to the British navigation laws, or bound by the treaties of Britain with other states; that, without the testimony of such witnesses, and the aid of properly authenticated copies of the various documents relating to the sale of the vessel, the plaintiff could not safely proceed to the trial of the information: and therefore, he prayed that a Commission might be issued, for the purpose of examining such witnesses, and that an injunction might be ordered to stay further proceedings till the Commission should be returned.

The Attorney General having put in the usual answer to this bill:

26th May 1815.—Martin and Campbell now moved, according to the prayer therein; and, in support of the motion, put in an affidavit made by the plaintiff's solicitor, stating that he had been advised, and believed, that the material question on the issue under the information was, whether the "St. Juan Baptista" was, or was not, a British vessel, at the time of her seizure by the officers of the Customs; that he had been informed, and believed, from documentary evidence which had come before him, in the course of conducting the plaintiff's defence to the information, that the said vessel was, at the time of her seizure, a bona fide Spanish privateer, the property of the plaintiff, who was a Spaniard, and resided at Corunna. It then went on to state, that the defendant had been informed, and believed, that the sale had taken place, as alleged in the bill, and that the defendant had repaired and fitted out the vessel at his own expense, and personally hired the crew: that he had been informed, and believed, that the British register, and Mediterranean pass, of the said vessel, was in the possession of R. Allen, Esq. the British consul residing at Corunna, and that he would be a material witness for the defendant; that, without such documents and evidence, he could not safely proceed to trial, of which notice had been given for the Sittings after Easter Term.

Under these circumstances, it was submitted that, as between subject and subject, a Commission would be granted, as a thing almost of course, as necessary to the justice of the case, there could be no reason why there should be any exception in the case of the Attorney General. It would, in most instances, be otherwise impossible that the alien owner of a ship, cruising under the flag of a foreign state, could defend his property against such a proceeding as this. The other arguments in support of the present motion, were much the same as those used on the former occasion. The first case of those given in the notes in the following page, having been cited, the Court, expressing a desire that what precedents on the point there were to be found among the records of this Court and of the Court of [178] Chancery, might be brought before them, granted a rule to shew cause.

The cases in the note* (transcribed from the records) were now offered to the

* Sabbi, undecimo die Novemb' 1699.

Inter Johan Ward Gen (qui int.) &c. quer. : et Francum Willet clam. proprietat. &c.

Sup Informat Seizur.

Et inter pfat. Francum Willet quer. et Attorn. Dni Regis Genal & pfat.

Johan Ward def. p' billa Anglican.

Middlesex.—Upon the motion of Mr. Bernard, of counsel with the plaintiff in the said English cause, informing the Court, that all the linen in question, in these causes, are all of the manufacture of Germany, and imported into England from thence; and that the same were seized by the said John Ward, the plaintiff in the said information, as goods and merchandize of the manufacture of some of the dominions of the French King; and the said Francis Willet having thereupon filed his said bill, in order to obtain a Commission to examine his witnesses beyond the seas, to which bill his Majesty's Attorney-General, and the said John Ward, had put in their answers, to which answers the said Francis Willet had replied, and his Majesty's said Attorney-General, and the said John Ward, had rejoined: it was therefore now prayed by the said William Bernard, that the trial of the cause in the said Ward's information, may

consideration of [179] the Court : and it was said, that the Court of Chancery furnished no precedents of similar motions.

[180] Darncey, Clarke, and Mitford, now shewed cause. They took a preliminary objection to the [181] affidavit made in support of the motion : which, they contended,

be put off till next Term, and that the said plaintiff, Willett, may in the mean time have a Commission for examination of his witnesses beyond sea : and that the same may be read, and made use of as evidence, upon the trial of the said Ward's information : and, upon reading the affidavits of Humphry Willet and Francis Burgois : and upon hearing Mr. Ettrick and Mr. Browne, on behalf of the said Willet ; and of his Majesty's Attorney General, Mr. Dodd, and Mr. Bridges, on behalf of his Majesty, and the said Ward : It is this day Ordered by this Court, That the trial on the said plaintiff Ward's information, shall be put off till the last sitting of the next Term : and that, in the mean time, the said Francis Willet, the plaintiff in the said English cause, may take forth a Commission for examination of his witnesses in parts beyond the seas, wherein his Majesty's Attorney General, and the said Ward, may join, if they think fit : but, in case they will not join therein, within a week after the Term, the said Willet may take forth a Commission ex parte ; and publication of the said depositions shall pass, upon return of the said Commission.

BUTLER pro WILLET.

Martis, vi^o die Feb. 1699.

Same Cause.

Upon the motion of Mr. Turner, for defendant, to put off the trial till next Term, he having a Commission gone into Germany to examine witnesses, which is not returned : and reading the affidavits of Francis Willet, Mr. Etterich, Mr. Browne, and Mr. Barnard, of the same side : Mr. Attorney, Mr. Dodd, and Mr. Bridges, pro quer. : Ordered, by consent of Mr. Ward, and at the desire of defendant, Willett, that the plaintiff have his costs taxed this afternoon, and paid him to-morrow morning : and then the cause to be put off till next Term, to be tried ; otherwise the cause is not put off.

Mercurii, vii^o die April, 1700.

Ward & Willet.

Upon the motion of Mr. Turner, Ordered, that publication pass on Saturday, unless cause on Friday : and the depositions, being returned in high Dutch, to be translated by a public notary, upon oath.

Martis, 16^{to} die Junii, 1724.

Idle v. Westbourne.

Mr. Bootle. To put off the trial. The affidavit of defendant read : Ordered, the plaintiff shew cause on Friday.

Veneris, 19^o die Junii, 1724.

Same Cause.

Mr. Attorney General and Mr. Toller shewing cause against order, 16th inst. Order read : defendant's affidavit. The trial put off, on payment of costs, and the plaintiff at liberty to examine his witnesses, giving the defendant a note before of his witnesses.

Veneris, 20^o die Nov^{ris}, 1730.

Moore, qui tam, against Longuel.

Inter Thom. Moore, qui tam, &c. quer. et Sam. Longuel, del. p. Informac. Seizur.

London. Upon the motion of Mr. Ward, of counsel with the defendant, informing the Court, that the plaintiff having seized as forfeited, a ship called the " Fame Galley," for importing a parcel of skins, contrary to the Act of Navigation : to which ship the defendant entered his claim, and exhibited his bill in this Court, against the plaintiff, in order to examine his witnesses beyond sea, pursuant to the direction of the Act of Navigation : to which bill the defendant, being duly served with the process of this Court, appeared : It was therefore prayed, that the trial of this cause might be put off till Easter Term, and that the defendant might have a Commission to examine his witnesses in Bilbao, in Spain : and that the depositions of the witnesses may be read as evidence at the trial of this cause, on the part and behalf of the defendant : when, upon reading

as it stated no facts, and proceeded [182] entirely on the information of persons not named, and on the belief of the solicitor for the plaintiff: [183] and referred to documentary evidence, without describing the nature of those documents, was not, [184] therefore, a sufficient verification of the statements in the bill, to satisfy the Court that there existed good [185] grounds for granting the application. The cases, they contended, were not in point, being those in which Commissions had been granted under the Navigation Act: and no instance of a similar application had been found. A case of *Head (qui tam) v. Farrer*, was cited for the Crown, where a similar motion had been refused.

[It was urged, that the depositions could not be used at the trial, if the application succeeded; but the Court said, it would be part of the order, that they should be received in evidence.]

On the other side, it was submitted, that no affidavit was necessary in such a case

the affidavit of defendants, and on hearing of Mr. Attorney General and Mr. Bootle, of counsel for the plaintiff, and Mr. Chute, of counsel for the defendant: It is this day Ordered by the Court, That the trial of this cause be put off till Easter Term, and that a Commission be awarded, as desired: and that the depositions of the witnesses to be taken, be read as evidence at the trial of this cause, saving just exceptions.

Tuesday, the 25th of November, 1735.

Longman, qui tam, &c. v. Kemble.

Mr. Bootle, for the defendant; for a Commission to Hamburgh, to examine witnesses in the affidavit of the defendant mentioned, and that the trial may be put off to next Easter Term: defendant's affidavit read: Mr. Attorney, and Solicitor General, for the plaintiff.

Ordered, A commission ret. sine delatione, and the trial put off till the sittings after next Term; and that the defendant have a writ of delivery, by consent, on giving the usual security.

Monday, the 28th day of November, 1737.

*Between Adam Henry Schwartz, Samuel Felman, and Zuckerbocker, Plaintiffs:
and Stephen Scott, Defendant. By Bill.*

London — Upon the motion of Mr. Bootle, of counsel on behalf of the plaintiffs, informing the Court, that the said defendant having lately seized to the use of His Majesty and himself, a ship or vessel called the "Constant," with the tackle, apparel, and furniture thereof, and several parcels of hemp, pipe and hogthead staves, and fir timber, the property whereof has been duly claimed by the said plaintiffs; that the said defendant has filed an information of such seizure, in this Court, and has therein laid the cause of forfeiture of the said ship and goods to be, that the said goods were imported into Great Britain, in the said ship not being navigated pursuant to the Act of Navigation; and further informing the Court, that the said now plaintiffs have several witnesses, at present living at Riga, within the dominions of the Empress of Russia, who can prove the said ship to be navigated according to the said Act: had filed their bill of complaint in this Court, against the said defendant, Scott, in order to have the benefit of a Commission to examine the said witnesses; and the said defendant having put in his answer to the said bill, it was therefore prayed, in pursuance of a clause in the said Act of Parliament, That the plaintiffs may have a Commission, under seal of this Court, for the examination of witnesses in this cause on behalf of the said plaintiffs, at Riga aforesaid, and that the trial of the cause in the said information of seizure, may be put off till the said Commission shall be returned: and on reading the affidavit of Hare Hayson, and hearing His Majesty's Attorney-General, on behalf of the said defendant, Scott: It is this day Ordered by the Court, That a Commission shall forthwith issue, under seal of this Court, for the examination of the said plaintiffs' witnesses at Riga aforesaid: and the said defendant, Scott, may, if he think fit, cross-examine the said witnesses, and for that purpose, he is to name and strike Commissioners in four days, or else the said plaintiffs are to issue the said Commission ex parte; and that the trial of the cause of the said information of seizure shall be put off till the next Term, on payment to the said defendant, Scott, of costs incurred, for such matters as will not serve again to be taxed by the Deputy Remembrancer of this Court; and

as the present : that the cases cited, though certainly arising out of [186] offences against the Navigation Act, still were in point, to shew that the Court exercised its common law authority to grant Commissions in those cases ; for they did not proceed on the provision in that Act which merely gives the Court of Chancery power to grant a Commission in a summary way, on mere motion, without the expense and delay of a bill previously filed, as was necessary before that statute ; and that the present case was more in the nature of an offence against the Navigation Act, than the statutes for the suppression of smuggling.

Cur. adv. vult.

Friday, 1st March.—THOMSON, Chief Baron, delivered the opinion of the Court. (After having gone minutely through the circumstances and proceedings which had taken place, and reviewed the arguments used on either side) The question arises upon those counts in the information which assume the vessel to belong wholly, or in

the said plaintiffs are not to prosecute any action at law in the mean time, against the said defendant, Scott, touching the seizure of the said ship and goods.

Saturday, the 8th day of February, 1755.

Attorney-General against Stockton.

Mr. Cay. —To put off trial to next Term. Affidavit of defendant, William Stockton, read, and of Thomas Bampfield.

Mr. Attorney General to shew cause on Tuesday next.

Wednesday, the 12th of February, 1755.

Same Cause.

Mr. Solicitor General shewing cause against the Order of the 8th instant, Order read, and affidavit of defendant, Stockton ; affidavit of George Davy.

Mr. Starkie, for Stockton and Mackenzie, Mr. Cay for same. The trial put off to next Term, the defendant undertaking to try it peremptorily, and consent that the plaintiff may examine witnesses in the mean time, with liberty to the defendant to cross-examine, on payment of the costs of the applications, and of such matters as will not serve again by the defendants, Stockton and Mackenzie.

Tuesday, the 11th February, 1755.

Manby, qui tam, against Holloway. By Information of Seizure.

Middlesex. Upon the motion of Mr. Starkie, of counsel with the defendant, informing the Court, that the said informant having seized as forfeited, the goods in question, to which goods the defendant entered his claim of property in this Court, and gave security for costs, as the law directs ; and the said informant having filed an information upon the Act of Navigation, the defendant having since filed his bill in this Court against the said informant, in order to examine his witnesses beyond the sea, pursuant to the direction of the said Act of Navigation : to which bill the informant, being duly served with the process of this Court, appeared ; It was therefore prayed, that the trial of this cause might be put off till next Term, and that the defendant may have a Commission to examine his witnesses at Rotterdam, in Holland, and that the depositions of the witnesses may be read as evidence at the trial of this cause, on the part and behalf of the said defendant, saving just exceptions : when, upon reading the affidavit of the said defendant, and also the bill, It is this day Ordered by the Court, That the trial of this cause be put off till next Term, and that a Commission be awarded as desired, returnable the first day of next Term : and that the defendant be at liberty to join in such Commission, unless cause be shewn to the contrary by the said informant to-morrow.

Friday, the 21st May, 1756.

Batts and Another, qui tam, against Hart and Another.

Upon the motion of Mr. Perrott, of counsel for the said defendants, praying, for the reasons mentioned in the affidavit of Richard Cracraft, the younger, that the said defendants may have a new Commission, under the seal of this Court, directed to proper Commissioners at New York, for the examination of their witnesses in this cause, returnable on the first day of next Michaelmas Term, and that the trial of this

part, to a British subject : on which it becomes necessary, that the plaintiff should prove the property to be in him : which he alleges he can do, by means of witnesses in Spain, if the Commission for which he has applied should be granted.

This application has been strongly resisted on the part of the Crown, as one in which the Court ought not to interfere, there being no similar instance in which they have ever done so. On the other side, the case of *Jenkins v. Larwood* was cited as an instance in point. (Having gone through that case)—It does not appear by the report, whether that [187] application was made on a bill filed, or not. Since that case, there have been many instances of Commissions being granted out of this Court, on applications by defendants in informations, most of which, if not all, were cases of breach of the Navigation Laws. In one of which, the case of *Ward v. Willott*, a Commission was granted to examine witnesses for the defendant, in aid of the action at law : but it is doubtful whether that case arose out of an alleged offence against the Navigation Act : and I perceive it was not a proceeding with a view to the condemnation of any vessel, but was a seizure of goods, on a suspicion of their being of French manufacture. Now this case is somewhat similar to that. The question to be tried on this information is, to what country the ship seized belongs. The authority of this Court, to grant Commissions in such cases, is founded on its general jurisdiction at common law, and is not derived under any particular statute ; and it acts on the necessity of its interference, to afford a defendant aid in trials at law.

It has been urged, that the affidavit made by the attorney for the defendant, proceeding solely on information and belief, is insufficient for the purpose of the present motion. So it would be, if it did no more : but it is there sworn, that his belief proceeds on documentary evidence in his possession : and it is further stated, that the defence to the action depends mainly on the proof of the country to which the vessel belongs.

It has been suggested, that our granting a Com-[188]-mission in this case, would become a dangerous precedent, which might hereafter affect the proceedings of the Crown, in all cases of informations filed against defendants for breaches of the revenue laws : but the Court does not see that any such danger is to be apprehended. They would always take care not to grant such applications without good and sufficient ground.

The offences charged in this information are analogous to breaches of the Naviga-

cause may be put off until the sittings after the said Term ; on reading the affidavit of the said Richard Cracraft, the younger, and hearing the honourable William Murray, Esquire, His Majesty's Attorney General, on the behalf of His Majesty and said Thomas Butts and Henry Hastings ; It is thereupon Ordered by the Court, as prayed.

Wednesday, the 22d of November, 1758.

Copgrove, qui tam, &c. against Holding.

Between Richard Copgrove, qui tam, &c. informant, and Henry Holding, claiming the property of a ship or vessel called the "Dorothea," with her tackle, &c. and a parcel of molasses, seized by the said informant defendant, by information of seizure.

Upon the motion of Mr. Starkie, of counsel for the defendant, informing the Court that the said Richard Copgrove had lately seized as forfeited, the ship and goods in question, whereto the defendant had entered his claim in this Court ; and that the said informant having filed an information on the Act of Navigation, the said defendant duly pleaded thereto, and issue was joined thereupon ; since which the said defendant hath exhibited his bill in this Court against the said informant, for the examination of his witnesses beyond the sea, pursuant to the direction of the said Act of Navigation : to which bill, the said informant being duly served with the process of this Court, appeared : It was therefore prayed, that the trial of this cause might be put off to Easter Term next, and that the defendant might have a commission to examine his witnesses in Holland, and that the depositions of such witnesses might be read as evidence at the trial of this cause, on the behalf of the said defendant, saving all just exceptions at the said trial : and upon reading the affidavit of the said defendant, and the said bill, It is ordered by the Court, That the trial of this cause be put off to the sittings after next Hilary Term ; and that a Commission, with liberty for the said informant to join in the same, be awarded, as prayed.

tion Act; for the result will depend chiefly on the inquiry, whether this be a foreign or British ship. The Court has taken much time to consider this motion, because it is altogether new in practice, although it is not new in principle; because it falls in with the general jurisdiction which belongs to it, of aiding by such means, defendants at law, in cases where justice and necessity require it; and in applications of a similar nature, the Court would watchfully protect the rights of the Crown from being abused by pretences; for this is a motion by no means of course.

We think that, in the present case, the plaintiff is entitled to have a Commission, as prayed; in which the Attorney General, if he think proper, may join. And for that purpose, the trial of the information must necessarily be postponed till the sittings after the next Term.

Order made absolute.

[189] WATTLEWORTH v. PITCHER. Same day.—A variance between the affidavit in support of a motion for an injunction, and the bill, in the date of the bill of exchange, on which the defendant had commenced proceedings at law, is sufficient ground for dissolving the injunction obtained; and the Court will, on motion, dissolve it.

Parker moved, that the injunction which had been obtained by the plaintiff, in this case, might be dissolved, with costs, for irregularity. The objection was, that the affidavit made in verification of the bill, stated that one of the bills of exchange, to recover the amount of which the action at law had been commenced, was dated on the 10th day of July 1812, whereas the bill alleged it to be dated the 15th day of June 1812; which, he submitted, was such a variance as must prove fatal to the injunction.

Maddock admitted the variance, which he described as a clerical error; but submitted, that the correct date having been set out in the affidavit, as to one of the bills of exchange, and there being no objection to the description of the other, which alone would be sufficient ground for obtaining the injunction, the order ought not to be set aside, on a matter of form in the pleadings.

Per Curiam.—This is a mistake which can not be overlooked. It is impossible that the Court can be instructed as to which is the true, and which the false date. The injunction must be dissolved.

Order dissolved.

[190] ROE AND ANOTHER v. BUTTERWICK. Friday, 1st March 1816.—The Court will reform a deed, entered into under a previous agreement, by ordering a fresh conveyance to be executed, from which a covenant, complained of as not being the intention of the covenantor at the time of the agreement, or inserted therein, will be directed to be expunged: although such covenant was introduced by the attorney of the covenantor, (but without his express authority,) on its being shewn that the party had not considered himself when liable to such covenant he entered into the agreement.

This bill prayed, that the defendant might be decreed to execute a fresh conveyance of tithes purchased of him by the plaintiffs, agreeable to what was charged to be the true intent and meaning of the articles of agreement entered into between the parties, on which the conveyance objected to was founded; and that an injunction might in the mean time be granted, to restrain the defendant from proceeding further at law, to recover a proportion of the arrears of rent claimed to be due from the plaintiff.

The facts on which the bill was filed were, that the parties having contracted for the sale of certain tithes, held by the defendant on lease from the Archbishop of York, under an annual rent of 20*l.* payable to the Archbishop, and subject to a further annual payment of 40*l.* for the purposes therein mentioned, articles of agreement, dated 16th December 1795, were executed between them, of which the following are the material parts: The defendant, rector of Thirsk, in the county of York, agreed, in consideration of the sum of 2840*l.*, to execute on a future day, a conveyance of the said tithes, and a barn, usually let therewith, to the use of plaintiffs, their heirs

and assigns, for and during the lives and life of the longest liver of the several persons for whose lives the said tithes were granted to defendant, with all benefit and advantage [191] of renewal, from time to time, upon the death of any of them; the said conveyance to contain all covenants usually comprised in conveyances of estates for lives and terms of years. "And it was thereby covenanted and agreed upon between the said parties, that the plaintiffs, their heirs or administrators, should and would from time to time, and at all times, upon the renewal of any of the lives for which the said tithes were then or should be thereafter held, bear, pay, and sustain a proportionable part of the fines, fees, and expenses of renewal, in respect of the said tithes thereby contracted for, after such manner and proportion as the said sum of 2840*l.* bears to the full value of all the tithes of him the said defendant, at Sowerby, Thirsk, Carlton, and Sandhutton, and as the same were lately valued by Mr John Amsley;"—that soon after the execution of the said articles of agreement, indentures of lease and release were duly prepared and executed between the parties in pursuance thereof; that about years after the execution of the said indentures, the defendant made a demand on plaintiff, for the payment of a proportional part of the rents reserved by the original indenture of lease from the Archbishop of York to defendant; when plaintiffs, conceiving such demand to be contrary to the agreement, referred to the indenture of release, and, for the first time, discovered the following clause:—"Subject to the doing and performing a proportionable part of the covenants and agreements to be done and performed in and by the said original in part recited indenture of lease, in respect of the said tithes and premises therein [192] before mentioned, and intended to be thereby released. And it is hereby further declared and agreed, by and between the said parties hereto, that upon any renewal of the lives by which the said tithes and premises then were or should be thereafter held, they the said plaintiffs, their heirs and assigns, shall and will bear and contribute their proportionable parts or shares of the said *yearly rents reserved in and by the said in part recited lease, and also of the said fines, fees, and expenses of renewal,*" &c. The bill then charged, that the words in italics were interlined in the said deed in a different hand-writing; that, at the time of their executing the said release, the plaintiffs had no suspicion or belief that any such covenant or interlineation had been introduced in the said release, but that they signed it under the idea that the same corresponded literally with the terms of the said agreement.

The defendant, in his answer, insisted that the interlineation was consistent with the spirit, true intent, and meaning of the parties to the agreement, and with the terms thereof; and alleged, that the interlineation itself was introduced by the plaintiffs own solicitor.

It was in evidence, that some years (either five or eight, for the witnesses differed as to the time), after the execution of the deeds, the plaintiffs were, for the first time, called on by the defendant to pay a proportionable share of the reserved rents, which they refused to do. It appeared, by the answers given to [193] the interrogatories on the Commission, by the person who had been employed by the plaintiffs to treat for the purchase of the tithes, that nothing was said about the reserved rents; and he also stated, that he did not consider that the plaintiffs were to have paid any part of them, or he should not have agreed for so large a sum. The professional person who prepared the deeds, and was, on that occasion, the solicitor of both parties, in answer to the interrogatories put to him, swore that he had made the interlineation himself, before the execution of the deeds, and that he had done so of his own accord, without consulting either party; because he had considered, that it had been the intention of both parties, and that it was therefore a necessary alteration.

On these facts, it was contended, by Martin, and Perkins, for the plaintiff, that the subsequent deed could not be extended beyond the terms of the contract on which it was founded, which had been attempted to be done by the interlineation in the deed now complained of, imposing a burthen on the purchasers which the agreement did not warrant, and there did not appear to be any authority for the insertion; and it has been decided (3 P. Wms. 277), that a specific authority is necessary, to bind the principal by the act of his attorney; that, at least, the plaintiff was entitled to an issue, to ascertain how it had found its way into the deed, and whether it had been in the contemplation of the parties, at [194] the time of the purchase, that the plaintiff was to pay a proportion of the rent reserved.

Fonblanque, and Roupell, for the defendant, contended that the Court could not interfere, in the present instance, to reform the deed of conveyance, inasmuch as there was no express variance between the articles of agreement and the subsequent release; the latter had only supplied the silence of the former. The principle of equitable interference, in the reform of deeds, is, that there must be strong evidence of fraud, or of an obvious mistake; as if, for instance, the agreement had expressly provided, that the assignee was not to pay rent; but in the present instance, there was no such clause, and he was, as assignee, to take the tithes, subject to the rents and covenants to which the assignor was liable: and such would have been the effect of a deed framed in the language of these articles: such is the nature of all assignments: or otherwise, an express indemnity would be necessary. The interlineation complained of, was made by the plaintiffs' attorney, and the acts of professional men are binding. The policy of the law excludes parol evidence, offered to impugn any written instrument, still less the habendum of a deed, and after so long a period.

In the case of *Irnham v. Child* (1 Br. Ch. C. 95), Lord Thurlow lays down the principle at great length, [195] and declares the rule to be clear, that where there is a deed, it will admit of no contract that is not part of the deed. The attempt made on this occasion, if successful, would destroy that principle, and be productive of mischievous consequences; and therefore ought not to be acceded to, but in a case of the clearest deviation from the true intent and meaning of the parties to the agreement: which so far from being the case in this instance, it was a much more natural conclusion, that a covenant so fit and proper to be introduced as the one complained of, was intended by the parties to be introduced into the deed as a matter of course, so consistent was it with the nature of the agreement.

Friday, 1st March.—THOMSON, Chief Baron, now delivered the opinion of the Court. In stating the circumstances, his Lordship observed, that with respect to the interlineation complained of, no fraud was imputed to any party. The effect of that interlineation, however, would be to render the plaintiffs liable to pay a proportional share of the rents reserved. Now, certainly, there is not in the agreement the least reference to the plaintiffs paying any such proportion. It is an agreement for the absolute purchase of the tithes. The rent reserved must have been matter of attention to the parties at the time of the agreement; and the more so, as there are two reserved rents, — the one payable to the Archbishop, and the other in trust for certain purposes.

[196] After the execution of the deed, no demand of rent was made by the defendant on the plaintiffs for some years; but at length a demand is not only made, but the action brought, which it is now sought to restrain.

The solicitor who prepared the deed, has been examined as to the fact of the interlineation. He says, that he was employed by the plaintiffs as their solicitor in the purchase; and he states very fairly, that the words interlined are of his hand writing, and that he inserted them at the time of examining the engrossment with the counterpart, and previous to the execution of the deed by the plaintiffs; but that he did so without any express authority, but merely because, in his judgment, he considered them proper and necessary; and that the deed, and words so interlined, were read over in the presence of the plaintiffs, previous to the execution.

On the other hand, John Smith has deposed, that he was employed by the plaintiffs to treat for the absolute purchase of the portion of tithes mentioned in the pleadings; and that the defendant agreed to an absolute sale for the sum paid: that the purchaser was only to pay a proportional part of the fines and fees on the renewal of the lease; and that no conversation or agreement took place on any occasion, respecting the payment of any proportional part of the rents reserved. He then proceeds to state, what indeed is obvious, if that be so, that if any such proposal had been made, he should [197] have expected an abatement out of the purchase money, or that he would not have consented to have given so large a sum for the tithes.

Then the question is, whether there is such evidence before the Court as to induce them to interfere in the manner prayed. It is not suggested, that the parties came to any new agreement, respecting payment of any part of the reserved rents. The agent says, that nothing was said about payment of rent, and the nature of the transaction does not of itself warrant the interlineation. The payment of a proportional part of the fine on renewal, certainly appears to have been the sole burthen intended to be borne by the purchaser; and we think, that what was afterwards added in the deed, arose from a misconception on the part of the solicitor, but clearly without intending

any fraud. We are of opinion, that it was not warranted by the original agreement : and that, therefore, this suit is well founded. There must be a fresh conveyance executed, as prayed, which it must be referred to the Master to settle.

There was another mistake, in the proportion of the fine to be paid being according to a valuation. That must be made matter of inquiry, in the same way. In the mean time, the injunction which has been obtained must be continued.

It should be observed, that the interlineation complained of, was the act of the plaintiffs own attorney, certainly.

[198] *THE KING v. ROCK AND OTHERS.* Friday, 1st March 1816. —The Court will not grant an *amoveas manus*, to remove the King's hands from partnership property seized under an extent, against one of the firm, in the first instance. —The course is, to apply for a reference to the Deputy Remembrancer, and that he may report an account of the joint and separate property, when an *amoveas manus* may be obtained by consent, on giving security.

The defendants, together with Thomas Eyton, deceased, were partners composing the firm of the Shrewsbury Bank. On the death of Eyton, who had been receiver-general of taxes for the county of Salop, his effects, including the whole of the property, credits, and effects of the banking concern, were seized into the hands of the Crown, under two writs of *diem clausit extremum*, issued against the property of Eyton, and executed in the county of Salop and city of London : in consequence of which, the bank had been obliged to stop payment.

Blosset, Serjeant, applied for an order to shew cause, why an *amoveas manus* should not be granted as to the partnership property : informing the Court, that the partnership debts amounted to more than their joint assets, by 6995l. 2s. 2d., which deficiency was to be answered out of the separate estates of the defendants ; that the joint business was indebted to the defendants respectively : but that the said Thomas Eyton was indebted to the joint business in 5450l : and he mentioned a case in this Court, of *The King v. Clough* *¹, where the [199] Court had interposed in the case of a seizure of partnership effects, and had ordered a reference, to ascertain and distinguish the separate and joint property.

Per Curiam.—There have been many instances of such a reference to the Master being ordered ; but we cannot grant an order for an *amoveas manus*.

Motion refused *².

[200] *BRACEBRIDGE v. BUCKLEY.* 22d April 1816. —The Court will not give relief in equity against a lessor's right of re entry, for a forfeiture by breach of a covenant to lay out a sum of money on the premises in repairs within a given time.—And that notwithstanding there have been no requisition made by the landlord, for performance of the covenant, and although he have suffered the tenant to continue in possession of the premises for three years after the breach of covenant, but has not received rent from him in the mean time, or otherwise recognized the sub-

*¹ In that case (26 Feb. 1812), it was ordered, (on motion on the part of the assignees under a commission of bankrupt against Clough and his partners), that the Attorney General should shew cause why the inquisition and extent should not be quashed, or the assignees be permitted to claim : and on hearing the parties, it was ordered, that the assignees should be permitted to enter their claim, and that it should be referred to the Deputy Remembrancer, to inquire and report what separate property the defendant was entitled to on the 24th of July last, (the date of the inquisition) ; and it was further ordered (by consent), that there should be a reference, to take an account of what proportion of the property the partners were entitled to on the said 24th July, and of the debts due to and from the partnership, and to ascertain the clear surplus and proportion to which each party, and particularly Clough, was entitled.

*² An *amoveas manus* was afterwards ordered, by consent, on the defendants giving security by bond to answer the Crown's debt out of the effects seized, as far as it might appear, on taking the joint and separate account between the partners, that the Crown would have been entitled, as against those effects, without prejudice to the Crown, the sureties of Eyton, or the sheriff of Salop.

sistence of the tenancy.—The time within which the covenant was to have been performed having been limited by the lease, is equivalent to a specific requisition of performance by the lessor: and a neglect on the part of the tenant, is tantamount to a refusal in Law.—The ground on which the Court refuse to relieve, in such a case, is, that they have no effectual means of ascertaining, or of making compensation to the Covenantee.—Nor is it enough, to shew that no damage has been sustained by the delay, and that the premises may be put into as good or better condition than they would have been if the covenant had been punctually performed, or even that, by a mistake of the solicitor who prepared the lease, the limitation of the period for performance of the covenant had been introduced, although not warranted by the previous agreement, or so understood at that time by the parties themselves, denied by the answer.

The plaintiff prayed to be relieved from the forfeiture of a term incurred by breach of a covenant in his lease, to lay out 1000*l.* in repairs on the premises within twelve months from the commencement of the demise: and for an injunction, to restrain the defendant from proceeding in an action of ejectment, which he had commenced, to recover the possession of the premises.

The bill stated, that the parties having agreed on the terms of the lease some time in the year 1805, the following note was made of the agreement then entered into between them:—"Memorandum of agreement between General Buckley and Mr. Bracebridge, for the house in Duke-street, late Dr. Symonds's: conditions as under:—term for sixty-one years, from Lady Day 1806; rent 140 guineas. General Buckley to pay the rent of the garden as now paid; the land-tax redeemed.—Mr. B. to lay out 1000*l.*"

[201] At that time (it was stated), the house was very much out of repair; and the plaintiff having caused the premises to be surveyed, found that it would require a much larger sum (3000*l.*) to put them into complete repair. He represented the result of that survey to the defendant, and requested an abatement of the rent in consequence, which he refused; but proposed instead, to extend the term to eighty-one years, the original agreement in all other respects to stand; which was acceded to by the plaintiff. The defendant, on the 28th November 1805, executed a lease according to that agreement. In the indenture, there was inserted a covenant, that the plaintiff should, within twelve months, lay out and expend on the premises, in good and substantial repairs, the sum of 1000*l.*, and should and would, during the said term, at his own costs and charges, sufficiently repair and maintain the same, and deliver them up at the end of the term, in sufficient repair and condition. The plaintiff took possession under the lease.

It was alleged in the bill (as one ground of the plaintiff's equity), that notwithstanding the said covenant had been introduced in the lease, it was in fact understood between the parties, that the plaintiff was to take his own time to proceed with the repairs; and that the time limited by the covenant for that purpose, was a mistake of the nature of their agreement on the part of the defendant's solicitor, who prepared the lease; that the state of the premises was such as to render it necessary that a great part of the house should be entirely rebuilt.

[202] The plaintiff continued in undisturbed possession until the month of August 1809, without having been called on by the defendant to begin to repair. He then received a letter from the defendant's solicitor, demanding payment of one year's rent, due up to Lady Day 1807: "from which time," (the letter added), "General Buckley does not consider you his tenant." The plaintiff, finding that it was intended to take advantage of the covenant, wrote to the defendant, proposing to enter into an engagement to rebuild the premises within a reasonable time, and to lay out 1000*l.* on them; and, in the following October, tendered the whole of the arrears of rent due.

The defendant, in his answer, admitted the facts stated in the bill, except that it was understood between the parties, that the money was to be laid out as suited the plaintiff's convenience, or other than according to the terms of the covenant: and denying that the premises were so much out of repair as had been represented, and stated, that the repairs had not then been begun.

It was in evidence, from the depositions of a surveyor, that the premises had sustained no injury by not having been earlier repaired: and that the money might be more advantageously laid out on the premises at the time the defendant proposed

to do it, than before. And it was deposed by the solicitor who prepared the lease, that the defendant had not required that the period for laying out the repairs should be limited by the covenant to twelve months: [203] and that the introduction of such limitation was a mistake; and that the defendant had, on the contrary, observed to the deponent, that the longer the money was delayed to be laid out in the repairs, the more advantageous it would be to him.

On the 12th December 1809, the Court granted an injunction, on argument and the authority of the cases, till the hearing or further order: directing the plaintiff, in the mean time, to pay the arrears of rent due, without prejudice.

The cause was afterwards heard by the Court, on a motion to dissolve the injunction which had been obtained: on which occasion it was ordered to stand over for further argument; and now.

5th December 1814. —Roupell resumed the argument, on behalf of the plaintiff; and contended, that this was a fit case for the interference of a Court of Equity, to relieve against the covenant. He placed his chief reliance on the case of *Sanders v. Pope* (12 Ves. 282), which had been founded on a series of previous authorities^{*1}, and incontestably established the jurisdiction of Courts of Equity to grant relief in such cases. In that case the Chancellor (Lord Erskine) had relieved against a forfeiture, under circumstances less [204] favourable to such an application than those under which the present plaintiff applied. As far as that case goes, it is precisely the same as the present: and no objection can be made in this which would not have applied to that. The principle of the Equity is, that wherever a compensation can be made for a breach of covenant, the Court will relieve against the forfeiture. The strong grounds of the present application are, that the plaintiff is willing to submit to any terms the Court shall impose, even to place the defendant in a better situation than he would have been if the covenant had been performed strictly. The plaintiff has been permitted to continue in the undisturbed possession of the premises for two years after the alleged breach of covenant, and a great arrear of rent has been allowed to become due subsequently, notwithstanding the forfeiture: whereby the plaintiff has been lulled into a security, not inconsistent with the mutual understanding between the parties at the time of entering into the agreement. Those circumstances, and the fact of there being no limited time for commencing the repairs, mentioned in the original agreement, sufficiently confirms the evidence of the solicitor,—that it was not the intention of the parties, that the time should be so limited. During all that time, the defendant never applied to the plaintiff on the subject, or required that he should begin to repair: on the contrary, he seems to have considered, that the delay would have been for his advantage. A Court of Equity will expect that such application should be made, or that some notice should be [205] given of the lessor's intention to enter, unless the covenant be performed, before they will permit a sudden advantage to be taken of an involuntary and uninjurious omission to do what may afterwards be done. The neglect, in this case, has rather been on the part of the defendant, in not calling on the plaintiff to perform the covenant before, or giving him fair notice that otherwise he would avail himself of the omission. He has waived his right by not immediately, or at least sooner, adopting his remedy. This is not the case of a refusal or wilful neglect to perform the covenant; and that is a distinction made in all the cases.

In *Hill v. Barclay* (16 Ves. 402, and 18 Ves. 56^{o2}), where relief was refused, and which would be, but for that material difference, a case in some sort adverse to this application, there had been a demand made, of performance of the covenant before the ejectment was brought. In the conclusion of the Lord Chancellor's judgment on that case, the refusal to comply with the requisition to repair, is expressly stated as a ground for withholding the relief. The Chancellor emphatically so distinguished the case of *Hill v. Barclay* from that of *Sanders v. Pope*.

Another favourable circumstance in the present case is, the large amount of the rent; and it is, [206] therefore, not like the cases wherein the rent is, in

^{*1} All the authorities on this point are so fully gone into in the course of the judgment, that they are omitted in the discussion at the bar, where they were collated and commented on with great research and ability.

^{*2} The case particularly alluded to by the Chancellor, (but not named) in page 61 of the Report in Vesey, and somewhat animadverted on, is obviously *Hack v. Leonard*, and not *Brown and Quiller*, as stated in the note.

consideration of the sum to be laid out in repairs, little more than a nominal acknowledgment.

[Richards, Baron, suggested, that a difficulty occurred to him throughout, which had not yet been removed: and that arose from the impracticability of a Court of Equity seeing that precise compensation were made to the party in a case like the present. The Court, for that purpose, should have some means of satisfying itself, that its decree would be carried into effect: and without an officer duly appointed to superintend what repairs should be ordered, it could not be done.]

It was answered, that the case of *Sanders and Pope*, as well as other authorities, had pointed out the mode of effecting that object: which was, by directing an inquiry to be made, of what sum would be necessary to put the premises in the same state of repair as they would have been in if the money had been applied according to the contract.

The Court inquired of the result of a case of *Rolfe v. Harris*, then lately before his Honour the Vice-Chancellor, which arose out of an application for relief against a

* *Rolfe v. Harris*.—Courts of Equity will not relieve against a forfeiture for breach of a covenant to insure, &c.—Vide *Reynolds v. Pitt*, p. 212.

The bill was filed for relief against a covenant in a lease to insure the premises, which the plaintiff contended ought not to have been introduced into the deed: or against the forfeiture which had been incurred by the breach, if the Court should be of opinion that the covenant ought to stand. The plaintiff's father, William Rolfe, had agreed with the city of London, for a lease of a house in Skinner-street, for a term of sixty years, from Christmas 1806, at a rent of 225l. per annum. In April 1807, the defendant became entitled to the freehold in the premises, under the City Lottery Scheme, subject to the said agreement for a lease. Previous to the execution of the conveyance to the defendant, the City executed the lease to W. Rolfe, in which was inserted a covenant, that the lessee should insure the premises from fire, and keep and continue them insured, from thence till the end of the term: and that, during the term, he should keep them in good repair, and so leave them. The bill charged, that that covenant had been introduced by inadvertence, without consideration paid: and that it was not warranted by the original agreement.—That in September 1808, W. Rolfe assigned his lease to the plaintiff.—That a short time before Christmas 1809, the defendant caused the plaintiff to be served with a notice to insure the premises, according to the covenant, and he effected an insurance in 2000l. for one year: but that he neglected by accident, in the hurry of business, to renew the insurance by Christmas in the next year.—That two days afterwards, the defendant insured the premises, and, without notice, brought an ejectment for the breach of covenant, and obtained a verdict.

The answer denied that the covenant was inconsistent with the original agreement: and that the plaintiff had omitted to insure by accident: and charged, that he had declared he would not insure without regular notice.

No written agreement, nor any memorandum of agreement, was produced: nor were the contents of any agreement, if once in existence, stated or proved. It was not shewn that the covenant had been objected to by the lessee, or his solicitor, who perused the draft of the lease.

It was in evidence, that the defendant had never called on the plaintiff to insure, till Christmas 1809, although he had been in possession, under the lease, from Christmas 1806.

19th April.—The Vice-Chancellor, in a long and elaborate judgment, delivered his opinion on this case, of which the following are the principal heads:—In stating the facts, his Honour adverted to the absence of the original agreement itself, and the very imperfect account which was given of what were stated to be its contents: that nothing was expressed but the parties, premises, term, and rent. Three distinct questions arise in this case: first, whether the plaintiff can be relieved from the covenant altogether, on the ground that it was inserted by mistake: secondly, whether the defendant had waived his right of availing himself of the breach of covenant, by not having called on the plaintiff before: and thirdly, whether this Court will relieve the plaintiff against the forfeiture, on his performance of the covenant. On the first point, (his Honour, it appears, said), the plaintiff has neither by the bill, or by the evidence in support of it, made out a case for relief, by expunging the covenant to insure. It is a principle, that the party who controverts a deed, should shew the

breach of a covenant [207] to keep up an insurance : and it was submitted at the bar, that whatever was the final deter-[208] mination in that case, the neglect was wilful, as the defendant had there also required the per-[209]formance of the covenant, and the plaintiff had neglected it. The Court desired to know, if much [210] stress was

Court most satisfactorily, that it is not consonant with his agreement, and that there must have been some mistake or fraud ; whereas, in this case, neither is the agreement produced, or the terms of it put in proof : and what evidence there is, is rather the other way. To rectify a deed by striking out so material a covenant, is a strong act, and requires a very strong case. In the present, there is no pretence for such an interference of the Court.

The next question that arises is, whether the defendant had waived his right to re-enter for the breach of covenant. Now this bill is not framed to bring that point fully before the Court ; and it is only brought forward, as a circumstance in favour of the main objects of the application ; but if there had been any waiver, it would have been matter of defence at law, and that destroys the equitable ground on which that part of the plaintiff's case stands.

As to the compromise which was attempted to be effected between the parties, and which has been alluded to, that having gone off, on account of a disagreement about the terms, can have no weight as a circumstance, in the case ; and if there were any thing in that, it would also have been more properly matter of consideration for the Court in which the ejectment was brought.

That brings us to the third object of the bill,—whether the Court ought to give the relief sought against the forfeiture, for the breach of the covenant ! and that is certainly a very important question.

By the terms of the lease, the tenant was bound to keep the premises in repair, without any exception in case of fire. Under that covenant, he was an insurer to the landlord, as far as his responsibility went : but not chusing to depend on that alone, he insists on the further security of an insurance in one of the public offices. Notwithstanding the covenant, the tenant did not insure from 1807 to 1809, when the landlord gave him notice to perform the covenant ; and his attention being thus called to it, he did insure for one year : but, at the expiration of that policy, he omits to renew it : and when asked, whether he has insured, it appears that his answer is, not that he intended to insure : but that he had not, and would not without receiving a regular notice. Now, though he had previously been given a notice, it was more than he was entitled to ; and the defendant might have ejected him without, upon the first omission, for the breach of covenant. But all notion of inadvertence was thereby excluded : and if it were not so, the covenant amounts to a condition, that the tenant shall hold no longer than whilst he insures.

His Honour then went at large into the authorities, (all of which are cited in the principal case :) from which he deduced the following principles, as the general result and effect of the decisions :—That where the Court will relieve, the omission, and consequent forfeiture, must be the effect of inevitable accident, and the injury or inconvenience arising from it must be capable of compensation ; but that where the transgression is wilful, or the compensation impracticable, the Court will refuse to interfere. If the latter branch of the doctrine were not established to restrain the latitude of the jurisdiction, it would be a most dangerous jurisdiction, as was well observed by Lord Eldon, who asks, what is there to govern a Court of Equity, in the exercise of such a discretion ! The decision in *Sanders v. Pope*, appears to have been founded rather on dicta than authorities, and goes further than the authorities warrant.

Why, in such cases as these, of relief against breach of contract, is a Court of Equity to be called on to make a new contract ! The parties agree, that if the condition be broken, the lessor shall re-enter : and the Court is asked to give damages instead. What damages can the Court give ! and what damages could reconcile a man to a tenant who breaks his contract, and brings his landlord before a Court of Equity by a bill, to be relieved against the effect of his own injurious neglect ; and to defeat the landlord's remedy for the breach of the condition on which he holds, because he has done so ! It seems to me, to be a mischievous and arbitrary jurisdiction ; and, if exercised at all, ought to be confined to cases of a pecuniary nature, such as non-payment of rent, and money not paid by a day certain, and where such breaches

laid on that circumstance by his Honour: but it was submitted, that in all events, that feature [211] of the case, and the consequent risk which had been incurred during the interval, sufficiently distinguished it from the one now before the Court.

The Lord Chief Baron then expressed a wish to know, what had been finally done in a case of [212] *Reynolds v. Pitt**, which was also a suit instituted for relief against

stand alone. In such cases, perhaps, compensation may be made: but when the principle of compensation is applied to other cases, such as waste, and not repairing, it becomes very difficult, if not impracticable, to effect it. The only mode of measuring damages is by an issue, quantum damnicatus: and that may turn out to be wholly unsatisfactory, and, in many instances, not capable of being carried into effect, by any means, as in breaches of covenant for assigning without leave. In this very sort of case too, how can we, when a risk has been run, estimate the quantum of that risk in damages? This is such a breach of covenant as is out of the measurement of damages; and the effect of giving the relief prayed would be, that any tenant may hereafter break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer, for want of power to enforce his covenant. Whatever may be done, therefore, in general cases, the Court ought not to relieve, in forfeiture for breaches of the covenant to insure. I should have been of the same opinion, if I were not so well borne out by authorities on this point, as I find I am. Having stated the case of *Wadman and Culcraft*, and observed that the question there was distinctly, whether the power to relieve was restricted to cases of non-payment of rent; and having adverted to the other cases, the effect of which is to confine the jurisdiction of the Court, in applications for relief against forfeiture, his Honour particularly and emphatically took a view of the case of *Reynolds v. Pitt* (cited in the next page). That case, he observed, was precisely in point with the present in all its circumstances, and proceeded on a breach of the same covenant (for trivial distinctions should not be introduced in important cases); and that alone would be a sufficient authority for refusing the relief sought.

Upon principle, therefore, and precedent, I am of opinion, that I am not warranted in giving the relief prayed against the forfeiture: and I think, that in no part of this case ought the plaintiff to be relieved.

Bill dismissed without costs.

* *Reynolds v. Pitt*. 18th February 1812.

[See S. C. 19 Ves. 134; 34 E. R. 468 (with note).]

Pitt had let Grigsby's Coffee-house to Elizabeth Shewin, for twenty-one years, with a covenant in the lease, that she should insure and keep it insured during the term, at 800l., in some one of the public Insurance Offices, with a proviso for re-entry, in case of breach of covenant. She took out a policy for seven years at the Phoenix Office, which expired at Lady Day 1808. She then neglected to insure for two whole years; but during that time, regularly kept up an insurance on her own goods, in the Sun Fire Office. Pitt, however, forgave that omission, and she took out a policy for one year, which expired Lady Day 1811. On the 25th or 26th April 1811, Pitt called at her house, to inquire about the insurance, when she was absent from home. On the 27th, he brought an ejectment; on the 26th or 27th, she had paid one year's premium on the policy, and took a receipt for it.

When she found that an ejectment had been brought against her, she filed a bill in the Exchequer, for an injunction. Pitt having put in his answer in time, she moved for an injunction on the merits, on the 21st of May 1811; when the Court ordered Pitt's costs at law to be taxed by the Deputy Remembrancer, and that, on payment of the costs so taxed, an injunction should issue.

On the 27th May, a commission of bankrupt issued against Shewin, on which she was declared bankrupt, and assignees were chosen. On the 30th June, the costs were taxed at 34l. odd. No tender was made of the costs till the 9th November. Pitt's solicitor then refused to receive them, and gave notice of trial. The assignees then filed a supplemental bill, and in Michaelmas Term, moved for an injunction, offering to pay the costs; which motion was refused, with costs.

The assignees then dismissed their bill: and in Hilary Term filed another bill in Chancery, which Pitt answered, stating all the foregoing circumstances. On the day after Hilary Term they made a motion before his Honour the Master of the Rolls,

a forfeiture for a breach of a covenant to insure, and had originally come on in this Court : where, according to his Lordship's note of it, an injunction had been granted : but it was afterwards carried into the Court of Chancery, and was brought on both before the Master of the Rolls and the Chancellor.

On that case, also, the same distinction was taken.

[213] Thomson, Chief Baron. If a man covenant to do an act within a certain time, no demand is necessary ; and a neglect of performance is tantamount to a refusal in Law.

[214] Barber, for the defendant, contended that there had been no waiver of his right to enter for the breach of covenant, as he had not, by any subsequent act, recognized the plaintiff as his tenant, either by receiving rent or any other ; and that a mere delay in prosecuting that right, has never been held to amount to an abandonment of it.

In support of the proposition, that this was not a case for the interference of a Court of Equity in granting relief, the following cases were cited and commented on : —*De Scarlet v. Bennett* (9 Mod. 22) ; *Flint v. Bradon* (8 Ves. 159),—where the Chancellor refused to decree specific performance of a covenant to fill up a gravel-pit, saying, if a specific performance is decreed, a question may arise, whether the work is sufficiently performed, —*Wadman v. Calcraft* (10 Ves. 67) ; *Sparks v. The Liverpool Waterworks Company* (13 Ves. 428) ; *Hill v. Barclay* (16 Ves. 402, 18 ib.) ; all of which establish the principle, that a Court of Equity will not relieve, in any case of a breach of covenant, unless it be in the excepted instance of non-payment of rent, and then only where there has been no other covenant broken.

22d April.—The Court, this day, delivered their several opinions.

RICHARDS, Baron (having stated the case). The point before the Court is, whether the plaintiff, [215] under the circumstances of the case, shall be relieved from the forfeiture, and be allowed a reasonable time to repair the premises.

The prayer of the bill is for general relief.

There is no fraud imputed to the defendant, and no mistake attributed to the plaintiff. He must have been perfectly aware of the covenant which was in the lease, on the new agreement (His Lordship read the terms of the covenant.) This was the contract between the parties ; and I conceive it would be held, that it must be performed, in a Court of Equity, as it would in a Court of Law, unless there were cases against it. I only know of one in 9 Mod.*. There have, indeed, been some others cited, as applying, in the course of the argument. That in 2d Vernon † I do not understand ; nor do I see the ground of the decision in 9 Mod. I am well aware that, in ancient times, Courts of Equity assumed a larger jurisdiction than they do now ; anciently, they corrected men's contracts without any foundation. Lord Alvanley observed, on that doctrine, that it had been carried to a length that became alarming, but that it had, of late, been much restrained ; and that Courts of Equity would no longer relieve from forfeitures for breach of covenant, except where the party, having done all he could to perform it, had been prevented by unavoidable accident ‡. In the case of penalties, I think the Courts have very properly interfered. [216] A penalty

for an injunction to stay execution ; and on this day his Honour said, the covenant to insure, differed widely from a covenant to pay rent. If rent were not paid at the day, still no danger was incurred, if it ultimately should be paid. But, in case of non-insurance, the risk was incurred immediately. His Honour doubted if the Court of Exchequer were right in granting an injunction in the first instance ; and he refused the motion with costs.

On the second seal after Trinity Term, the plaintiff gave notice of a motion to reverse his Honour's order ; which the Chancellor refused, with costs. His Lordship, on that occasion, stated all the cases on the subject, from *Cage and Russell* down to *Hill v. Barclay*.—Mr. Hart had insisted on the case of *Rolfe v. Harris*, 6th May 1811. —The Chancellor said, that the result of the cases was, that Courts of Equity would not relieve against wilful default, except in the case of breach of covenant by non-payment of rent ; nor will they relieve, except where the damages, &c. for which compensation may be made, are certain.

* *Hack v. Leonard*, 9 Mod. 90.

† *Webber v. Smith*, 2 Vern. 103.

‡ *Eaton v. Lyon*, 3 Ves. 693.

is merely a mode of making it the interest of parties to perform their contracts, as in case of bonds given for the performance of covenants. So in borrowing money on mortgages, if the principal money and interest be ultimately paid, the contract is substantially performed. Rent, if paid, although a forfeiture has been incurred by non payment, has been held to be a ground of relief against the forfeiture. In those cases, the rent is certainly not paid in due time, exactly according to the condition of the covenant : but interest being paid on the arrears, though that may be not quite equal, in point of advantage to the landlord, to primary performance, has been decided to be sufficient. But as to covenants such as the present, I know not how they are to be performed, unless according to the terms, or what compensation can be given for non-performance : or, if there could be any made, how it can be offered. Here, indeed, none is offered. *Hack v. Leonard*, is a case much relied on in support of this application. There, indeed, the Chancellor said, he could not see what damage the landlord could sustain by the building being suffered to be out of repair, provided the lessee kept the main timber from being rotten, and left all in good repair before the end of the term. Now that does not amount to a decision. But even that case had nothing to do with compensation : nor was any decreed. A reference was ordered to ascertain what damage had been done : but to whom, and how, is compensation to be given ? Certainly not by decreeing a sum of money to the lessor, to enable him to repair, for he could not [217] enter for that purpose : and are you to trust to a Jury to say what sum would be necessary to put the premises in repair ? I do not, therefore, think that a case which makes at all in favour of the plaintiff : nor does the ground of the determination appear, so as to afford a principle.

I will not travel through all the cases which precede that of *Saunders v. Pope*, in which Lord Erskine went into them all largely ; but he pronounced no decree, perhaps, because the parties compromised. I am anxious to know what decree could have been made.

No doubt the contract of these parties required that 1000*l*. should be laid out within a year : and I wish to know how what they contracted for can now be done ! If not done within the given time, the contract is not performed. The lessor cannot call on this Court to compel the lessee to perform the contract : and why should the lessee call on the lessor to forego it. There is, certainly, no direct authority against the case of *Saunders v. Pope* : but both the present Chancellor and the Master of the Rolls have intimated, by dicta, that they think otherwise ; and I think that the case of *Hack v. Leonard* does not sustain Lord Erskine's decision. I am of opinion, therefore, that the lessor, in this case, is entitled to re-possess his estate, by consequence of the non-performance of the covenant.

But the bill suggests that the lessee will expend as much money as will put the premises in as good [218] repair as if the 1000*l*. had been laid out, according to the contract. In that case, it must be referred to the Master, to say what money would be required : and the sum directed by him to be laid out, though sufficient at that time, might, by a change of circumstances, become insufficient when the repairs are in progress.

This bill was filed in 1809 : now if the lessee had died insolvent in the mean time, and pending the suit, what compensation could have been made to the lessor ? In covenants to insure, the Court will not relieve, as has been decided : and what distinction is there in such cases and the present ? If Bracebridge had died, and repairs had become necessary again, must an action of ejectment, and another bill in Equity, be again resorted to ? But above all, how can the thing sought be done ? The lessor cannot enter to superintend the repairs : and must the Master be directed to do so ? If this had not been a long Term, it might by this time have been exhausted. The Chancellor has said, the Court will not superintend repairs. The Master cannot : it is impossible. Lord Thurlow thought a building could not be erected under the superintendence of the Court * : Lord Hardwicke thought a building might † : but both thought that repairs could not be carried on under the direction of the Court. The Court therefore, cannot give a compensation, because they have no means of [219] ascertaining, precisely, what the compensation should be, or the mode of making it, when ascertained. If affidavits were adduced, they could not enable the Court to arrive at any conclusion. I am of opinion, therefore, that this bill should be dismissed.

* *Lucas v. Comerford*, 3 Br. C. C. 166. 1 Ves. 235.

† *City of London v. Nash*, 3 Atk. 512.

Lord Erskine's decision did not give satisfaction in Westminster Hall.

WOOD, Baron. I am of opinion, that the decision in the case of *Sanders v. Pope* is founded on proper and equitable grounds. In *Hill v. Barclay*, I know the Chancellor has expressed himself rather against it; but I think *Hill v. Barclay* is rightly decided, and does not affect *Pope and Sanders*, for the cases materially differ. The tenant (the plaintiff in this suit) offers to do now all that he was bound to have done; and though a long time has elapsed, yet no request was ever made to the tenant to perform his contract; and it is in evidence, that the premises have sustained no injury, and can now be put in repair. On what principle, then, can a Court of Equity refuse relief? In pecuniary penalties, Courts of Equity have, from the earliest times, relieved. The course of proceeding was formerly, before the statute, by action assigning one breach (a plaintiff could then not assign more). A verdict being found for the penalty, a bill was afterwards filed, wherein the plaintiff alleged, that there were other breaches: upon which an issue was directed, and the Court relieved. This circuitous mode excited the attention of the Legislature: and occasioned the statute of 8 and 9 Wm. III. ch. 12, [220] allowing the assignment of various breaches, and enabling the Jury to assess damages.

It is true that most of the cases of the interference of Courts of Equity relate only to pecuniary penalties, and not to forfeitures; but where is the distinction, if a compensation can be made? Now what has been done in Equity, in the case of forfeitures on specific grounds? In the case of rent, Equity always relieves: and now, by statute (4 Geo. II. ch. 28. sec. 3), the tenant may pay into Court, at any time before the trial of an ejectment, the arrears of rent and costs, and all further proceedings shall cease. In the first case that occurs, *Cape v. Russel* (2d Ventris, 352), is to be found, I think, the true rule to direct Courts of Equity in giving relief, though the case does not further apply on the present occasion. There the Chancellor relieved, saying it was a standing rule of the Court, that a forfeiture should not bind where the thing could be done afterwards, or a compensation made for it. The next case is that of *Webber v. Smith* (2 Vern. 103); and that must have been a case where there was a clause of re-entry in the lease. A re-entry had been made for non-payment of rent, and not repairing. The Chancellor said the Court cannot relieve but on payment of rent, and repairing all the premises. That is an authority that, on a general covenant to repair, the Court will relieve. Then, in the case of *Hack v. Leonard* (9 Mod. 91), the Court relieved against a breach of a general covenant to repair, because compensation could be made: and that is an authority [221] for referring it to the Master, to ascertain the damages sustained, with a view to making compensation. There are certainly cases of refusal, but they are where no compensation could be made; and that distinction is taken throughout. The only good objection arises, where it cannot be known what would be a sufficient compensation in damages. In *Waser v. Mocato* (9 Mod. 112), the reason given for refusing relief was because, in assigning without license, it is unknown what shall be the measure of damages; but, it is added, where the Court can give compensation in damages, it will relieve. Now the damages can be ascertained in neglect of repairs, as well as in any other case. In covenants not to assign, no such damage can be ascertained, because the tenant, though he might be perfectly solvent, may not be, in other respects, such a man as the landlord would chuse. So in *De Scarlett v. Dennett*, before Sir Jos. Jekyll, if a highway be over my land, no compensation could be made in damages. In *Grimston v. Lord Bruce* (1 Salk. 156), which I cite merely for the language, Lord Chancellor Cowper says, that wherever the Court can give satisfaction for a breach of condition, they can relieve.

Equity will relieve in almost all cases of forfeiture, if they can put the parties in as good a condition. In *Northcote v. Duke* (1st Ambler, 511) also, it is held, that "Equity will relieve, if there can be a compensation." The Chancellor also says, "I think the Court may relieve where a tenant cuts down timber."

[222] There have also been many cases where relief has been given against forfeitures of copyholds. It was granted in *Thomas v. Porter* (1 Ch. Ca. 95), where the copyhold had been forfeited by cutting down timber. It was also granted, in *Nash v. Lord Derby* (2 Vern. 537). In *Cox v. Hayford* (ib. 664), the Court relieved against a forfeiture for want of repairs. There is also a case in Saunders's Reports, of *Peachy v. The Duke of Somerset*, where relief was refused: but that was on the ground that it was a voluntary forfeiture, the tenant having made leases contrary to the custom of the manor, without license from the lord.

But the modern decision, of *Sanders v. Pope*, is precisely the same case as the present, in all respects; and it is a strong and unanswerable decision in favour of this plaintiff: so much so, that to refuse relief here, is to over-rule that case, and a series of others antecedent, on which, after much argument and research, that decision was founded. It is evident, that his lordship had taken great pains to inform himself, to be enabled to give judgment. I will now consider the cases that have thrown a doubt on *Sanders v. Pope*. The first of these is, *Wadman v. Calcraft*. That, however, was before, and is also a very imperfect case: there is no argument used there, nor a single case cited, in support of it: nor was the case itself mature for relief. The next is, *Hill v. Barclay*, and that is the most important, for in it all the others are brought before the Chancellor. In that case notice had been given, that if the tenant did not repair, advantage would be taken [223] of the forfeiture. Several objections are taken in that case to the practicability of giving relief, which I do not think very well founded. I will endeavour to answer the Chancellor's difficulties in that case. The first is, that it would be necessary to ascertain the state of the premises: which, it is said, the Court has no means of doing. To that I answer, that that may be done by an issue, which is the ordinary course. Secondly, he asks, How can it be ascertained that the subsequent repairs do put the landlord in the same state? To that I answer, by the same means. Then, thirdly, he says, there is no mutuality, for the tenant cannot be compelled to repair, and that the Court cannot entertain a bill for that purpose, according to Lord Thurlow's opinion. I agree there can be no specific performance of a general covenant to repair, decreed: but does it follow from thence, that a Court cannot relieve against a forfeiture? Was it not done in *Wehler v. Smith*? And do not Courts of Law set aside judgments continually, on condition that the party will do what is required of him, and what he ought to have done? The course of reference to the Master is an answer to all those difficulties. From the case of *The City of London v. Nash*, it appears that a party may come into Court on a covenant to build. In the case of *Moseley v. Virgin* (3 Ves. 184), the Chancellor, observing on what had fallen from Lord Thurlow, on the then prevalent opinion that no decree could be made on a covenant to repair, who added, that he did not see how it could be made on a covenant to build says, that certainly admits this qualification: -If the transaction [224] and agreement is in its nature defined, perhaps there would not be much difficulty to decree specific performance: but if it is loose and undefined, and it is not expressly stated what the building is, so that the Court could describe it as a subject for the report of the Master, the jurisdiction could not apply. There is no such objection here: the house is defined, and the sum to be laid out in repairs (expressly 1000l.) is defined. Fourthly, he objects, that there might be a possibility of the tenant's standing out. The answer is, no Court would relieve a second time. Fifthly, He suggests the difficulty of ascertaining the difference which it would make to the landlord, if the sum of money to be laid out within five years, were not laid out till the sixth year. I answer, by reference to the officer. Obstinate conduct would certainly deserve no relief, but here there was no such thing: and it is proved, that the covenant may at this moment be performed, with as much or more advantage to the landlord, than if it had been done before. Now as there has been no request on the part of the landlord, it is a mere case of simple omission, unattended with injury, and not of obstinate or wilful neglect. No doubt the determination in *Hill v. Barclay*, is perfectly correct, on the grounds taken, one of the most material of which was, that there was a demand of the performance of the covenant made by the landlord, which the tenant disregarded. I do not think, therefore, that the Chancellor has, by that decision, held the case of *Sanders v. Pope* overruled; but that it is, on the contrary, confirmed by his having taken the distinction, that, in the case before him, the landlord had made a requisition to [225] repair, and the tenant had refused to comply. Some part of the Chancellor's language, I confess, appears to militate against the decision in *Sanders v. Pope*, but not the ground of his judgment. A case of possible intermediate insolvency, is put as an objection to relief, where the money has not been laid out within the time prescribed: no doubt, in such a case, that fact would be a sufficient ground of refusal: but no such thing has happened, or was probable in this case. All the cases must depend on the tenant, and be governed by their own particular circumstances. Where, indeed, he has been guilty of wilful waste, or even presumptive waste, relief might be properly refused: but not for a mere want of repair, which, at the time of the application to be relieved, can be effectually supplied. When

there was notice to repair, and nothing was done, the Chancellor did not think it right to relieve. *Regnolds v. Piel* was mentioned, and *Holfe v. Harris*: those were cases of a refusal to insure, and relief was refused, on the ground of the defendant having incurred risk: but in both the plaintiffs had refused to perform the covenant. And in cases of wilful waste, or of an obstinate tenant intending to injure his landlord, the Court would properly refuse to interfere in his behalf.

I certainly agree that, under a change of circumstances, there might be a reason for refusing relief, as in case of bankruptcy; but there are none of those reasons in this case. As in the case of Lord Salisbury's re-entry, in *Webber v. Smith*, would [226] you turn out a whole street because one tenant had not repaired?

I think, therefore, that the plaintiff should be relieved, on laying out 1000*l.* now, and paying all costs which have been incurred, both at Law and in Equity.

GRAHAM, Baron. I agree that a Court of Equity will relieve, where a complete compensation can be effectually made, and the party put in statu quo. But I am at a loss to understand what is meant by compensation in such a case as this. In cases where penalties have been incurred, it is effected by payment of a sum of money, and so in the instance of rent in arrear; but this is a very different case. Formerly leases were much more simple than at present; at length it was thought necessary to have various covenants framed, and clauses of re-entry were introduced for the security of the landlord, which Courts are bound to protect.

There is an instance where the Lords would not relieve, against a covenant not to plough up meadow, under a penalty of 5*l.* per acre, though the land was not worth 5*s.* *Holfe v. Harris*, is a strong case of refusal to relieve against a breach of a covenant, which had been performed but a few days after the stipulated time. If any compensation could be made to the defendant, it must be done by a sum of money to be paid to him, to be laid out, which he does not desire, nor can he be compelled [227] to accept it. As to ordering a reference, suppose the Deputy Remembrancer reported 1500*l.* to be necessary to put the premises into repair, and the tenant, before he had laid it out, became bankrupt, that would stop the performance. In *Lucas v. Comerford*, Lord Thurlow said, there can be no decree to rebuild, any more than to repair. He considered superintending repairs as impracticable: indeed no one could do it but the Chancellor himself, for it must come back to him eventually, if referred in the mean time to the Master. In *The City of London v. Nash*, Lord Hardwicke says, there can be no decree to repair; and had he decreed a building, he would have found a difficulty there, however clear it might have been made to appear on paper. In *Webber v. Calcraft*, it is clear the Chancellor and the Master of the Rolls thought there could be no relief against a covenant to repair: it is a task beyond the power of the Court. If we should grant relief, we should decide that all such clauses are merely in terrorem, though made with care, and by skilful conveyancers. There are many cases where such breaches are pleaded, as an answer to bills for a specific performance of agreements for leases: and issues have been directed, to ascertain the truth of that defence, which could not have been so ordered but on the ground that if the fact were so the Court would not relieve. Equity never interferes, I think, except where the thing can be specifically done, as in the case of rent, or payment of a sum of money: and there the statute (4 Geo. III.) proceeding on the same equitable ground, enables parties to pay the money into [228] Court. I am surprised it should be thought that a series of cases support the doctrine of relieving in such a case, for I think it will be found to be only where a compensation can be made in the way of damages: but here the money should have been laid out in repairs. All the cases refer to where the party injured is to receive damages, which could not be the case here, for a recompence in damages is not required, nor would that remove the effect of the breach of covenant. As to the cases of copyholds, a lord has a special right to interfere in the repair of a tenement; he may do so, lest the tenant should suffer it to fall waste.

Hill v. Barclay is supposed to be distinguishable from this case, but I cannot see the distinction. Lord Eldon does, indeed, refer to the notice given, but that cannot make a difference; the landlord, in that case, was partly obliged to give notice by the terms of the covenant, which was, in that respect, particularly worded. To have made such a requisition necessary, the tenant should have had a stipulation introduced in the lease, but that not having been done, the lease itself was notice, and a demand. It cannot be supposed that General Buckley by not proceeding instanter, was acquiescing in the premises not being put in repair, as has been suggested, and that

he had waived his right of re-entry. In short, no rent was paid, and no repairs had been begun. I think, therefore, that this case is within the decision in *Hill v. Barclay*, and that the injunction should be dissolved.

[229] THOMSON, Chief Baron. This case has been so completely exhausted, that nothing remains for me to add. I agree with my brothers Graham and Richards: regretting exceedingly, that our opinion has not the concurrence of my brother Wood.

Three years had elapsed since the 1000l. was to have been laid out in repairs on the premises: and not a shilling having been expended, the ejectment was brought. And the question now is, what equity there is to prevent the defendant's taking possession under the verdict which he has obtained? It is in evidence, indeed, that the price of materials was higher at that time than afterwards: but what had the defendants to do with that? For if the plaintiff had laid out the money then, he would have been equally bound to continue the premises in repair to the end of the term, and so to have left them: so that that could have made no difference to the defendant. Lord Hardwicke did say, in the case of *The City of London v. Nash*, that the Court could superintend a building: but he only granted an issue of quantum damnificatus. Lord Thurlow has remarked that he could no more superintend a building than repairs.

It really comes to a question whether, in all cases of re-entry on breach of covenant, a Court of Equity will do away the covenant! The authorities of *Walman v. Culcraft*, and *Hill v. Barclay*, do, I think, establish what is right to be done in these cases. The first was for non-payment of rent. Ejectment [230] was brought: and an issue was directed, to ascertain if there had been any breach of the covenant to repair: clearly with a view to a decision, that, if there was, that would be conclusive, and no relief would be given. Those cases are not, I think, shaken by the decision of Lord Erskine. Lord Eldon does, indeed, in *Hill v. Barclay*, make a distinction as to notice, but not, I think, a material one: and particularly as that arose on the penning of the covenant, as has been well observed by my brother Graham. That notice had, as Lord Eldon observes, given him a further time than three months.

The argument of my brother Wood is no doubt a very able one, and the Court will always be happy to concur: but, in this case, the majority are of opinion that the bill must be dismissed.

Bill dismissed.

But without costs, in consideration of the difference of opinion in the Court, and there having been conflicting cases cited.

[231] BYAM v. BOOTH, (Manor or Township of Killerby). BYAM v. LAWSON, (Catterick and Brough). BYAM v. CROWE AND OTHERS, (Ellerton on Swale, Bolton, and Scorton). BYAM v. WOOD AND OTHERS, (Tunstall, Colburne, Scotton, Uckerby, East and West Appleton, and Whitwell). BYAM v. FAUCETT AND ANOTHER, (the farm called Greenbury Grange). Thursday, 25th April, 1816. —A vicar founding his claim to agistment tithe by shewing that he alone has taken the other small tithes, held to have made out his title to that tithe, although never till of late received or demanded by him or his predecessors, and although in ancient times the Crown had conveyed by grant to lay impropriators, tithe, not only of grain and hay, but of herbage ("decimas feni et herbagii"). Herbage does not, *ex vi termini*, necessarily mean or cover tithe of agistment, unless perception be proved. —Wood, B. dissentiente. —A modus pleaded, of a sum of money anciently and uniformly paid for tithes within a certain part of a parish, held good, although it far exceed the sum which such part should have paid if it had contributed its due proportion, with reference to the rest of the parish, measuring the share of such part according to its extent with respect to the whole parish, and although some witnesses shew it to have been broken in upon, and one, that he remembered (as appeared from depositions in an old cause) the origin of the payment. —Depositions in an old cause admitted, although neither bill, answer, or decree could be found, p. 234, note. —Where an exemption from payment of tithes is claimed for a grange formerly belonging to a privileged order, (*quandiu manibus propriis*,) the Court will direct an issue to try the exemption, and also to ascertain the extent of such grange, if doubtful, from the depositions in the cause. —The Court will not dismiss the bill of a vicar, who

claims by it tithes throughout a whole parish, and only proves his claim in part of it; nor if the issues, directed as to the parts wherein he has not made out his title, should be found against him on the trial.—Wood B. dissentiente.—But, sensible, the Court will not give him costs, where he seeks tithes generally, and recovers only in part.

The plaintiff, vicar of Catterick in Yorkshire, which is a large parish consisting of sixteen several townships and hamlets, filed bills against the above [232] defendants owners and occupiers of land therein, for tithes. The defendant Booth pleaded a modus of 4l payable in lieu of all tithes, within the manor or township of Killerby.

Sir J. Lawson, for himself, and the other defendants joined with him, who were some of his tenants, claimed the tithe of corn, grain, hay, and agistment, extending over the townships of Catterick, Brough, Tunstall, and Bolton, otherwise Bolton-upon-Swale, East Appleton, and Seorton, as impropiator.

The defence of Crowe, in respect of the lands in the township of Ellerton-super-Swale, was nearly the same as that of Sir John Lawson, strengthened by the word *herbagium* having been used in some of the grants to his ancestors, and other documents of the Ellerton tithes.

Wood, and his co-defendants, pleaded the right to agistment in their several landlords, by the same title as that pleaded by Lawson and Crowe, which was, that they, and those claiming under them, (having admitted the vicar's title to all tithes, except corn and grain, hay and agistment,) were possessed of those tithes: alleging that the rectory of Catterick, and the advowson of the vicarage, were formerly part of the possession of the late monastery of St. Mary, in the suburbs of the city of York, and so continued down to the time of the dissolution of that monastery; and that the said monastery was one of the larger order; and that the alien priory of Bagare in Brittany, or some religious house in England, [233] subordinate thereto, and also the monasteries of St. Martin and St. Agatha, near Richmond, in the said County of York, were, at the time of the dissolution thereof, respectively seised of or well intitled to certain portions of tithes within the said parish of Catterick: that the alien priory of Bagare was dissolved in the reign of Edw. IV., and the monasteries of St. Martin and St. Agatha in the reign of Edw. VI.: and that on such dissolution the said rectory and advowson, together with all the tithes of corn, grain, hay, and agistment, arising, &c. within the said parish, became lawfully vested in the Crown. That the said parish of Catterick is very extensive, and hath from time immemorial been divided into several townships, (setting out the ecclesiastical divisions:) that by divers mesue conveyances from the Crown, Sir John Lawson, and the other defendants, had become seised in possession of all the tithes of corn, grain, hay and agistment, within the said townships: and that no tithe of hay or agistment hath ever been paid by him or his predecessors to the vicar of said parish, or any compensation in lieu thereof. All admit agisting barren cattle, but state that they have never paid agistment tithe.

Faweett, and the other defendants joined with him, pleaded an exemption from all tithes extending over a tract of land within the said parish, consisting, as was alleged, of 500 acres, which was, and always had been called Greenbury Grange, and which having been formerly parcel of the possessions of the Cistercian abbey or monastery of Fountains, in York, had been immemorially privileged by [234] exemption from tithes, whilst in the occupation or manurance of the owners: and as owners, these defendants now claimed the exemption pleaded.

A great body of evidence, depositions, and documents, was brought forward and read on both sides.

Thursday, 28th April, 5th May 1814.—The modus set up in the first of these suits, was attempted to be shewn to be a composition: the plaintiff submitting, that however ancient the payment may be shewn to be, still, if it were not properly a modus, it would be no defence to the suit: and for that purpose it was stated, first, that it bore no proportion to the rest of the parish: for in the time of Edw. I. (as it appeared from some of the documents which were produced,) the tithes of the whole parish, consisting of nearly 20,000 acres, were returned by a survey as amounting to only 5l., yet Killerby alone, comprising only 700 acres, paid 4l.: secondly, that that payment had not been uninterrupted and uniform, or had covered all small tithes: and to prove that the payment of the alleged modus had been formerly broken in upon, and that certain land owners had been found compounding with the vicar for tithes,

the depositions^{*1}, in a cause of [235] *Sir John Musters and Others (Owners of Killerby) v. Collingwood, Clerk*, in 1686, were produced, in which it was sworn by several witnesses, that the sum of 4l. per annum had been paid as a compensation for the tithes of calt, wool, and lamb; and one of them deposed, that such composition had been first agreed on about forty-six years before the suit.

To these objections it was answered, that the valuation of Ed. 1st. was not a conclusive document; that even if it were, the amount of the value of the vicarage might have so diminished, from the circumstances of the times; and in fact, the incursions of the Scotch, at that time of day, alone might account for such a decrease; that the depositions were equally inconclusive: for there being no decree made, it does not appear that they established any fact, and most of the witnesses say, that they never knew any tithe paid for Killerby in kind, and all, that the sum of 4l. was paid in lieu of tithe.

[236] The next and main subject of consideration was, the defence set up by Sir John Lawson and Mr. Crowe, that under the original grant from the Crown of the tithes of grain and hay, and, in the case of *Crowe*, of herbage, the tithe of agistment (never having been demanded or paid) belonged to the impropiator, and that was the principal question in the cause.

The depositions on the part of the plaintiff went to prove, that the vicar compounded for an annual payment in lieu of tithe of lambs, wool, calves, pigs, and poultry: and that his agent always took an account at Michaelmas of the turnips, potatoes and rape grown in the parish, for which he received a composition the following Candlemas.

For the defendant, the evidence set out the boundaries of the several townships and divisions of the parish; and proved that it was the general reputation throughout the parish, that tithe of agistment was not due to the vicar, and that, in point of fact, none had ever been paid.

The documentary evidence which was read is very voluminous, complicated, and confused: and as such parts of those which were material, or affected this question, were cited and observed on by the Court, in delivering their very elaborate judgment on these intricate causes, only such of them are given here as seem absolutely necessary to elucidate the question^{*2}.

^{*1} On these depositions being produced, they were objected to by the counsel for the defendants, because the bill and answer were not forthcoming, and it could not be shewn that any decree was made in the cause: so that it does not appear in what character the parties stood with respect to each other, and otherwise they are mere naked depositions, unconnected with any object or result, and might be res inter alios. The case of *Idlingworth v. Leigh*, as reported in 4 Gw. 1615, is very imperfect and doubtful, as far as it relates to the objection taken to the depositions being read, that the bill and answer were not forthcoming. In *Scott v. Allgood*, Geo. 1372, the Court rejected depositions taken in a cause not affecting the parties in that suit.

For the reading of the depositions, it was urged, that to require proof of the relative situation of parties to the particular suit, would be to exclude ancient depositions altogether, as that could not be done. The keeper of the records proves that the bill, answer, and decree has been searched for, and cannot be found. In the cases of *Idlingworth v. Leigh*, and *Ilea v. Countess of Arundel*, Hob. 112, the Court admitted the depositions to be read.

The objection was over-ruled.

^{*2} That part of the case which depends on such evidence, may perhaps seem proper to have been omitted altogether, for the sake of disencumbering the report of all such points as appear to depend on matter of fact, and confining it to the points of law. But whoever has attended the hearing of tithe causes, knows how much, on all such occasions, the ancient documents and their effect are discussed. So much so, that they become rather public, than private matter, and constitute a branch of the law relating to tithes: and the more particularly, as their various construction and operation is from time to time argued and determined in the Courts which have jurisdiction of such subjects.

These observations, it is hoped, will account for and excuse the extraordinary length to which, not only this case, but those which are hereafter to be published, may run. It is a constant source of constant complaint on the bench, that the reports do

[237] The arguments of counsel are omitted, as the Court have stated such as were important at large, in giving judgment.

[238] The recent case of *Kewcott and Watson*, chiefly relied on by the counsel for the plaintiff, as to the [239] main question, where all the cases on the point are cited, is given in a note to that part of Mr. Baron Wood's judgment where it is mentioned.

not sufficiently disclose the facts and circumstances of the decided cases, or furnish the Court with the grounds of the former decisions: and that deficiency must also have been materially felt in practice.

The following are the documents from which it has been thought necessary to transcribe extracts:

The taxation of Pope Nicholas in 1291, taxing the church of Catterick at 100l., and the vicarage at 13l. 6s. 8d.; out of which latter the abbot and convent of St. Mary had an annual pension of 13s. 4d.

Extract from the Nona Roll of the 15th Edw. III. "Cateryk taxed, with the vicarage, 113l. 6s. 8d. The same (persons) answer for 93l. 6s. 8d. for the ninth of the same parish, committed to Rob^t Baronne (and others); whereof 2l. 13s. 4d. for the portion of the prior of St. Martin, and 1l. 6s. 8d. for the portion of the abbot of St. Agatha, arising to them from temporalities in the same parish by assessments, &c."

21st August 1344. —The act of Archbishop Zouch, evidenced in the registry of the Archbishop of York establishing the right and title of the abbot and convent of St. Mary's, York, to certain possessions which they had in his diocese, against common right, including therein the archdeaconry of Richmond; the church of Catterick, with its dependant chapels of Bolton, Hipswell and Hudswell; —also small tithes in Scorton, and the tithes of the mill there:—also small tithes in Colburn, and the tithes of the mill there:—also small tithes in Ellerton; which three places are in the parish of Catterick;—also a pension of 13s. 4d. from the vicarage of Catterick.

Ecclesiastical Survey, 26 Hen. 8th.

County of York. Caterike vicarage. The church is appropriated to the monastery of the blessed Virgin Mary, of York.

Is valued in the mansion, with the glebe, per annum, 10s.

Tithes of hay, flax and hemp 1l. Lambs, calves and wool 21l. Minute and privy tithes, to wit, in the Easter book 6l.—(total) 28l. 10s. Charges, viz. in synodals, 8s.; procurations, 6s. 8d.; in an annual pension to the prior of St. Martin, near Richmond, 40s.; making, with the pension of 13s. 4d. to St. Mary's, 3l. 8s.; and it is worth clear, 25l. 2s.; for the tenth part thereof, 2l. 10s. 2d.

35 Eliz.—Extract of the Queen's lease for 21 years to Edwin Sands, of—"omnes illas decimas feni & herbagii nostras cum eorum juribus membris," &c. in Ellerton-super-Swale, infra parochiam de Bolton-super-Swale, &c.

6 James.—The King's grant in fee to Philips and Moor, of the same tithes, in the same words.

6th and 7th July 1724.—Conveyance by lease and release from Lord Lonsdale, et alias, to Christopher Crowe, Esquire, of all those tithes of hay and herbage, with all and singular their rights and appurtenances yearly, &c. in Ellerton.

Depositions and decree in a cause, "*Anthony v. Smithson*." (The part for the sake of which the decree was produced, is transcribed in the judgment.)

24th January 1638.—Inquisitio post mortem, finding that Roger Lawson died, seised "De et in manerio de Burghe juxta Catterick in Com. Eboracensi, ac de et in omnibus illis decimis granorum et feni in Catterick et Burghe parcellis terrarum et possessionum, nuper monasterii beate Marie juxta muros civitatis Ebor. quondam existentibus, ac de et in omnibus illis decimis in Moulton Gilling alias Killing et Forseth in dicto Com. Ebor. et in Catterick predicto vocatis Beggarie tithes infra archideaconatum de Richmond nuper prioratui de Beggarie ibidem, nuper dissoluto spectantibus vel pertinentibus."

26 February 1638.—A demise by the king of the third part of the same tithes, (described in the same words,) to Cuthbert Hearon, (being in His Majesty's hands by the minority of Henry Lawson, brother and heir of the said Roger,) during his (Lawson's) minority.

The Court, not coinciding in opinion on all the points of the case, delivered their opinions seriatim.

RICHARDS, Baron. As all these causes depend on the same evidence, and several of them on nearly the same points, it may be convenient to take them all at the same time. There has been, in each case, a great mass of evidence gone into, very much of which might have been dispensed with, not bearing very materially on the question. In my view of it, therefore, I shall apply myself wholly to the consideration of its general result.

[240] These were bills filed by a vicar for small tithes, and his general right is admitted by all the defendants: but the great question to be disposed of, and which appears to have been the principal object of the suit, is the vicar's right to agistment. And I think he has very satisfactorily made out his case. At one time it appears that he had not a title to all small tithes: he was afterwards in the perception of many which he had not originally. Some titheable matters, indeed, were not in existence at the time he was first endowed. There must, therefore, have been a subsequent endowment: and it is a necessary inference, that it must have been of all small tithes, which will include tithes not in existence before. As no evidence to the contrary appears, I think he has made out a title, by enjoyment and perception, to all small tithes: for I see him going beyond the original endowment, and receiving tithes of which he was not then possessed: and by so doing, according to all the decided cases, I think he proves himself entitled to them all. Now as to agistment, there is certainly no distinct evidence of perception by him: but there is also none of perception by any other person, or of retention. It lies, therefore, between him and the rector: and there is clearly no evidence of the rector's taking any. There is, indeed, some evidence of the vicar's having taken some such tithe, though I do not rely entirely on the wool payment, for it may be said it was not paid as agistment, though I think it clearly was agistment. In the cause in this Court of *Anthony v. Smithson* (reported in 1st Wood), all small [241] tithes were claimed, and there was a decree for tithes generally. It may be said that that suit was only applicable to the township of Kipling: but if you give agistment tithe in any part of the parish, you give it as endowed. A vicar having shewn himself endowed of small tithes, and none having been shewn to be enjoyed by any one else, no proof of perception is necessary; and therefore, title of agistment not having been actually received by him, does not in any manner prejudice the plaintiff's claim. Agistment de nomine has not been paid generally till of late years. I remember its being first demanded in one part of the country, and I advised the claim. Proof of an endowment of the small tithes, has been held sufficient to support a demand of agistment, although it has never been received before. Now in this case an endowment is proved, and no title to any small tithes, either by perception or otherwise, is shewn to be in any other person.

But it is said, that in one of the grants from the Crown, as to one part of the parish, the word *herbagium* is used, and that it must mean agistment. Now I think that a word of very equivocal meaning, inasmuch as it may mean grass or hay; yet I do not think it can be construed to mean agistment in any instance; and, therefore, I think there is no distinction to be made on that account as to that township. Whatever may be the true meaning of *herbagium*, there has been no perception of this species of tithe proved to have been [242] enjoyed under that word; and therefore I think the plaintiff entitled to it.

As to Greenbury Grange, and the township of Killerby, there is no difference of opinion in the Court. We think there should be an inquiry in both these cases; and therefore issues must be directed. But except as to those two I am disposed to decide for the plaintiff, on the whole bill.

It may be said, that we should wait till these questions are tried, before we come to a final decision, however clear we may be as to the rest of the parish, and that the bills should be dismissed, if the verdict should be against the plaintiff on those issues: but that is a novel opinion to me. I never understood, that if a plaintiff does not succeed in his claim as largely as he lays it, he should therefore fail as to the part he proves. If a vicar demands tithe of a whole parish, and establishes his right only as to three parts, I have always understood, that the bill should only be dismissed as to what he does not prove. I know no way of answering so new a proposition but by stating it, for I know not on what ground it rests. I think, therefore, there should

be a decree in favour of the plaintiff, for tithes throughout all the parish except Killerby and Greenbury Grange.

WOOD, Baron. I much regret that I again differ from the rest of the Court, as I fear I shall in other cases. (Having stated the bill and answer, in [243] *Byam v. Lawson*.) The plaintiff's right to agistment is the only question between the parties in this case; and here a preliminary objection arises. I take it a vicar is bound to make out a title in all parts of a parish over which he claims generally: and that if he do not, his bill should be dismissed. On that ground, I think he has failed; for in Killerby, which is one of the divisions of this parish, where he has stated himself to be entitled to tithes in kind, it turns out that he is entitled only to a money payment. The bill, therefore, I think, fails altogether. Then what is the defence set up? As far as relates to the township of Ellerton, there is a clear title to the tithe of hay and herbage made out by Mr Crowe, and there also he has failed. He has failed too as to Greenbury Grange, which is proved to have been originally part of Fountains Abbey, and so exempt in the hands of the owners, which the two defendants, Faweit and Outhwaite, are. Although a rector is entitled of common right, and it is, therefore, not necessary for rector or vicar to prove title to all titheable matters: yet it is quite different, as to stating his title. In *Button v. Honey* (Hard. 130, and Gw. 511), an objection was taken, that the plaintiff had not set forth how he was entitled, which was overruled, because the defendant admitted him to be vicar, though the report says it had often been ruled contrary, it being the ground and foundation of the plaintiff's bill. I cite that case to shew that the Courts have not considered the stating a plaintiff's title in his bill, to be mere matter of [244] form. Endowment is constantly proved, I admit, by perception: and even a subsequent endowment may be proved by usage, but it must be proved as laid; and therefore, if a plaintiff lays his claim throughout the whole parish, and proves it in some parts only, he fails altogether. If a prescription at law is not fully proved, it fails: it is therefore not matter of form. If a partial right be claimed, the evidence must be confined to that part. If a general right be claimed, a partial proof will not support it: for evidence in part is not good, if the claim be general. Here evidence has been received in parts, that did not affect Killerby, because the claim is general, and extends over the whole, although the plaintiff has failed in proving the whole. If he had only claimed in Killerby, he could not have given evidence as to other parts of the parish. It is not necessary to cite cases as to the rule at common law; but I will mention those of *Mitchell v. Mortimer* (Hob. 209), and *The King v. The Inhabitants of Hermitage* (Carth. 241), which establish it clearly.

I think the vicar should have excepted Killerby, and the other townships in which he has failed: and if not originally, he should have amended his bill after answer. If an issue had been directed, the jury must have found against him. It is said a judge may endorse what is proved. I cannot tell how that may be; it must depend on circumstances. It may be said, greater laxity is allowed in Equity, in laying a claim, than in common law [245] pleadings. I know it is so, in fact: but the title laid must be proved, otherwise the whole bill might be read hereafter, as proof of a general right through the whole parish. The objection which was made in *Travis v. Challoner* (3 Gw. 1237), has a strong application. The plaintiff, claiming tithes in kind in certain townships within the parish, alleged in his bill that he was entitled, as vicar of the parish, to the tithes in question, in those townships: which he attempted to support, by proof of the payment of tithes in all other parts of the same parish: and the objection taken by the Court was, that it was evidence of a general right, whereas the allegation was of a particular right: and that thus the defendant might be misled in his defence. The Court, therefore, thought that what was the case as to other townships, was not evidence generally, so as to affect the particular townships for which tithes were sought. In the case of *Leigh v. Maudsley* (2 ib. 703), from Burybury, the Court said, that a defendant might, in Equity, insist on several defences which are consistent: yet, having undertaken to prove a general exemption, by failing in that, he cannot have the benefit of the other points. Although that was the case of a defendant, the reasoning is equally applicable to that of a plaintiff. As it regards the evidence also, the mode of laying the prescription becomes very material. In the case of *The Earl of Churckward v. Lady Denton* (1 ib. 360), where a custom was alleged, that all the owners and proprietors of any coppices or woods in the weald of Kent, should be discharged of tithe for all manner of wood: such a [246] general allegation,

if permitted, would have the effect of excluding the testimony of any one entitled to be discharged from payment of tithes for any wood within the ward, although they should have no interest in the question, as to the particular part in dispute between the parties to the suit: and so it would be (it is said) in the case of a common, if the right be alleged in a whole vill, and in the case of a modus, so laid. Now to apply the doctrine of that case to the present, the general mode of alleging title to tithe through the whole parish would, as in the case of a general prescription, exclude all parishioners as witnesses for the defendant. And thus an undue advantage would be gained by a plaintiff laying it too largely. The manner of laying the title, therefore, makes a great difference in point of evidence, and might be made the means of promoting the most manifest injustice. Therefore, my opinion is, that as in all the suits the title is laid too largely, the bills should be, for that reason, dismissed; or at least suspended till the issues have been tried. As to Killerby, there must be an issue; and I think that the defence is proved, unless the vicar chuses an issue.

I will now examine, first, the vicar's general right; and, secondly, the circumstances. It seems, there had been an endowment before the time of the taxation of Pope Nicholas, in 1291, for the vicarage is noticed in that document, and valued at 13l. 6s. 8d.: and it is stated to pay an annual pension of 13s. 4d. to the abbot and convent of St. Mary's. But as no endowment has been produced, we can only collect of what tithes it consisted by evidence; and it is plain it was not endowed of all tithes originally, as appears by the act of archbishop Zouch, in the year 1344. It is argued, that though those tithes then belonged to the monastery, there must have been a subsequent endowment.

The next evidence for the vicar is the Ecclesiastical Survey. "Hay" is mentioned there as belonging to him; but it is clear that hay was not his: so that shews these ancient documents are not very correct. Then "minute and privy tithes" are mentioned, amounting to 6l.; but does that shew that he is entitled to all small tithes? He is only entitled, according to that document, to those in the Easter Book, and what those are we know not. The Ministers Accounts, 31 Hen. VIII. have "pro quobusdam decimis," still leaving it in the dark as to what tithes. All the proceedings in the cause in the Exchequer are dragged in by the mode adopted of laying the title*. The wool tithe there decreed can be no evidence of agistment being due. In *Garnons v. Bernard*, those tithes are treated as paid diverso intuitu. The evidence of Atkinson, of payment for turnips eaten by barren cattle, for twenty years, is a mere modern matter, and by no means sufficient to establish a general right.

[248] Then as to Ellerton, the defence is, a title under the Crown to hay and herbage: which I am clearly of opinion, must be taken to include agistment. No payment to any one is shewn, and retainer is equivalent to actual possession, where the same person is owner of both tithe and land. The lease to Sandys is, of "hay and herbage:" and can it be supposed the vicar was then in the enjoyment of agistment? It is, on the contrary, excessively clear, that the vicar was not. The grant by letters patent to Phillips and Moore is, of "all the vicarial tithes of hay and herbage in Ellerton," reserving a rent in fee of 6s. 8d. for hay and herbage; and that has been always paid up to the present time, and is now paid. In a marginal note to the accounts of the collector, in the 10th James, these tithes are called *decime feni* only; and it has been urged, therefore, that *fenum* and *herbagium* mean the same thing: but the grant says both, and so does the conveyance of 7 July 1724 to Crowe, the purchaser: how then can a marginal note, which generally refers to the principal object of the document, make any difference? The bargain and sale is, of "all that the manor of Ellerton, and also all those tithes of hay and herbage:" and from that time they have been in the family of the same person: a clear title, therefore, is made out to hay and herbage, in the family of Crowe. As to *fenum* and *herbagium* being the same, there is no foundation for such an assertion. They are distinct tithes, though, being of the same nature, and both prebial, it is natural that they should go together. The words are, [249] *fenum et herbagium*, and are called, in the plural number, "all those tithes." Hay, is grass mowed: herbage, is grass not cut, but

* *Anthony v. Smalson*, before referred to. By the decree which was made in that cause, it appears, that amongst the tithes scheduled, as sought by the plaintiff's bill, is one for "sheep sold with their wool, before they were clipped, for which monthly tithe is due,"—an expression much relied on for the plaintiff.

eaten by barren cattle. In *Ellis v. Saul* (4 Gw. 1326), the then Chief Baron Eyre says, "agistment tithe is the tithe of herbage, not of the cattle." Herbage is sometimes called herbage, and sometimes agistment. Lord Coke, in his Com. on Stat. Ed. VI. says,—“for barren beasts, he (the parson) shall have tithes for agistment or herbage.” We may shut our eyes to the light, but herbage must mean agistment. The evidence in this case shews it beyond a doubt. The receiver of the Crown rents answers for tithes of herbage or agistment of the farm, shewing that it means the same thing. In the Ministers Accounts, under the head spiritualties, “herbage in the castle-yard,” is spoken of; and can that be hay? We have “decimæ feni,” in some of the documents: “decimæ herbagii,” in others. There is, therefore, a manifest distinction. When we find “omnes illas decimas nostras herbagii unius pasturæ sive clausi,” as we do in the second grant of Kipling, there can not be a doubt of the meaning.

Let us now look at the authorities: besides the case of *Ellis v. Saul* (before referred to,) and the exposition of Sir Edw. Coke (page 651), in *Green v. Austin* (Yelv. 86), it was held, that the tenant, having paid tithe of hay, was discharged of agistment tithe for that year: and in *For v. Adge* (2 P. Wms. 521), it is called [250] tithe herbage of dry and unprofitable cattle. So also in *Gulbert v. Eversly* (2 Gw. 502), and *Tamberlain v. Humphrey* (4 ib. 1345). These authorities are abundant proof to shew, that agistment and herbage mean the same thing: and that is established by all the cases in Gwillim from beginning to end.

It has been said, that the grants of the Crown do not convey agistment, for that the Crown had it not to grant; but that is a strange objection to be made by a vicar who proves no endowment, or even perception, till within the last twenty years. Why had the Crown no title? It is said, because the vicar was endowed before the dissolution; but how is that made out? It is very clear the tithe devolved on the Crown, and the Crown has granted it to Crowe: who becomes thereby, in fact, rector, and represents the abbey, and may therefore stand on his common law right. It is also argued, that the vicar must have been endowed of small tithes generally, and that that includes all tithes of modern introduction. I agree that one case has gone so far, that is the case of *Kennicott and Watson**: [251] but there the defendant did not prove himself entitled; whereas here, I think, the title to agistment is made out to be in the defendant.

[252] Greenbury Grange, derived down to the defendant Faweit from the

* *Sittings after Hilary Term.*—54 Geo. III. Serjeant's-Inn-Hall.

Kennicott v. Watson and Others.—A vicar, proving perception of small tithes (where the Crown, and those claiming under it, have never received or dealt with other tithes than those of corn and grain,) held entitled to demand tithes of agistment, turnips and potatoes; although such tithes have never before been received by his predecessors; and that, although the documentary evidence adduced in support of the vicar's claim refer to “small tithes,” and not “all small tithes;” and although it appear that a pension or portion is payable out of the vicarage to the superior.—Semble, there must be an express grant of such small tithes to the impropriator, or an express exemption of them out of the vicarage, or an actual perception of them by other persons proved, to take away the vicar's right.

This bill was filed by the vicar of Woodhorn, in the county of Northumberland, against the defendants, occupiers of lands within that parish, for an account of tithes of agistment, turnips, and potatoes: founded on the plaintiff's title to all other small tithes throughout the parish.

The defendants, in their answer, admitted that the plaintiff was, as vicar, entitled to tithe of hay, and certain small tithes in kind, or *sub modo*; but they all denied his alleged right to tithe of agistment, turnips and potatoes, and all other tithes not theretofore rendered; and to those they set up a title through the Crown, or its grantees, of the impropriate rectory, insisting, that they were become vested in the owners of the land. The defendants, Watson, Potts, and Jackson, set up a *modus* also, of 7s. 4d. in lieu of tithe of hay, hemp, flax, and rape, in the township of North Seaton. The defendants, Pattersons, a *modus* of 3s. 4d. in lieu of tithe of hay on a farm called Blakemoor, in the township of Creswell. And the defendant, Smith, a *modus* of 1l. 7s. 8d., in lieu of tithe of hay, and all small tithes, on a farm called

privileged order, is therefore [253] exempt. There may be a doubt as to the extent of the Grange, but that can be ascertained by an [254] issue. As to the other townships, I say that a clear title not being made out to Killerby, the [255] claim, (being

High and Low Horton, in the township of Horton. The bill was afterwards amended as to all the moduses, except Smith's.

In support of this bill, the plaintiff put in the following documentary evidence :

1st. Taxation of Pope Nicholas, in 1291. "Woodhorne Rectoria, 75l. Vicaria ejusdem cum capella de Horton, 50l. Portio de Prioris in eadem, 4l 18s. 3d."

2dly. Ecclesiastical Survey of 26 Hen. 8. "Woodherne Vicaria valet clare, 21l. 15s. 8d."

3dly. Ministers Accounts, 32 Hen. 8. "Coñpus Wittmi Grene Collectoris firma' ib'm p tempus p'dm. Woddern Rectoria.—Et de Cx' de firma grano' decimalii p granis crescen': in anno Regis Hen. viij. xxx^{mo} sic dimiss: Johñi Cooke p indent. dat. xvj. die Julii anno R. R's. Hen. octavi xxx^{mo} p termino xxi anno solvend. ad terminos S'ci Martini & pu'. Bte. M. Virg. p equales porções D'. vj. £. de firma grano' decimalii. Villa de Wetherington p granis crescen in Authumpno anno xxxj^o hic non respondit, eo quod inter alia dimittit Thome Hilton Militi cum firma terri' dominical put in deo cōpo Firmarii plene liquet.

[The same excuse was returned for each of the other townships.] Penções et Porções. Sed de £.iiiij. xiiij. iiiij^l. de annuali pençone exeunt de Vicaria de Woodherne p antiq'm composicionem solvend. ad termin' p'dm hic non respondit eo quod Thomas Burton Clericus Vicarius & Incumbens ib'm ptulit eoram Commissionar' Dom. Reg. super surreddicionem Monasterii p'dci vi'sas escripti sive composiciones sigillo Epi Dunelm. corororati inspectq tenor eor'dm evident patet quod Vicaria de Woodherne consistere debet tm racone primar' ordinaconis qm confirmaconis ejusdem in quinquagint marc sterling & non ultra et si aliq' emolument sive pficium pvenien' de exit decimali ib'm p dcm Vicar' recepi ultra pdeam summā quinquagint marc emiserit aut in exit ejusdem Vicar' annuatim crescere contigerit ad pprietarios spectabit. Et q dñs Vicarius in minut decimali et alior pficium ad eandem nuper spectant ex minima decasu inhabitant villar' ib'm diet Vicar' ptinen et incolar' & mercato' ib'm nuper inhabitant adeo minorat sunt qd totis exit pficium de Vicar' nunc spectant non attingit ad summā quinquagint marc ut p'fertur considerat est p comar' p'diet qd p'diet annual pençō respect' quousq, &c.

4thly. Grant of 24 May, 7 Jac. 1st, to F. Morrice and F. Phillips, de omnes illas decimas nostras gronorum annuatim et de temp. in temp. crescē, &c. infra villat. & campos de Woodhorn;—and so of the same tithes in each of the other townships in the parish.

5thly. Parliamentary Survey, A.D. 1654. "The parish of Woodhorn is a vicarage, unsupplied with a vicar, worth 68l. per annum. Impropriation in the hands of the Mercer's Company in London, worth 100l. per annum.

6thly. Receipts of successive vicars for 7s. 4d. in lieu of tithe hay, hemp, and lints, for North Seton from 1701 to 1778; and fish and hay moduses, and tithe compositions, for Blakemoor estate, from 29 September 1752 to 1800. Leases by Hen. Latton, vicar, of all the great tithes of the several townships of East and West Hartford; and all and every the petty tithes, moduses, &c. charged upon the lands belonging to the chapelry of Horton. An account book, referred to in defendant Smith's answer, kept by Robert Smith, the last lessee under Latton, entitled, Hartford Tithe Account, commencing in 1783, and ending in 1788. And three terriers; the first of 20 December 1663, describing the glebe only; the second of 5th July 1788, specifying the glebe, as in the former, and the compositions, moduses, and tithes due to the vicar, and noting that turnips and potatoes are refused; the third, of 5 August 1792, describes the vicarage-house, states the glebe to be 85a. 12r., and enumerates various small tithes.

By the depositions read on the part of the plaintiff, it appeared that High and Low Horton were two distinct farms, and occupied by two distinct tenants; that the occupier of High Horton had paid no tithes, but a sum of 1l. 6s. in lieu of tithe, and that the occupier of Low Horton paid 9s. in lieu of tithe, and that the average yearly value of the tithes of calves, wool, lamb, pig, geese, and hens, was about 2l. for High Horton; that in some parts of the parish, tithe of turnips and potatoes had been paid.

The evidence on the part of the defendants was, that no tithe of agistment had

extended over the whole parish, and of course including that township, is too large; and [256] therefore the plaintiff fails; and in that township there is a modus clearly proved; so that no tithe in [257] kind is due or could be claimed. As to Greenbury

ever been paid; and that the vicar had said, on one occasion, that he was not desirous of receiving the tithe of potatoes.

Duncey, Whetherell, and Simpkinson, for the plaintiff, admitted, that a vicar must make out his title to tithes in one of three ways; by endowment or grant; if neither could be produced, he must give evidence of its existence and contents: or he must make out a possessory title by usage or actual perception, which presumes an endowment. That there was a vicarage, and that it was endowed, is clear from the documentary evidence. The Ministers Accounts are peculiarly favourable to the plaintiff's claim: they shew that nothing was claimed by the Crown but corn and grain, and that the whole was let to Sir Thomas Hilton; and if agistment, or any tithes beside that of corn and grain, had been reserved, it would have been noticed there. Turnips and potatoes, indeed, were not then introduced into this country; and it would be a gross anachronism, to contend that such tithes had passed from the Crown to the terre tenants, as suggested by the defendant's answer: agistment, though an ancient subject of tithe, has not been rendered in the north till of late years: they could not, therefore have passed from the abbey to the Crown. The second part of this document is not only evidence of the endowment, but also of its contents. It states, "that a pension is payable out of the vicarage: which, it appears by inspection of divers writings, ought to consist (as well by reason of its primary ordination, as of the confirmation of the same,) in fifty marks sterling, and no more; and if any emolument or profits arising from the issue of the tithes there, by the said vicar, shall happen, beyond the said sum of fifty marks, it shall belong to the proprietors." And however unintelligible this part of the document may be said to be, it is clear from it, that the small tithes were payable to the vicar, whatever part of them he was entitled to retain; and even if he had himself no right to more than fifty marks, it is a right conclusion that the vicar was to have all the small tithes. It cannot be said to appear by this, that all that belonged to the vicar was fifty marks, payable out of the tithes due to the rector, for it sets out with stating the pension as issuing out of the vicarage. The taxation of Pope Nicholas corresponds with it. And the grant to Morrice and Phillips, who were vehicles of the Crown, for the purpose of sale, corroborates this view of it, for it grants the tithe of corn and grain only. It is plain the vicar receives the tithe of hay in all the townships except Cowpon; and where hay is given, agistment is never kept back; no one ever saw such an endowment. The Parliamentary Survey estimates the vicarage at 68*l.*, more than double fifty marks; and the impropriation there stated to be in the hands of the Mercers Company, is estimated at 100*l.* The Crown, the Commissioners, and the Mercers Company, claim no more than the tithes of corn and grain; and there is not an instrument, or any other evidence, of a claim of any of the small tithes of the parish by any other person. It must be argued then, that these documents prove endowment; and the documents, aided by the usage, prove the endowment to be of all small tithes. As to the Smiths, they set up a modus of 1*l.* 7*s.* 8*d.* for a farm called High and Low Horton, one entire sum, for one entire farm. Whereas the plaintiff's evidence shews the farms to be distinct, and the sums distinct, and absurd in the amount proved by us; 1*l.* 6*s.* and 9*s.* were the sums forty-four years ago, i.e. 1*l.* 15*s.*; what becomes then of the antiquity of the modus of 1*l.* 7*s.* 8*d.* paid since? Though in an answer, you need not describe the boundary of a farm, pleaded to be covered by a modus, with perfect accuracy, yet you must shew that the farm was known, and was ancient; but here there is no character of identity given it. Then as to the usage, perception by the plaintiff of all small tithes, except agistment, and turnips and potatoes, is in evidence.

Foulblanque, Martin, Hail, and Meggison, for the defendants, contended, that whatever the testimony might be, the fair result of the evidence was, that the vicar was not entitled to all the small tithes; and it was on proving himself entitled to all alone that he could succeed. *Primâ facie*, the rector is entitled, and a vicar must make out his title clearly, and independent of presumption, in his favour. What is not proved to be granted by the rector, cannot be considered out of him; and as tithes of agistment has never yet been paid, (for that is a fact established by all the

Grange he also fails, although he claims an unqualified [258] right; and therefore, I think that each of the bills should be dismissed, unless he takes issues; and that if he should fail in any one, he must fail in toto.

evidence,) the fair conclusion is, that the vicar has no title to demand it, and that it still belongs to the rector, whoever he may be. The documentary evidence, which is in all cases considered inconclusive, and, as held by Lord Hardwicke, will not destroy a modus, does not prove enough for the vicar. It only proves, that corn and grain were granted to Sir T. Hilton, not the rectory; and if agistment were not intended to pass it remained in the Crown. And as to the usage, the perception of all small tithes has not been shewn. For, not to mention the tithes in question, the vicar has not shewn that he ever received the tithe of milk, orchards, and other vicarial tithes; and all the cases go on his being entitled to all the small tithes. The endowment was to amount to fifty marks, and no more, as appears by the minister's accounts; and all received beyond, must have been paid over to the proprietors.

[Graham, Baron. How do you reconcile that with what has been received!]

Gibbs, Chief Baron. The document assumes that the vicar was in the receipt of the tithes; the vicar was not, therefore, to receive a dry sum of money, but tithes, to whomever he was to account for the residue in money.

If a conjecture might be hazarded, the vicar probably received the tithes beyond that sum, on account of the rector, and the rectory is certainly yet in the Crown: for what was granted to Morrice and Phillips, was corn and grain only, and not the rectory. Our evidence is, that no such tithes have ever been paid; not in non-decimando, but to disprove the right of the vicar. The terriers speak of some certain small tithes, but make no mention of all small tithes. As to the defendant, Smith, the occupier of High and Low Horton, though his defence is a modus, he is not precluded by having set up that bar, from objecting, in this stage of the cause, to the vicar's title (*Cost v. Bell*, 3 Atk. 497.—3 Burn's Eccl. Law, 401). Now he has produced no endowment: not that it does not exist, but he may probably do better without it: nor is there any evidence of the articles of which the alleged endowment consisted; it might have been of glebe alone, of pension alone, of tithes alone, or of all; but we cannot presume of what. The first terrier shews it consisted of glebe alone; the second adverts to the ecclesiastical rights, moduses, and tithes, where due; but the terriers are all unsatisfactory. And if the title rest on usage, that cannot avail the vicar, at all events, as to Smith's modus; and usage against endowment, may even take away the right of a vicar. The Court, at least, will not decide in so doubtful a case, in the absence of the rector, without a trial at law. *Charlton v. Charlton* (2 Gw. 715); *Gurnons v. Barnard* (4 Gw. 1462); *Travis v. Orton* (3, 4 Gw. 1566, 1293), twice decided here. If the rector should sue the next day, we could not plead that decree.

[Graham, Baron. I do not remember an instance of calling for the rector, when it did not appear that the rector claimed. Every endowment must be proved against a rector, certainly.]

The modus is well laid, and even if it should turn out to be not precisely proved as laid, yet, where there is such reasonable ground for a modus as here, there can be no decree in Equity (*d*). The evidence of the modus is not broken in upon in more than two instances. It is said, they have destroyed the entirety of the farms: but they have only proved that they were occupied by different tenants, not that they belonged to different owners. One Delaval is stated to be the landlord of one part, but it is not said who was the landlord of the other part; and it lies on the plaintiff to prove that. But even if we fail in strict proof of our modus as laid, it is by their having proved another for us; and that is a sufficient ground for a Court of Equity refusing to grant a decree of tithes in kind, where there is so strong evidence of the existence of a modus. *Scott and Frewick* (3 Gw. 1250). *Elms v. Dummer* (2 ib. 800).

Dauncey, in reply. The defendants rely, that the tithe of agistment, and turnips and potatoes, not having been proved, nominatim, to have been rendered to the vicar, they therefore remain in the rector, against whose right, in his absence, they ask the

(*d*) *Webb v. Beal*, in notis, 1 Gw. 131. — *Coles v. Walner*, ib. 172. — *Brook v. Richardson*, ib. 1303.

[259] GRAHAM, Baron. I shall confine myself to the result of the complicated evidence produced in [260] these causes, and observe on the prominent parts. As to *Byam and Booth*, there exists no difference [261] of opinion : a modus of 4l. is proved, as

Court not to decide. Our evidence is, that these tithes do not remain in the rector ; for each portionist of great tithes, and the Mercers Company, in whom the impropriation is shewn to be, are confined to corn and grain ; and the bailiff's return, which takes notice of both rectory and vicarage, speaks of the small tithes ; and there is no real difference between " the small tithes " and " all small tithes. " If we had no documentary evidence, the parol testimony would have been sufficient for our case. It is said, an endowment may be altered by usage : it is true, it may be diminished, but it may also be increased. Our documentary evidence, the leases, and receipts, and the depositions, speak of the small tithes. The lease to Smith, the father, is of " all small tithes : " and, by the moduses set up, particularly by Smith's, they admit our title to every species of small tithes ; and the occupier certainly cannot avail himself of the special nature of this endowment : for, whether the vicar is to have only fifty marks, or more, the occupier must pay the tithes to him, and it cannot concern him to inquire who is entitled to the rest. They say the Ministers Accounts shew, that all beyond that sum is payable to the proprietors ; but, by proprietors, may be meant the vicars themselves, for, as far as regards their endowment, they stand in loco rectoris. Actual payment of the tithes in question, by Swann, for nine years, is in evidence. The cases which have been cited, do not in the slightest degree bear upon the present : they relate chiefly to questions of jurisdiction. In *Garnons v. Bernard*, the question was between the rector and vicar, on perception of agistment tithe : and there, it is true, a trial at law was held necessary to establish the fact.

Smith's modus is overthrown, by our having proved the farm, by them alleged to be single, to be two distinct farms : the tithes for which were paid for, prior to the time of the payment of the supposed modus of 1l. 7s. 8d. by them, in sums exceeding together the amount of that modus ; but then they say, that by having proved such payments, we have set up such a probable ground of modus for them, as will preclude us from a decree of tithes in kind, and entitle them to an issue. But the facts of the cases cited by them in support of that argument were not similar to those of this case. There the moduses were brought forward by the plaintiff : here the passages in the depositions were read by the defendants, notwithstanding our objecting to them. And there too the moduses were proved to have been immemorial payments, which these do not appear to have been.

GIBBS, Chief Baron, this day delivered the judgment of the Court. Having stated the case, he proceeded as follows :

The original bill having been amended, as to all the moduses except Smith's, the claim is reduced to the tithe of agistment, turnips and potatoes only ; Smith's modus is, however, still denied. The defendants all negative the vicar's title to those tithes, and Smith says further, if he can make out a title, I can also prove a modus of 1l. 7s. 8d. There certainly can be no presumption entertained in favour of the vicar ; he must prove his case. A rector is *prima facie* supposed to be entitled, but it is directly the contrary in the case of a vicar : his title can only be shewn by endowment, or perception, which will be admitted to supply the want of endowment ; and where it appears, that he has uniformly received all the small tithes, there can be no difficulty in his making out his claim. But the cases have gone further, deciding, that where a title is made out by the vicar to all small tithes, he is entitled to whatever tithes are legally of that description, although not before paid ; and where tithes of modern introduction, or other small tithes, have not been received, it will be presumed it was because no occasion occurred. It has been again and again determined, that tithes of modern introduction are vicarial tithes : that is the case of turnips and potatoes, and though of field cultivation, they are still such. Agistment is also a tithe which was not rendered in the North till lately. Fitzherbert's Nat. Brev. has an authority, that tithe of agistment is not due. (Ch. Writ of Consultation, No. 53, Letter G. and also the marginal notes.) The marginal notes are Sir Wadham Windham's, those at the bottom are Sir Matthew Hale's. But that must mean agistment of profitable cattle : without that explanation, such an authority is calculated to mislead. If then we find a vicar receiving small tithes, and no one else receiving any portion of the small

laid, for all manner of tithe payable so the vicar: and I think [262] there is such evidence of long continuance of that payment, as requires an issue. So in the last cause, [263] the defendants have made out their case. We all think there is something

tithe, it is to be presumed he is endowed of all (*g*). Some cases go further, where the rector has received some small tithes, and the vicar all the others; and a mistake may account for the rector's receipt.

Now the first question here is, has the vicar shewn that he was endowed of all the small tithes! If so, though not rendered to him, yet, not having been received by any one else, he is entitled to demand them. The evidence, then, is next to be considered. The first document is the taxation of Pope Nicholas, in 1291: "Vicariate of Woodhorn, 50l.;" and this is produced, to shew, principally, that the vicarage was then endowed: but it also states, "Portio Prioris de Tynemouth in eadem." Whatever this was, it was payable out of the vicarage; it cannot, therefore, refer to any thing of which the vicar was not endowed: for instance, if he had been endowed of all small tithes, except agistment, turnips, and potatoes, they would not have been a charge on the vicar, but excepted. Then we have the Ecclesiastical Survey of 26 Hen. VIII.; by which it appears to have fallen to 21l. 15s. 8d. The next is, the Ministers Accounts of 31 Hen. VIII., the year after the dissolution of the monastery to which this living belonged. That document it is material to attend to, for it is almost impossible that any thing should have passed out of the Crown in that short period. In those accounts, tithes of corn and grain only are accounted for by the minister. They are stated to be in lease to Sir Thomas Hilton; and there is no mention any where made by them, of any of the small tithes being due, which is a very strong argument that nothing of that sort was in the Crown. The leases to Hilton are also produced; and there is no mention of any small tithes there. Pensions and portions are also mentioned in these accounts, "de annali pensione exeunte de Vicaria de Woodhorne." The same observation that I made on the taxation of Pope Nicholas, applies here: the difference of the amount is not material. Minute decimae are afterwards mentioned. Those words not only include all small tithes, but they also shew, that the attention of these officers was called to small tithes; and they could not have omitted to mention them, if any part belonged to the Crown. The wording of this document has been the subject of much criticism, but it has not rendered it clearer. Some parts of it, however, are sufficiently clear, and shew that the rector was entitled to the pension only. The excuse of the bailiff is, that the farm of the grain-tithes had been demised. It has been argued, that the vicar has been shewn by these accounts to have had only fifty marks, and that the rest was in the rector; but it is impossible to reconcile that argument with any part of the document. The most disadvantageous construction which I can give it against the vicar is, that he is accountable to the rector for the excess; though I do not say that that is the construction: but if it were, he would be, in that case, entitled to receive all the tithes, and would be accountable in value, not in kind, for the excess: for you could not divide these tithes, and say which should receive carrots and which potatoes: so that, be that as it may, the Vicar would still be entitled to all he seeks. The grant to Morrice and Phillips, shews that nothing but grain was its subject. The Parliamentary Survey of 1654, states the parish of Woodhorne to be a vicarage, unsupplied with a minister, and worth per annum, three score and eight pounds; and that the impropriation is in the Mercers Company. As to the rest of those documents, it appears from them, that neither the Abbey, the Crown, nor the persons deriving title under the Crown, had ever claimed the small tithes: and thus they shew that the vicar is entitled. But then what is the evidence of usage? for an endowment may even be altered by usage. Now let us see how this is. We have the vicar's receipts, those relating to Blakemoor are for fish and hay moduses, and for certain other small tithes. These, and the receipts for North Seton, from 1791 to 1778, shew the vicar entitled to small tithes, and also to tithe of hay. Then we come to the leases of the vicarial tithes: that of the 17th November 1783, is of "all and every the petty tithes," for five years, to Robert Smith, the father of the defendant Smith: but at the expiration of two years, that is in November 1785, a new lease is granted to him by Luton,

(*g*) *Clarke v. Shyler*, 3 Gw. 926. *Cartwright v. Barber*, 3 Gw. 938. *Jerome v. Strangways*, 3 Gw. 1173. *Payne v. Poullett*, 3 Gw. 1247.

of a claim as to Greenbury [264] Grange, that may require investigation as to its extent. In that suit there are two defendants, who swear that they believe that the 500 acres which they hold were part of the abbey: and claim, by 31 H. VIII., the advantage of being exempt from tithes in the hands of the owner. They have given [265] some evidence of the extent of the Grange: though I think that the land must have been greatly added to in modern times: but that may be tried. These two parts of the case being dismissed, introduces the general question, and I cannot but be surprised that the objection taken has received the authority it has: for I should have thought the course was too well understood. I have not sought authorities; for no man ever heard of a rector's bill, where the plaintiff was to find out what moduses exist. He stands on his common law right. A vicar must shew endowment or usage, but either may be within time of memory. Enjoyment is tantamount to an endowment; but when that is once shewn, he stands as a rector would, and has then a right to put the defendant to prove his exemption. If not,

the vicar, for ninety-nine years, if he should so long live: his acceptance of which is an extinguishment of the first lease. The tithes, which are, in part, the subject of these leases, are expressed to be payable out of lands in the chapelry of Horton, where Smith's lands and Swann's lie. From the tithe-book, kept by R. Smith, he being now the lessee of the vicar, it appears he uniformly from 1783 to 1799, received all the small tithes. This book speaks of the vicar's title to all small tithes, and not as to any modus for them. Then we have the depositions: and from them it appears, that the vicar received small tithes from all the different districts, if that were necessary to be shewn. Then how does this case stand? From the dissolution, we find that the Crown, and those deriving title under it, have never claimed more than the tithe of grain: and that there is a pension payable to them, issuing out of the vicarage. That the minutæ decimæ were a part of the endowment there is very strong presumption: but when it appears that the vicar has been in the constant perception of all small tithes, except agistment, turnips, and potatoes, it puts the case beyond all doubt. Mr. Hall suggested, that the endowment was kept back: that was expressly denied, as far as his knowledge went, by Mr. Dauncey, and we cannot presume it. Several cases have been pressed on us by Mr. Hall, to get an issue. But that of *Charlton v. Charlton* (2 Gw. 715) only shews, that perception must be proved by him who claims certain tithes; no doubt, except he be a rector, such proof does lie on him. *Travis v. Oulton* (3 ib. 1066. 4 ib. 1293) was also strongly pressed on us as a decision; but I think that it does not bear at all on the present case. Each Court was correct, in the view it took of that case: but which view the evidence supported, I do not enquire. The other, *Garnons v. Bernard* (4 Gw. 1462), is wholly unlike the present case. There there was no pretence to say that the vicar was entitled to all small tithes. That was a contest between a rector and vicar, and proof was adduced of the rector having received tithe for lamb and wool; on which it was disputed, whether it was not for agistment, besides its being an immediate question between them alone, and the vicar not having all small tithes. We do not therefore meet on either of those cases: as the fair result of the evidence here is, that the vicar was entitled to all the small tithes, and the bill, as now filed, is for agistment, turnips, and potatoes. As to the evidence of the vicar having said he did not wish to take the tithe of potatoes, it was only a good-natured declaration, and cannot break in on any right. The title then being thus disposed of, including hay, which I think Mr. Hall was entitled to question, the next subject of consideration is the modus for High and Low Horton Farm, of 11. 7s. 8d. I do not now discuss, if the modus be properly laid: but it was indispensably necessary for the defendant to prove it correctly, whatever laxity might be allowed in laying it. But he rests on his arms, and tries what the plaintiff will do for him; and that evidence was untoward, for what was called one farm, turns out to be two farms: and it having appeared who was the owner of one farm, it lay on the defendant to shew who was the landlord of the other. It also appeared, that two sums were paid, exceeding together the alleged modus. But Mr. Hall says, if I have not proved my modus, you have proved one for us, and so are out of Court. Now it cannot fairly be shewn, that any such thing is proved. Therefore the plaintiff is entitled to the account prayed: but not beyond six years from the time of filing the bill.

Decree accordingly, with costs.

what would be the duty of a vicar? he must go about to enquire whether any exemption exists, lest his bill should be dismissed. It is said, he may amend, when the answer comes in: but by doing so, he would admit what could not, perhaps, be proved. Without looking into cases, this of itself satisfies my mind: the argument is not only perfectly novel, but contrary to my idea of right reasoning. This is quite distinct from proving a prescription at common law, where great strictness is required, both as to stating and proving it. If an occupier sets up a modus, he indeed must prove it as laid; but a rector is entitled to put his right generally. What endowment ever mentions moduses or exemptions? It lies on the party to prove them.

We come then to the consideration of *Byam and [266] Lawson*. The defendant admits the plaintiff's title, except as to corn, hay, and agistment; which latter he claims as a portionist, and says he is entitled under the portions payable to the abbot out of the vicarage.—(His Lordship here went through the documentary evidence which mentions those portions.)—Then a question arises, as to what species of tithe the portions were payable for; but whatever they were, they did not form the rectory; and therefore it was necessary that he should prove what they were. Had he brought an action, he must have done so, otherwise he would have been nonsuited. Now he and all his tenants admit that the vicar was entitled to all tithes, except agistment; that must therefore be expressly shewn to belong to the rector. An impropiator differs from a rector in one material respect: for a rector may stand on his common law right, but an impropiator's title must be shewn; and no proof is offered of his having enjoyed any tithe beyond corn, grain, and hay. The suit between Byam and Crowe, is confined to Ellerton-upon-Swale. The defence rests mainly on the dimission of Archbishop Zouch, in 1344.—(Here his Lordship commented on the other documents, and stated that the result did not establish the object of shewing the tithe of agistment in the defendant; he also intimated, that the word Catterick, in the act of Archbishop Zouch, might have crept in by mistake for Colbourne.) The case is thus reduced to the effect of the word herbageum, in the lease to Sandys, on which too much reliance has certainly been placed; for, down to 35 Eliz. there is no [267] evidence of any right in the Crown to agistment. I do not feel it necessary to go into the definitions of *foeni* and *herbagii*; definitions in law are extremely dangerous. Agistment is not the tithe of herbage, strictly; but grass fed by the mouths of barren cattle. In many parts the grass, though cut, is not made into hay. But suppose it meant more; why do we not see some proof that Sandys got any thing more than hay? he should have proved that. Men had no idea of the tithe of agistment in the North, in those times; and the 6s. 8d. rent is expressed in the Ministers Accounts, to be for the tithe of hay. Then we come to Crowe's family; what evidence is there that they had all the lands in Ellerton? Nothing is done to prove the claim extends to agistment; nor is there any evidence of their having ever claimed it: and no minister of the Crown ever thought of such a right, or acted as if he had. On these grounds, I think no title is shewn in the defendant, to take it out of the vicar. Then I find, in the ancient causes, no resistance to the vicar's general right; and he has, in every township, taken the only tithe that looks like it, and which he could only receive, *de jure*, as agistment, that is the tithe for lambs and sheep; no resistance being made on the ground that it was not a wool tithe. I therefore think that no title, or shadow of title, is shewn by those who resist this claim under an impropriation. The Begare tithes, alluded to in the inquisition, meant great tithes, or nothing. The vicar, therefore, was entitled to all tithes not enjoyed by the rector; and, *inter alia*, to agistment.

[268] THOMSON, Chief Baron. The opinion that has fallen from one of the Court, respecting the manner in which the vicar's claim is laid, I do not consider consonant with the general rules or practice of a Court of Equity. I do not apprehend that such a rule ever existed, as that a plaintiff who claims too largely, fails altogether. A vicar who claims tithes throughout a parish, may establish his case by proving his right in part; though, in matters of prescription at common law, the rule is very different. In bills, whether by rector or vicar, the plaintiff's failing as to part, does not invalidate the rest of his case, as is proved by every day's practice. The only effect of such a laxity of pleading is, the punishing him with costs, and that only where it is clear that the vicar is not entitled. But I do not think that he has laid his claim too largely, or failed, in the present instance. We are agreed, as to an issue on the modus for Killerby; and on the exemption set up in *Byam v. Fawell*, for

Greenbury Grange: but it by no means follows that he has failed on those points, or that the Court thinks so. There are difficulties on both sides: and therefore the questions are fit for the interposition of a Jury. The witnesses, and the depositions in the suit given in evidence, do not greatly advance the truth of the case. The exact question is not well known: a payment of 4l. seems to have been insisted on, but whether the suit was instituted to establish it, or for what other purpose the bill was filed, is not quite clear. A great deal of evidence has been given to support the *modus*: though one person stated his recollection of the commencement of it as a composition; but he was very young then.

[269] As to the Greenbury Grange, there is evidence of a confirmation to the Abbey of Fountains of what they had in Greenbury: but what they had is a question: therefore, whether they had these lands, and of what extent they were, must be the subject of an issue.

Then arises the general question of agistment, between Byam and Lawson, Crowe, and Wood: and it is confined to that. It is admitted that the plaintiff is entitled to all the tithes, except corn, hay, and agistment. In all the causes, an attempt is made to establish a title in the defendants to agistment. It is visible, however, that they have difficulty in stating how they became entitled. In support of this answer, there is not a title of evidence of a title derived from the Crown, except as to the great tithes, for which originally a rent of 10l. per annum was paid: but that rent was paid expressly for the great tithes, and the great tithes only. The grantee purchased that 10l. afterwards, of the Crown. Some of the defendants joining Sir John Lawson, are the tenants of other persons, who say their landlords are entitled: but there is no proof of that, or of any title in the Duke of Leeds. One defendant there is, however, (Dodd) whose defence is material. He says, one Robert Bower is entitled to the great tithes and agistment in Tunstall: but there is no evidence of any payment to Mr. Bower. The answer in *Byam v. Crowe* is material, the defence being apparently strengthened by the word *herbagium* having been introduced in the grant to Crowe's predecessors. There is no [270] conveyance of agistment proved, however, unless it passed by the grant of James I. of hay and herbage to Sandys, on what I call a speculation. What possession Sandys ever had of agistment, does not appear. There was afterwards a grant to Phillips and Moore, by the same description. Let us suppose, therefore, that the true construction of *herbagium* was agistment: what possession has there been here? None at all is shewn. That *herbagium* means agistment, in many cases, there can be no doubt: but the term, however, is not fully settled by the glossaries: yet, it by no means follows, that here it necessarily imported agistment. In the Ministers Accounts, in 31st Hen. VIII. as to Ellerton, nothing is accounted for but 43l.: and it appears what that was for: "Richard Whalley, farmer of the tithes of corn of Ellerton." Hay, therefore, was not given: and that might be the object of Mr. Sandys's purchase. There are many cases among the records where *herbagium* can only mean grass, as contradistinguished from agistment, or grass eaten by the mouths of cattle.—(His Lordship here took notice of the various senses in which the word appeared to be used in the several documents before the Court.)—Such uses of the term in the documents produced are decisive of its meaning grass, till made, and then it is called hay: There are also many instances in the books of strong contrast between *herbagium* and *agistamentum*. It does not, therefore, follow, that *herbagium* was meant to convey, or did convey, more than *fenum*, although it might. I think *herbagii* meant no more than *feni*. The question, therefore, is, what [271] title the plaintiff has made out to it, for none of the defendants have: and Crowe's, if he had, would only extend to Ellerton: and I think the vicar has made out that title which is usually expected, where no endowment is produced. He shews the rector only had what is called great tithes. Pope Nicholas's Taxation, the Ministers Accounts, and Ecclesiastical Survey, shew the vicar possessed of the small tithes and privy tithes: and that title is not lessened, I think, by mentioning what are in the Easter Book, which generally are very small: for that has not confined the tithes to those there mentioned. But it is admitted in all the causes, that the vicar is entitled to and has received all small tithes, except agistment, and no other person has been shewn to have received that. Now it is a common rule, that if you shew that the vicar has received all that has been paid, he must be taken to be entitled, not only to those, but all others of new introduction, although never before paid. The vicar, therefore, having made out his title, and no sufficient defence

being set up: there must be a decree for the plaintiff, for all tithes in each case, except Killerby and Greenbury Grange, which will be the subject of issues.

Costs reserved, till the issues tried.

[272] PREVOST v. BENETT AND OTHERS. Monday, 29th April 1816.—A modus of 3d. a year for every cow, and 6d. for every calf, in lieu of the tithes of cows, calves, and milk, is good.—A modus of 1d. a year, in lieu of the tithe of gardens, is good, and may be so pleaded, without stating that it is payable for ancient gardens.—As to the fact of the modus being payable for gardens generally, or ancient gardens, the Jury will be directed to take that into their consideration, and the Judge to endorse the *postea* according to their verdict.—Where there are several issues directed, and some are found for the plaintiff and others for the defendant, the parties will be allowed costs on the issues found in favour of each, and must pay them where the issues are found against him.

The plaintiff, as vicar of Tisbury, (Wilts) claimed, by his bill, the great and small tithes of the parish, in kind, due from the defendants, occupiers of land therein.

The answer admitted the plaintiff's title to tithes generally; but insisted on the following payments, as moduses "in lieu of the tithes of cows, calves, milk, heifers, gardens, eggs, and poultry respectively; that is to say, the sum of 3d. a year for every cow, and 6d. for every calf, in lieu of the tithes of cows, calves, and milk;—the sum of 1½d. a year for every heifer,—the sum of 1d. a year in lieu of the tithes of gardens,—and the sum of 1d. a year for eggs, in lieu of the tithes of eggs and poultry."

As to the garden modus, the plaintiff, by amendment, charged, that the defendant Benett had recently converted about two acres of pasture land into a garden, and that the modus pleaded, if it had ever existed, could only apply to ancient gardens: which he admitted, stating that he did, at the same time, convert an old garden, consisting of three acres and upwards, into meadow or pasture, from whence the plaintiff had taken tithe of hay in kind. [273] The depositions for the plaintiff went to prove, that the payments had been broken in upon, and varied; and that larger sums had been paid at different times, for the tithes alleged to be covered by the moduses, such as 3s. for tithe of cow and calf, and 1s. for gardens.

Wetherall, and Spence, for the plaintiff, contended, that the modus of 9d. for cow and calf was rank. They objected also to the laying the modus of a penny for gardens generally.

Dauncey, and Daniell, for the defendants.

THOMSON, Chief Baron. The bill claims all the great and small tithes arising from the different hamlets within the parish of Tisbury. It is not quite clear, whether all the tithes of corn and grain were received by the plaintiff; but, according to my recollection, a balance was admitted, by the defendant, to be due on an account current; and if so, the plaintiff will be entitled to have an account of all such tithes as are not covered by the moduses which have been set up. (His Lordship then stated the moduses from the answer).—The 3d. for every cow, and 6d. for every calf, payable in lieu of tithes of cows, calves, and milk, make one entire modus in respect of those different articles. The penny for gardening is laid generally, without taking any distinction of the garden being ancient or modern. The evidence on these moduses, though not very distinctly read, seems, as the Court understood it, to be sufficient to induce us to grant [274] issues, if we should be of opinion that they are well laid.

We are then to consider what objections there are, in point of law, to the moduses, to oblige the Court to over-rule them.

It was contended, that the entire modus of 3d. for a cow, and 6d. for a calf, (laid as one entire modus,) was rank, and that the Court were bound to take notice of that rankness, without resorting to an issue; and the case in *Bunbury*, of *Frankland v. The Master and Brethren of St. Cross* (Bunb. 78), was cited. But there the sums were payable as distinct moduses. The first was 12d. for a milch cow; the second, 6d. for every calf killed and sold: both of which are said to have been held rank. But in a note to the same case, it is said, that a modus of 6d. for a calf had been subsequently held to be good; and the case referred to there, is that of *Reynold v. Wells*, and is to be found in 2d Wood, 144; and there it appears, that on a cross-bill being filed by

one of the defendants, the owner of an estate in the parish, the Court established a modus of 8d. for a calf. That was a case subsequent to that of *Frankland v. St. Cross*; and there the impropiator waved all his demands which the moduses were said to cover, thereby admitting himself to be unable to dispute the validity of them on the ground of rankness.

There is also another case, of *Roe v. The Bishop* [275] of *Exeter* (Bunb. 57. 2 Wood, 136), which is very strong. There a modus of 1s. 5d. for every cow having a calf, for the tithe of the milk and the calf, was insisted on and allowed. That case is also reported in 2d Wood, p. 137, where it appears, that the Bishop submitted to the opinion of the Court, declining a trial at law, after an offer made him by the Court; shewing that there was no validity in the objections made to it. There is also the case of *Phillips v. Symes* (Bunb. 171. 2 Gw. 654. 2 Wood, 228), which is likewise subsequent to that of *Frankland v. St. Cross*, where a modus of 8d. for a cow, and 4d. for a heifer, were established in lieu of the tithes of milk and calves for such cow and heifer, without an issue being granted. On these authorities, therefore, we are of opinion, that there is not such evidence of rankness in this case as would authorize the Court to say that there shall be no inquiry. It must therefore go to a Jury. It is observable, that notwithstanding there are two sums, they are put together as one modus, and amount, so considered, to 9d. for milk, cows, and calves.

There is another modus objected to, of 1d. for every garden, which is certainly laid generally, and not confined to ancient gardens; and there are many cases wherein it has been laid both ways, as for gardens generally, and for ancient gardens. There are many instances of both, in cases of prohibition; and there may be such a modus, applying differently [276] in different parishes. The true meaning of a garden is, the ground furnishing fruit and vegetables for the house to which it is attached. In the cases which have been already alluded to, of *Boquell v. Wills*, and *Roe v. The Bishop of Exeter*, 1d. is laid as payable for gardens generally, not confining it to ancient gardens. On that point, too, there is a modern case, of *Blackburn v. Jenson* (17 Ves. 476), where the Master of the Rolls held, that it was not necessary, in laying a modus for orchards and gardens, to state that they were ancient. As to the objection of this being a modern garden, that is supported only by Benett's saying that he had made a new garden; and that there was any fraud is not even pretended, nor that the new garden was not intended for vegetables for the consumption of his household. And thus explained, we think that on this evidence also, there should be an issue directed, and that it should be on the question of the modus being payable for gardens generally; and that the Jury should be directed to say whether they find the modus to be payable for gardens generally, or only for ancient gardens.

There is a dictum to be found in *Hetley* on this point, which should be attended to. It is in *Hoolmston's case* (page 85), which was a libel for the herbage of young cattle. It was put, that a parson might libel for tithes of an orchard, for that it was a young orchard, there being a custom to pay 4d. for an orchard; when *Hitcham* said, "that there [277] was no such difference between old and new orchards; for if the custom be, that he shall pay 4d. for every orchard, it will reach the new orchard." That dictum does not amount to an authority, but it is, at least, the opinion of a learned man, at that time a Serjeant, and may be used by way of illustration. In the same way we may refer to *Watson's Clergyman's Law* (page 447). The author, commenting on the opinion given in *Thornhill's case* (*Hetley*, 94), that tithe ought to be paid in specie for an enlargement of an ancient garden, for which a penny had been accustomed to be paid, says, (having the other case in *Hetley* also before him,) the reason is, because the prescription was particular for that garden only; but if the custom of the parish had been to have paid yearly a penny for each garden in the parish, the addition or enlargement of a garden would not make any tithes due in specie.

Taking the whole into consideration, we are of opinion that there should be an issue generally, as to the modus of a penny for gardens; and the Jury may be directed to distinguish and endorse, whether the modus found applies to one or the other species of garden; and the Court will finally dispose of the cause on the return of the postea. No objection was made to the other moduses, in point of law.

An account was decreed for all tithes not covered by the moduses; and the question of costs was reserved for the discretion of the Court.

[278] The issues granted on each of the moduses pleaded, having been tried, the

Jury found a verdict in favour of the plaintiffs at Law, on all except the second issue, (1½d. for every heifer): and the Court apportioned the costs according to the result of the trial of the different issues; each party receiving costs of the issues found for him, and paying them on those found against him.

End of sittings after Hilary Term.

[279] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF
EXCHEQUER, EASTER TERM, 56 GEO. III.

RAINE v. HODGSON. Friday, 3d May 1816.—The clause in the 14 Geo. II. requiring ten days notice of trial for the sittings in London or Westminster to be given to a defendant, where he resides above 40 miles from the said cities, he'd to apply to his permanent, not temporary residence.

A rule had been obtained last Hilary Term for setting aside the verdict which had been obtained in this cause at the sittings in that term, for want of due notice of trial being given to the defendant, under the 14 Geo. II. ch. 17, sec. 4, which requires ten days notice at least to be given, where the defendant resides about forty miles from the cities of London or Westminster: in construing which statute (it was said) the Courts have uniformly held, that in all such cases there must, by the course of practice, be fourteen days notice given (*a*). The defendant's affidavit stated, that he resided at [280] Brighton at the time when he should have received notice of trial in the regular course.

Campbell, opposing the rule, put in an affidavit of the plaintiffs solicitor, stating that process was issued in Michaelmas Term, and served the 13th November at the residence of the defendant in Portman-square, where he then resided; that on the 16th January last, notice of declaration being filed was left there also, with the defendant's housekeeper; that on the 1st February defendant pleaded, and, on the same day, issue was delivered, with notice of trial for the following sittings, which were held on the 10th February, when he received a note from defendant's clerk in Court refusing to accept the notice of trial, as the defendant then and at the commencement of the action resided at Brighton. The affidavit also stated deponent's belief, that the defendant had continued to reside in Portman-square till the 1st of February, on which day he let his house there for a short time, furnished.

It was contended, that the defendant had neither so abandoned his dwelling-house in Portman-square, or so completely taken up his residence at Brighton, even if it were true that he was there at the commencement of this suit, as to entitle him to set aside the judgment for want of sufficient notice.

The cases cited all refer to a bona fide leaving the town residence by the defendant, and his permanently residing beyond the distance of forty miles from London. In *Brind v. Torris*, it is distinctly [281] stated, that the defendant left London on the 16th April, which was two days before the declaration was delivered, and had gone to Dublin. So in *Spencer v. Hall*, the defendant had quitted his residence in Middlesex, and gone to reside permanently in Worcester; and notice of that was given to the plaintiff before the delivery of the declaration.

Per Curiam. The words of the statute, "where the defendant shall reside," must be taken to mean his permanent residence. It is not to be supposed that a plaintiff is to follow a defendant during his temporary residence at a watering place. It appears by the affidavit read on the part of the plaintiff, that the defendant had a substantial place of residence in Portman-square up to the very day of the service of notice of trial.

Rule discharged.

[282] WILSON v. STEPHENSON. Saturday, 4th May 1816. If the Jury find that words directly charging the plaintiff with being a murderer, and having murdered his brother, were spoken by the defendant, but not maliciously, on which a verdict be recorded for the defendant, the Court will not grant a new trial on the ground

(*a*) *Brind v. Torris*, 2 Bl. Rep. 1205.—*Spencer v. Hall*, 1 East, Rep. 688.

that it was a verdict against evidence, although it had been proved on the trial that the words were spoken in anger, and it appeared that the plaintiff had had the misfortune to have been the occasion of his brother's death by an unlucky accident.

A verdict had been found for the defendant at the Spring Assizes for Stafford, in this action, which had been brought for words spoken by the defendant, imputing to the plaintiff the crime of murder. It was proved that the plaintiff had called the defendant a murderer, and said that he was guilty of the murder of his brother, accompanied with other language of reprobation. It appeared, that on some occasion of public rejoicing at the place where the parties lived, the defendant had had the misfortune to be the innocent occasion of the death of his brother, by discharging a small cannon, the wadding from which struck and killed him as he was imprudently crossing before it at the instant of explosion.

The defence was that the words, whatever they were, had been spoken in the way of admonition to the plaintiff, on the general tenor of his conduct.

The Jury found, that the words were spoken, but not maliciously; which was recorded as a verdict for the defendant.

Dauncey now moved for a new trial, on the ground, that if words charging a plaintiff with being a murderer, and that he had murdered his brother, founded on the melancholy fact of his having been [283] actually the cause of his death, by means of such an accident as had occasioned it, had been found to have been uttered at all, (and particularly when expressed in anger, and with warmth, and accompanied by other charges of a criminary tendency, as had been the case in the present instance,) it was not within the province of a Jury to qualify accusations of so highly serious a nature, by stripping them of the motive, which the law will imply to be necessarily inferrible, from the fact of their having been made. The words having been used to the plaintiff, under the peculiar circumstances of his situation from the accident alluded to, could not have been used otherwise than in malice; and therefore, if the special finding of the Jury were to be taken as a verdict for the defendant, it would be a verdict against evidence; and on that account there ought to be a new trial: but

The Court were unanimously of opinion that it was entirely a question for the Jury, and that notwithstanding any particular circumstances attending the case, they were concluded by the verdict, and would not therefore disturb it.

Rule refused.

[284] MANBY, Clerk, *v.* CURTIS AND OTHERS. Monday 6th May 1816.—Endowment produced, shewing the vicarage expressly endowed of hay, not sufficient to support a bill for that tithe, without usage, against evidence of a money payment to the rector in lieu of corn and hay.—Grant from the Crown (subsequent to endowment) of lands, including in the general words all the tithes, &c., not sufficient to overturn the vicar's right, without proof of perception.—A particular and minute enumeration of the several articles of endowment in the instrument, does not preclude the vicar's right to other small tithes, not mentioned therein.

The plaintiff, vicar of the parish church of Lancaster, claimed by his bill against the defendants, occupiers of lands in the township of Bleasdale, the tithe of hay, and all small tithes arising therein: and, amongst other things, the bill alleged, that several offerings, oblations, emoluments, and other dues and duties, and several mortuaries, had become due to the plaintiff.

The answer denied the plaintiff's title to any tithe except lamb and wool, for which it stated the defendants had been accustomed to make an annual payment: and alleged, that the tithe of hay was covered by a *modus* of 5s. 7d., payable to the improper rector in lieu of corn and hay.

On the part of the plaintiff was produced an endowment by the archdeacon of Richmond (dated 14th March 1430,) of the perpetual vicarage of the church of Lancaster cum Pulton, belonging to the manastery of Sion. That endowment was particularly and minutely worded. Its contents are given almost in detail in the commencement of the judgment

The defendants, on the other hand, put in a grant of 20th Jac. I. to Edward Badby and William Weltden, of (inter alia) crown lands in Bleasdale, [285] within the forest

of Amounderness, in the county of Lancaster; and also, (amongst the general words,) "all tithes of sheaves, corn and grain, and hay, wool, flax, hemp, and lambs, and all other tithes whatsoever, as well great as small, and all oblations, obventions, fruits and profits, waters," &c. &c. thereto belonging.

Dauncey, Martin, and Heys, for the plaintiff, relied on the endowment; which, they contended, placed the vicar in loco rectoris, and that it was not impugned by the vicar's not having enjoyed perception under it to its full extent, unless total non-perception were shewn, or adverse enjoyment, from which, they submitted, the case was relieved by the defendants admission of the tithe of wool and lamb being due to the vicar.

Fonblanque and Whetherell, on the other side, insisted that an endowment per se, and without evidence of perception, was not such proof of title as would support a vicar's claim (a); that the modus was an answer to the claim of hay; and that the grant of James I., coupled with non-payment of the tithes, was destructive of the endowment, so far as it was not supported by the usage; that the endowment mentioning hay must have been a mistake, or it must be applicable to the money-payment in lieu of that tithe.

In reply, it was said that the Crown could only have become entitled to what remained in the [286] monastery at the dissolution, and that the grant must be so construed; if so, it was clear, that the vicarage was endowed expressly of hay, and therefore, it could not have belonged to the abbey.

THOMSON, Chief Baron. This is a bill brought by the plaintiff, as vicar of the parish of Lancaster, and what he prays is confined to his claim upon the township of Bleasdale, part of that parish: and he demands in that parish, particularly, tithe of hay, flax, hemp, potatoes, turnips, carrots, and the produce of various other seeds and roots; and he states, that the defendants got and made from milch cows, large quantities of milk, butter, and cheese, and other small tithes: in short, there is a general enumeration of small tithes, so that it is stated that his title comprises hay and all small tithes within the township. His claim is under an existing endowment, made within the legal memory. That endowment bears date in the year 1430, and is made by the archdeacon of Richmond, who was the ordinary of this place; and it appears to have been made with the assent of the bishop of London, who was the ordinary within whose jurisdiction the monastery of Sion was situated: the abbess and monastery of Sion being the impropiators of this living of Lancaster, or rather, the priory who had the living.

Now it is necessary to see what is the effect of that endowment. It states that the ordinary had urged the creation of a vicar in this church of Lancaster; in consequence of which, the archdeacon states, he caused an inquisition to be made respecting the mat [287]-ters with which he was to be endowed. It then proceeds with stating the creation of one perpetual vicar, in the church of Lancaster to officiate, and not in other parts: and it was decreed, that the portion of the vicar for the time being should be in oblations and tithes, and other profits and emoluments arising from the places, things, and goods within described only, and not to exist, or be in other things, in all further times*: and they decree, limit, and assign, that the perpetual vicar shall for his sustentation, and in support of the charges on him as vicar, receive the same freely, peaceably, and quietly. It then states that the vicar shall repair and maintain the mansion formerly called the Priory, with all its houses, chambers, dove-cotes, and stables. It then proceeds particularly to the articles with which he is to be endowed, and adds, that he is to have the tithes of all sheaves in and of the fields of the vill of Lancaster, and the tithes of all sheaves of Thorne and Glassane, within the parish of the church of Lancaster, in what manner soever arising; and also the tithes of sheaves of Rygley, Wra, and Bagerburgh, within the parish, and the oblations whatsoever in the three principal feasts of the Nativity of our Lord, Easter, and the Assumption of the Virgin Mary: and all churchings in churches and chapels, and marriages in churches and chapels; wax lights at the time of burials, and also all mortuaries whatsoever in the parish church, with its members, howsoever arising: and that the vicar shall receive and have in the right and name of his portion for ever,

(a) *Carr v. Heaton*, 3 Gw. 1258.

* His Lordship, reciting the endowment, took it from the instrument, as far as was thought necessary, verbatim, and it appears to be literally translated.

[288] tithes whatsoever of lambs, wool, calves, butter, milk, and cheese whatsoever, of those inhabiting the places called Wyresdale and Bleasdale: and the entire tithes of pigs, ducks, salmon, eggs, gaulick, onions, and leeks, and of flax and hemp, dove-cotes, apples, hay, and milk, of the whole parish. It proceeds then to bestow upon him other offerings of the church: and it states that the estates with which he is endowed are worth nearly 76l. 19s. 7½d. as it was found by the inquisition, (which was a very large sum in those days). And then it charges him with several considerable burdens, which the abbess and convent would be liable to; and ordains, that the abbess and convent of the monastery of Sion, to the said church of Lancaster, with the church of Pulton as aforesaid, appropriated, and the same as aforesaid obtaining in the right and name of the church of Lancaster, with the said church of Pulton, given and granted in all future times, shall perpetually have and receive in all future times, all and all manner the great tithes, of whatsoever kind of blade, of hay, and other rights and emoluments whatsoever, to the same church of Lancaster in anywise appertaining and belonging, except the portions and parcels above specified, to and for the portion of the said vicar and his aforesaid vicarage limited and assigned. This received a confirmation from the bishop of London: and in 1461, thirty years afterwards, there was a confirmation again by the archdeacon, together with some addition to the endowment, that the perpetual vicar should find bread and wine for the communion. This is the endowment under which the vicar's claim was founded: he has not the benefit of shewing any [289] actual receipt of tithes in kind by his predecessors, as far as it can be traced, except in the book of an old rector, which was in 1691. It appears that these tithes were let out by the vicar, from time to time, and of late they have been so let to occupiers of land in Bleasdale.

The defendants, by their answer, admit the plaintiff to be vicar, but they deny that he is entitled to any tithes whatever, except the tithe of lamb and wool, notwithstanding the ample endowment of other tithes contained in that instrument; and then they insist that his endowment does not extend to the tithe of hay: and the reason they give why it does not extend to the tithe of hay in Bleasdale is, that there has been immemorially paid to the rectors of this church of Bleasdale a sum of 5s. 7d. in lieu of the tithe of corn and hay, arising, growing, renewing, or increasing within the township of Bleasdale: and that no tithe or payment in lieu of the tithe of hay, has ever been rendered or paid to the vicars of the parish church of Lancaster, by the occupiers of lands in Bleasdale, but only to the inappropriate rectors; and therefore they contend, that though the endowment has mentioned the tithe of hay, it is erroneous in that respect, and that no such claim was ever set up. Then they attempt to make another defence with respect to all the other tithes, of this sort. They state that the whole of the township of Bleasdale was formerly part of the demesne or forest lands of the Crown of England, and that by a grant under the great seal of England, and seals of the duchy of Lancaster, bearing date [290] the 21st March, 20 James I., the King, for the considerations therein mentioned, had given for himself his heirs and successors, to Edward Badby, and William Weltden, in fee for ever, amongst other hereditaments, the said township or hamlet of Bleasdale, then consisting of several corn pastures, called by the several names specified in the answer; and all and singular tithes of sheaves of corn and grain, and hay, wool, flax, hemp, and lambs, and all other tithes whatever, as well great as small; and also all oblations, and so on, situate, lying and being, arising, growing or renewing, within towns, fields, parishes or hamlets, thereinbefore mentioned; and the grantees were thereafter to hold and enjoy the several liberties and privileges therein mentioned, as fully, freely, and entirely, and in as ample manner and form, as his Majesty or any of his progenitors or ancestors, or any earl or duke of Lancaster, or any abbot or abbess, prior or prioress, or any or either of the then late monasteries, or any chaplain, had enjoyed the same. And they state, that this rectory of the church of Lancaster, which extended to and included the township of Bleasdale, formed a part of the possession of the monastery or convent of Sion, and that, upon the dissolution of that monastery in the reign of Henry VIII., the rectory became transferred to, and was at the time of the grant vested in the Crown; and therefore, they submit, it is to be inferred that the tithes of the lands within the township of Bleasdale passed by the grants from King James I., to Edward Bradbye and William Weltden, and that the defendants, as the occupiers of the lands and premises [291] comprised in the grant, and as deriving their title thereto from Badby and Weltden, are exempted, by means of this grant, from all the

tithes which are demanded. This is the nature of the defence; and, in consequence of this defence, the vicar thought proper to amend his bill, and to make land owners parties, who are the landlords of some of these defendants; and the landlords put in an answer, in which they maintain their tenants right to the tithes, and the modus, which they allege to be payable to the impropriate rector. It appears that the former vicar's name was White, who was a prisoner in France, and died there: but I believe he died before he was instituted. There was found among the papers of Oliver Martin, a former vicar of this parish, a vicar's book in 1690, and which appears to contain several articles of tithable matters, wool and lamb, the tithes to which the defendants would by their answers confine the vicar. Other certificates are produced, of tithes called quakers' tithes, and, in one instance, amounting in the whole to 11. 3s. from one quaker; all these are in Wyresdale, and not in Bleasdale: but it is to be observed, the tithes are granted in Wyresdale and Bleasdale jointly: and therefore, what the vicar is entitled to in the one, he is intitled to in the other. Then it lies on them to shew what tithes had been paid: and they produce evidence to shew what tithes the lessee took under their leases, all of which were paid by way of composition; and the witnesses say generally, that that composition was paid for lamb and wool, but there are others who speak as to their paying, not only lamb and wool, but geese and pigs [292] and an annual sum for a sow. This is the nature of the evidence they give as to the perception of tithes, if it can be called perception: and there is certainly evidence of composition for other small tithes than wool and lamb having been paid to the vicar.

This was the nature of the case that was laid before the Court on the part of the plaintiff, resting upon the words of the endowment, and on his lessees (though bona fide occupiers of the land,) having received composition for various articles besides wool and lamb. The defendants insist, in their defence, upon the modus they had set up as payable to Mr. Standish, the impropriate rector. It is observable, it was one single modus of 5s. 7d. for both corn and hay, and not one payment for corn and one for hay. Now they enter into no sort of proof on the part of the defendants, with regard to the title of the rector to any tithe whatever, otherwise than that which arises from the fact which is proved, that, for a series of years, commencing in 1788, the impropriator has received a payment of 5s. 7d. which was understood to be for the tithe of corn and hay also; and there is no evidence on the part of the vicar, to shew that his lessee, or the vicar himself, did receive in Bleasdale the tithe of hay. It is contended, therefore, that the tithe of hay is not included in the endowment; and that, if it passed any thing under the denomination of hay, it could pass only the modus that it claimed in lieu of that tithe. Now it is difficult to support that latter suggestion, for it does not appear what was [293] the amount of the tithe of hay, as distinct from the tithe of corn, or how the 5s. 7d. was to be apportioned. If, however, the fact is, that from time immemorial it has been a payment for both, it is difficult to say how the vicar's claim to tithe of hay can be made out. The tithe of corn is always reserved to the monastery, where it is not otherwise expressly granted; and it is granted no where, that I see, within the parish, which it is said comprehends Bleasdale: and there may be some difficulty in the construction of the grant with regard to that exception. It is stated, in point of fact, that hay has been received by the vicar in other parts of the parish, as it appears by entries in the books of the parish, that the tithes of hay was received; but there are none applicable to Bleasdale. Now this has been proved to be the usage for a great length of time. The evidence on the part of the defendants has proved, that with respect to hay, from 1788 the understanding in the parish was, that 5s. 7d. was paid in lieu of the tithes of hay in Bleasdale, as well as of corn: it is therefore difficult to say we can at present, in the face of that evidence, decree the vicar the tithe of hay in Bleasdale: therefore there must be, as it appears to us, an issue, directed in the words of the answer, whether, from time immemorial, there has been this payment of 5s. 7d. made to the rector in lieu of the tithe both of corn and hay. With respect to the other small tithes demanded, there is no evidence whatever of any person having received them other than the vicar. As to the ground of defence under this grant of James I., if [294] that means any thing, it would carry all tithes of every kind to those grantees; and it is to be observed, that it is not confined to the lands out of which these tithes are received, or the lands in the parish of Lancaster, but it comprises a great quantity of lands in the county of Lancaster, and lands belonging to the duchy of Lancaster,

in the county of Leicester also; and then, at the conclusion, are the general words passing these tithes, to the extent I have mentioned, that is, all and every the great and small tithes in the lands so granted; words certainly large enough to comprehend all that is contended for, if there had been any enjoyment under it to give it effect. (Reads the words.) Now there seems ground to contend, that these words would not pass that which the vicar was not endowed of at the time of the grant. It is extraordinary, that there has not been on the part of these defendants, any desire to shew us what it was that the monastery of Sion was in possession of at the time of the dissolution. There were no ministers accounts produced to shew what tythes were at that time in the possession of the monastery; and the observation is applicable to this, that it does not appear that at the dissolution of the monastery the rector had the tithe of hay.

Then the question is, what is to be the consequence of the opinion we entertain; there being no usage proved to take from the vicar any other tithe than that of hay, he must be decreed to be entitled to an account of all else that he has demanded; and though the words of the endowment [295] only contain particular articles of small tithes, yet that will not deprive him of other small tithes, for the true construction of that enumeration is, that the articles named are only put to instance what was payable at that time; but they will clearly carry all vicarial tithes, although not expressly mentioned in that instrument. There is a tithe demanded, of which the vicar was expressly endowed, that is the tithe of mills; it is admitted, by the defendants, that some of them (it does not appear which, but that must be inquired into,) have enjoyed and worked corn mills on the lands; and therefore we must decree the profits of those mills: but nothing more than the clear profit, ultra all expenses of rent, and carrying on trade: that was so settled in *Chandless v. Neale* (2 Gw. 596). There is one other article demanded, which I do not remember ever to have seen in a bill before. It is the tithe of mortuaries, but it is not stated at what persons' death they became due, or how it is that these defendants are liable. It is a moot question, whether mortuaries may be sued for, even at Law, and whether they must not be proceeded for in the Spiritual Court, under the Act of 21st of Henry VIII. chap. 6. It is not necessary, however, to enter into a minute inquiry upon that subject, because they have given no evidence with respect to these defendants being liable to mortuaries, and therefore that, at present, is not material; otherwise it would be difficult to say that they would be recoverable in a Court of Equity.

[296] There must be an issue as to the general modus, and whether it be payable as well for the tithe of hay as of corn: the defendants to be plaintiffs, being bound to sustain the rector's right. The question of costs must be reserved for further directions.

With respect to mortuaries, the bill must be dismissed, but it is not worth while to give any directions respecting costs upon that subject.

As to the rest of the bill, there must be a decree for all the other tithes demanded.

BENNETT v. FORESTER. Wednesday, 8th May 1816.—If, pending proceedings against bail, a writ of error be allowed, the bail, on application to the Court, will be given the same time to surrender the principal, after judgment affirmed or writ of error non-prossed, as they would have had at the time the writ of error was allowed: and in the mean time the proceedings against the bail will be stayed. And that application will be granted, where the writ of error was allowed two days after the return of the subp. ad resp. against the bail, and the motion not made till five days after (the fourth day being Sunday).

In the course of the last term, Owen, W. had obtained a rule, by which the plaintiff in this case was called on to shew cause, why the proceedings against the defendant's bail should not be stayed, pending the writ of error allowed in this action, and why the bail should not have the same time to render the defendant, after judgment affirmed, or writ of error non-prossed, as they would have had at the time of the allowance of the writ of error.

Proceedings on their recognizance had been commenced on the 5th February against the defendant's [297] bail, by service of a writ of subpoena ad respondendum, which was returnable on the 7th. The defendant then sued out a writ of error, which was

allowed on the 9th, and notice of the present motion, to stay the proceedings pending the writ of error, was served on the plaintiff's clerk in Court on the same day.

This rule had been applied for on Monday the 12th, and was granted, on the ground that a writ of error being a superseas of all proceedings, pendente errore, the bail (consistently with the practice in the other Courts,) ought to be allowed as much time after the errors should be disposed of, to render their principal, as they would have had (exclusive of what had already elapsed after the return of the process sued out against them,) in case the writ of error had not been allowed; and cases were cited, to shew that that was the practice of the other Courts *¹.

Oldnall shewed cause, furnished with an affidavit made by the plaintiff's clerk in Court, stating a detail of the proceedings in the action against the principal; and that, according to the practice of this Court, the defendant's bail would have become fixed, unless they had surrendered the defendant within four days after the return of the process against them; and that the deponent had not been served with notice of render. The plaintiff's solicitor [298] also deposed, that he believed the writ of error had not been sued out for any real error, but merely for the purpose of delay.

It was submitted, that the rule now opposed had not been obtained in time, the bail having only four days to render the principal, after return of process, and the application, in the present instance, had not been made till the 12th *², although the writ was returnable on the 7th; that the allowance of the writ of error on the 9th, did not operate as a superseas of the proceedings against the bail; and that, under the imputation of a merely dilatory purpose in suing out the writ, (the affidavit made on the defendant's part containing no suggestion of actual error existing,) it should therefore be discharged. A case of *Whitfield v. Bird*, in this Court, T. 37th G. III. was cited, where a rule nisi of 23rd of June, to stay proceedings against the bail, who had been served with process on the 17th June, returnable on the 19th, and had obtained a writ of error, which was allowed on the 23d, was discharged with costs. *Copons v. Blyton and Another* (1 N. R. 67) was also mentioned, a case wherein the Court of Common Pleas held the bail fixed, and would not consent even to stay proceedings, but on terms of undertaking to pay the condemnation money, the costs of the action against themselves of the proceedings in error, and of the application (Tidd's Pr. p. 529 (5th edit.)).

[299] Owen, in support of the rule. It is quite clear that the attorney's belief, that the writ of error is brought for delay, is wholly nugatory. (The Court assented to that proposition.)

Then the only question is, whether we were in time. The bail were served with process on the 7th; on the 11th we were entitled to surrender the principal at any time before the rising of the Court, but that day being Sunday, we had till the 12th; the writ of error was allowed on the 9th, and that is the day to which the Court are to look on the question of the application being made in time, and not when the indulgence was applied for. It was so held in the case of *Sprang v. Monprieat* (11 East, 319).

The Court made the
Rule absolute.

BOURKE, Clerk, v. ISAAC AND OTHERS. Thursday, 9th May 1816. If it is not stated in an answer to a bill for tithes which sets up a modus, in respect of what titheable article the modus is laid, it is bad for uncertainty; and the omission is a substantial defect which no evidence can supply. — But if it can be collected from the whole answer, to what article it refers, it will be sufficient.

The defendants, in their answer to this bill for tithes, set up a defence of modus in these words; "There is now, and has been for time immemorial, [300] a custom of tithing within the said parish, under which the minister of the parish is entitled to (inter alia) a cow calved, 1d."

Evidence being offered to prove that the 1d. for a cow calved was payable in lieu of milk,

*¹ Vide Tidd's Practice, p. 269, 525, 526 (5th edit.).

*² The Master reported, that in calculating the four days, one was inclusive, and the other exclusive.

Dauncey, and Dowdeswell, objected that the modus, as pleaded, was not stated with sufficient certainty to admit such proof. It was not stated for what tithe the penny was payable, which should necessarily appear on the record, and could not be supplied by evidence.

Martin, Benson, and Phillimore, on the other hand, contended, that the payment was not laid with such uncertainty as to preclude the evidence; that it was sufficient so to lay the money-payment, as that evidence might be given to shew for what it was paid; the sum is certain, and the animal is certain; it is so expressed in the terriers delivered in by the vicar, who must be taken to have known for what it was payable. A cow calved means a productive cow, as contradistinguished from a barren cow. The produce is milk, and that is the titheable matter. It is therefore set up for milk, and is sufficiently certain to apprise the vicar of the point to which he is to direct his interrogatories.

In an answer to a bill for tithes, moduses are not required to be so strictly laid as in bills to establish them. In the case of *Mullock v. Browse* (Ambl. 423.—3 Gw. 905), the [301] modus was set out in a much more imperfect manner; it was there pleaded to a demand of tithes of apples, and consisted merely of "cyder, 2d. a hogshead," and was not stated to be in lieu of tithe of apples. On the objection of uncertainty being taken, Sir Thomas Clarke, the then Master of the Rolls, said, that if it appears that a pecuniary payment was made for any sort of tithe, the Court will help the imperfection in the manner of setting out the modus, and put a sense upon the words; and an issue was directed to try whether the modus, as laid, was payable in lieu of tithes for cyder apples.

[Thomson, Chief Baron. In that case the modus was substantially laid as for tithe of apples; for it was said subsequently, in the answer, that tithe of apples was not payable in kind; and it is a common mode of paying for apples. There is nothing in the answer in this case as to the tithe of milk not being payable in kind.]

It was then urged, that it was manifest that the vicar knew to what points to examine the defendant's witnesses on the modus, as laid, because he had prepared cross-interrogatories; but as they had not been used, the Court would not allow them to be read.

Dauncey, about to reply, was stopped by the Court.

THOMSON, Chief Baron. The objection here is, that it is not said in respect of what titheable article this payment was made. It is not said whether it is [302] a modus for milk or for calves, or for what; and the subject-matter, in respect of which a modus is claimed, must in all cases necessarily be stated. The mistake, I perceive, has arisen from copying the terriers verbatim, whereas the custom should have been properly stated, and the terrier might then have been applied in evidence. The omission of the article to be covered by the modus renders it totally void, for uncertainty. It is a substantial defect which no parol evidence can be admitted to supply.

GRAHAM, Baron. I agree that much greater latitude is allowed in laying moduses in answers than in bills, though I think that that has led to much inconvenience, answers being drawn with much less precision; but I have never known it carried to so great a length as to permit it to be so loose as to require evidence to explain it. A penny is said to have been paid, but it is uncertain whether in lieu of calves or milk, or both. It is said to be for milk; and then it might be a question, whether it is meant to cover milch cows bought without calf.

In the case cited the subject of the modus was expressed, but here there is nothing stated.

WOOD, Baron. I am of the same opinion. I think every modus should be stated with some degree of certainty, though, perhaps, if that can be collected from the whole of the answer, it might be sufficient. Here the rest of the answer does not explain it, and it would be quite impossible to frame an issue.

[303] RICHARDS, Baron. However one may be surprised at the case in Ambler, still, enough certainly appeared, from the whole of the answer in that case, to shew to what subject the modus applied. It could only have been payable for apples. I agree with my brother Graham, as to the inconvenience of laying moduses loosely in answers, though I should hold myself bound by decisions. But there is not a word here of milk, and there is no reference in this answer to any titheable matter to which 'cow calved' can apply.

BERTIE v. BEAUMONT. Monday, 13th May, 1816.—A modus may exist for artificial grasses, used in the improvement of hay.—Modus of 3d. for a lamb not rank.—Modus of 4d. for every cow, in lieu of the tithe of milk, not supported by proof of a modus for every cow with calf.—Modus of 1s. for every seventh pig on the 9th day, held good, after some doubt.—An old receipt of a former rector, in the hands of a defendant, for a money-payment in lieu of tithes, where there was a probability that it had come to him from an ancestor of the same name, admissible evidence to support a modus (p. 307).—As to the custody of the document, see pp. 308, 309. —A valuation of tithes, made by a surveyor at the instance of the rector, with reference to certain money-payments reputed to have been always made in lieu of such tithes, not evidence to fix the rector with an acknowledgment of such money-payments, unless it be distinctly proved that the surveyor was expressly required by the rector to make the valuation with reference to such payments (p. 310).

The plaintiff, rector of Buckland (Surry,) filed this bill against the defendant, the lord of the manor and owner and occupier of lands in the parish, for an account of all titheable matters arising from the said lands : charging that the defendant had, during a certain number of years, mowed a considerable quantity of hay, clover, and other artificial grass, on the said lands, and kept a [304] considerable number of milch cows, and sheep, producing milk, wool, calves, and lambs : and that he also had had within the said rectory a considerable number of colts, pigs, eggs, and poultry, and a considerable quantity of hops, flax, beans, peas, potatoes, turnips, wood, honey and garden stuff, and apples, pears, and other fruits, without having made any satisfaction for the tithes thereof ; and that he had, during the same time, fed and depastured divers barren and unprofitable cattle on the said lands, for which agistment tithe had become due.

To this bill the defendant, by his answer, set up the following moduses :—Sixpence an acre for hay, for every acre of ancient meadow land, in lieu of tithe of all grass or hay of such land : —four pence an acre, for every acre of land sowed or planted with any kind of grass seed used for the increase of hay and grass, and the improvement of tillage, if cut or mowed in lieu of tithe of grass or hay of such land : —one shilling for every orchard : —one penny for every garden : —four pence for every cow, in lieu of the tithe of milk : —one penny for every cock, in lieu of tithe eggs ; —one penny halfpenny for every sheep or lamb kept and shorn on the said lands, in lieu of the tithe of wool : —one shilling for every seventh pig, or for one pig of every seven pigs, farrowed on the said lands, due on the ninth day : —four pence for every calf, in lieu of the tithe of calves : —three pence for every lamb yeaned or dropped on said lands, in lieu of the tithe of all lambs.

[305] The evidence offered in support of the moduses, consisted of the depositions taken in an old cause of *Parsons and Others v. Priault*, instituted Michaelmas Term, 2d Anne, to perpetuate the testimony of witnesses for the establishment of the moduses of sixpence an acre for ancient meadow ; four pence for lands sowed with seed ; one shilling for orchards, and one penny for gardens : four pence for every cow with calf ; two pence for every barren cow or heifer, in lieu of milk ; one penny for a cock, and one penny for a hen, in lieu of eggs : in which many witnesses (some of whom carried it back as far as sixty-five years,) deposed to the money-payments for hay and grass, and refusal of demands made by the receiver of tithes in kind, and that an action had been brought, in which the rector had failed. The witnesses examined on the part of the defendant attempted to prove, that the use of clover seed, and other artificial grass seed, was of very modern introduction in the parish.

The defendant next produced account books of Mr. Browne, (a former occupier) headed "Small tithes paid to Mr. Eyre," (Dr. Eyre succeeded Dr. Priault, as rector in 1723,) in which were put down the money payments now set up, as for the small tithes alleged to be covered by them. There were also produced other accounts of tithes paid to Dr. Eyre, in the same way, said to be in the hand writing of Browne, and of Mr. Jordan, who succeeded to his property, and of Thomas Beaumont, (the father of the present defendant,) by whom the [306] estate was at that time possessed (about 1743 ;) at the foot of some of which latter account, were receipts purporting to be given for the amount of the moduses by Dr. Eyre, and said to be in his hand writing.

Those accounts were headed, "Small tithes accustomably paid and due to the Rev. Dr. Eyre for the year, &c." (from 1743 to 1775,) and were in the possession of the present defendant, and now produced by his solicitor.

18th January, 1815.—When these receipts (*a*) were offered as evidence, it was objected to them on the part of the plaintiff, that there should be proof given of their being of the hand-writing of Dr. Eyre, who had died so recently as 1775; whereas no attempt had been made to prove it, either by direct testimony, or by comparison with his known hand-writing or otherwise, as had been held necessary on a former occasion in this Court, which had been the subject [307] of much discussion (*b*); and that being produced by Beaumont (the defendant) it did not come from the person to whom it had been given, and was not therefore found in the proper custody, there being no privity between the parties.

On the other hand, it was contended that the age of the receipts, and their connection with the parties and subject-matter of the present dispute, gave them sufficient authenticity to make them evidence in this cause.

THOMSON, Chief Baron. (Having read the receipt at length.) The question is, whether this paper, which on the face of it contains evidence of money-payments in lieu of the tithes enumerated in it, is admissible to shew that a Dr. Eyre, who was clearly at the time rector, and had been so for many years preceding, and had received customary payments, (there being also the negative evidence of no payment of tithes in kind having been ever made,) had given such receipt, and thereby acknowledged such payments.

It is produced by Mr. Glover, the defendant's solicitor, who lives in Buckland, and he says that he received it from the defendant, for the purpose of preparing his defence. It was not given to this Mr. Beaumont, but to another person of the same name, and who, of course, occupied lands in Buckland, for none but an occupier could have ac-[308]-quired such a receipt. That person being of the same name with the present defendant, there is reasonable inference that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient.

It was objected also, that the hand-writing has not been proved; but I do not think that any such proof was necessary to establish a document of this sort, at such a distance of time, any more than it would have been necessary to prove a deed of the same date.

It is supposed that we had decided this point otherwise, in another case on a former day, (*Manby v. Curtis*). That is not so. The cases are very different. Here the receipt was not given by an agent of the vicar, nor to a person unconnected with the defendant, in whose custody it is found. There was no proof in the case which has been alluded to, that Smith was agent of the party whose receipt it purported to be, or that he was not alive; and there were other objections to that paper which I thought very material. In the present case, I think this receipt is admissible.

GRAHAM, Baron. The question is, whether the proof of hand-writing in the signature of a receipt can be dispensed with; and I think it clear, that in this case it may. There is only this slight circumstance against it, that it comes from a Beaumont, who is not the defendant; but there can be but [309] little doubt that that Beaumont was the father of the present, and that he came by this paper in the course of succession to those rights which his father once had. I certainly do not recollect a case where the proof of hand-writing of a rector to his receipts has ever been dispensed with:

(*a*) Exhibit "F." one of the receipts to which the objection was taken, and on which the Lord Chief Baron particularly commented, was in these words: "Small tithes accustomably paid and due to the Rev. Dr. Eyre. for the year 1766, are as follows," 39 acres of meadow grass, at 6d. per acre, 19s. 6d.; 34 fleeces, at 1½d. per sheep, 4s. 3d.; 2 calves, at 4d. per calf, 8d.; 2 pigs, one of seven, due the 9th day, at 1s. per pig, 2s.; cock, 1d.; orchard, 1s.; garden, 1d.; 11. 7s. 7d." (Then followed a similar account for the year 1767, both in the hand-writing of Thomas Beaumont, making together 51. 11s. 9½d., and then the receipt, said to be in the hand-writing of Dr. Eyre.) "April 14, 1768. Received of Thomas Beaumont, Esq. the sum of 51. 11s. 9d., on account of small tithes due at Michaelmas last. Received by me, Rob. Eyre."

(*b*) *Manby v. Curtis*, 1 Price, 225.

but it must often happen that receipts go back beyond the memory of living witnesses ; and there is an instance, I think, of a receipt admitted by Lord Hardwicke, which was seventy-four years old : and if seventy-four years could make it evidence, a much less time might do so. It may be put, as my Lord Chief Baron has put it, on the footing of a deed.

As to the case of the other day, which has been alluded to, there every circumstance which could operate to render the receipt admissible was wanting. I therefore perfectly concur.

WOOD, Baron. I am happy to concur in what has been already said by the rest of the Court. The case which was before us the other day certainly differed very materially from the present : a fortiori, therefore, I think the receipt which has been now produced is admissible evidence, having thought that that was so. Here Dr. Eyre is proved to be the rector, and entitled to the tithes expressed to be received from Beaumont, a predecessor of the defendant. Now who should have the custody of this receipt but the present defendant ? Can we suppose that a Beaumont of Buckland could be otherwise than interested in it ? Such receipts are the title deeds of modus, and are almost the only evidence [310] which it is capable of. I might say, that title deeds are hardly so strong, for it might perhaps be objected to them, that they are *res inter alios acta*. I am of opinion, that this is clearly evidence.

RICHARDS, Baron, of the same opinion.

The evidence was therefore received.

Much parol evidence was then given of the money-payments, and of no title in kind ever having been paid, to the knowledge or belief of the witnesses, for articles which the moduses were stated to cover.

One witness (George Smallpiece, a surveyor,) deposed, that he had made an estimate of all the tithes, by the direction of the plaintiff, with a view to a composition between him and the occupiers ; and that he had made such valuation with reference to the money-payments, as stated in the moduses ; and that, had not those money-payments existed, he should have valued the tithes at a much larger sum.

To this evidence it was also objected, that it had not been proved that the witness had been directed by the plaintiff so to estimate the tithes according to the money-payments.

THOMSON, Chief Baron. The object of this evidence is to establish the modus, and it cannot be offered with any other view. To be admitted as against the plaintiff, therefore, as evidence of his having acknowledged the money payments, those payments should be proved to have been communicated to him by the witness, as the criterion of his valuation, on which ground alone can it affect the plaintiff : but that not having been shewn, the evidence cannot be received for that purpose.

GRAHAM, Baron. Although it is clear that the plaintiff gave the witness directions to make a valuation of the tithes, it does not appear that he directed it to be made with reference to the money payments ; and therefore the fact cannot be used to affect the plaintiff.

WOOD, Baron. Perhaps I do not substantially differ in opinion. There are two questions here, 1st, whether the evidence offered is admissible ; and 2dly, what effect it may be permitted to have, if admitted. If put as bringing it home to the rector, or adopting the payments, I think it cannot have that effect, but still it is admissible as evidence.

RICHARDS, Baron. It is undoubtedly very important to lay down distinct rules on the admissibility of evidence ; but I am clearly of opinion that these depositions are not evidence.

Rejected.

13th May. — THOMSON, Chief Baron, this day delivered the judgment of the Court. — (Having stated the objects of the suit, and the various moduses insisted on in the defence.) — The question is, what proof has been furnished of the several moduses ; and certainly the [312] depositions, in the suit of *Parsons v. Proud*, are sufficiently strong as to the existence of the modus for hay and grass, which appears to have been then, as now, the principal object of the suit, or at least the circumstances under which that hay was made. That evidence is clear and distinct as to the payment of the moduses for the hay, according to the different quality, and no objection has been made to them as laid ; for though the improvement of cultivation of hay, by the introduction of many artificial grasses, may be modern, yet there were at that time indigenous grasses and

seeds, such as clover and some others, which most probably were used in the same manner to improve the hay. But the rector may try that modus if he desires it. The next are, one shilling for orchard, and one penny for garden; then four pence for every cow, in lieu of tithe milk. There is besides, four pence for every calf, laid as a distinct modus, although, in the former suit, the moduses pleaded were four pence for every cow with calf, and two pence for every barren cow or heifer, in lieu of milk; so that in the present suit the defendant goes further; and as the main evidence for the defendant is the depositions in the former suit, the question will be, whether there is evidence to support those two sums of four pence. Some of the moduses in that defence are different from those now set up. There is no mention made among those of cow as distinct from calf: nor is there any such tithe noticed in the accounts, which have also furnished the defendant with some of his principal evidence. The customary payment for pigs is also [313] noticed, for the first time, in those accounts, to which Dr. Eyre has given effect by signing them.—(His Lordship went minutely through the exhibits, beginning in 1768, and ending in 1774, and particularly letter F, which is transcribed in the note.) Then there is general negative evidence of non-payment of tithes in kind to Dr. Eyre, during the whole of his incumbency. In the former suits of *Priant v. Lucas*, and the cross-bill (*Ser John Parsons v. Priant*), no modus for tithe of lambs or pigs is set up, and the evidence of those payments depends entirely on the accounts between the defendant's predecessors and Dr. Eyre, and those say nothing of a modus for milk. The defendant, too, has divided the modus for milk and for calf into two sums, so that it is not stated as proved by the depositions in the old cause; therefore, on some future occasion, he must lay his defence more according to the truth. At present we cannot direct an issue on the modus for milk. With respect to the three pence for tithe of lamb, we are also under some difficulty with respect to the fact, for there is no evidence given of that payment, except what is to be collected from the accounts which have admitted it. That modus is certainly not set up in the ancient cause, and one would think that the parish, in a suit to establish their rights, would have taken notice of all existing moduses; but that is matter of observation on the evidence. The amount of the modus for tithe of lambs is said to be rank, and that objection has been taken at the bar; and certainly the Court would have had great difficulty on that point, [314] after the opinion given by the Lord Chancellor in the case of *Bishop v. Chichester* (4 Gw. 1320), having the case of *Giffard v. Webb* (4 Br. P. C. 212; and 2 Gw. 708), before him, but for a subsequent determination of this Court, in the case of *Askew v. Greenhow**, where an issue was [315] directed to try a

* In Exchequer Term.—46 Geo. III.

Askew v. Greenhow. (Decree and Postea.) Monday, 7th July, 1806.—Modus of 1d. for each lamb, where the number did not exceed four; 1s. where the number did not exceed five; 1s. 8d. where the number did not exceed six; 1s. 9d. where the number did not exceed seven; 1s. 10d. where the number did not exceed eight; 1s. 11d. where the number did not exceed nine; and 2s. where the number did not exceed ten; held not rank, and sent to an issue.—Summary of the usual proceedings, on the direction of issues out of this Court, to be tried at Law, and on the return of the postea.

Cumberland.—Whereas by a decree made on the hearing of this cause, bearing date 15th May 1805, it was ordered and decreed by the Court, that the plaintiff should forthwith proceed to a trial at Law on the following issue; to wit, whether there was not then and from time immemorial had not been paid and payable to the rector of the parish of Greystock, in the county of Cumberland, for the time being, yearly and every year, for and in lieu of the tithe of lambs, the several moduses or customary payments following, except as to two houses, one called Harrison's tenement, the other called Threlkeld Hall: viz. one penny for each lamb, when the number did not exceed four; one shilling where the number did not exceed five; one shilling and eight pence, where the number did not exceed six; one shilling and nine pence, where the number did not exceed seven; one shilling and ten pence, where the number did not exceed eight; one shilling and eleven pence, where the number did not exceed nine; and two shillings, where the number did not exceed ten.

That such issue should be tried on a feigned action, to be brought in the Office of Pleas in this Court by said plaintiff against said defendant, to be tried at the next

modus of three pence for a lamb: and that direction was affirmed on rehearing. The issue was afterwards tried before Sutton, Baron, who left it to the jury on the question of rankness and they, without much hesitation, found against the modus. A motion was afterwards made for a new trial, which was refused, and a decree was pronounced for tithes in kind. As to the actual fact in that case, there was strong evidence made in favour of the modus, both by living witnesses, and by the terriers, signed by the rector, from 1749 to 1773, wherein that mode of tithing lamb had been admitted as here, yet the Court thought it right to send it to trial; and we now think that that will be right in the present case. The modus for pigs also depends on the entry in the [316] rector's books, and non-payment of such tithes in kind. Now every seventh pig on the ninth day, would exclude the tithe of pigs, if under that number; and again, of those above seven, if the number were under fourteen: and therefore we have had some doubt, whether we should do right to send such a modus to an issue. It is also one of those not insisted on in the suit in 1703.

As to the articles not covered by the moduses, there must be a decree for the plaintiff, and for milk. As to all the other moduses, there must be [317] issues. The costs must be allowed for all the tithes recovered: and as far as they relate to the moduses to be tried, they must wait the event of the issues, as matter for our consideration when the cause comes on for further directions.

THE KING v. HENRY ELLIS ST. JOHN. (Demurrer) Tuesday, 14th May 1816.

D. by articles, in consideration of his intended marriage, bearing date in 1796, covenants to settle certain lands, to be purchased with a certain sum of money, to uses (in strict settlement). In 1808 he enters into bonds to the Crown. In 1812 he purchases lands (generally) in fee, and a mortgage term is assigned to a trustee to attend the inheritance, and the estate is then settled (in strict settlement) to the uses declared by the said articles, under which D. himself takes only a life-interest. Held, that the term does not protect the inheritance of the fee against the

assizes for Cumberland: that the said defendant was forthwith to appear and name an attorney in the said Office of Pleas, accept declaration, and plead to issue therein, so as the same might be tried as directed: at which trial, the depositions of such of the witnesses taken in this cause, as should be dead or unable to travel to the assizes, should be read in evidence on behalf of the said parties, and the judge, before whom the said trial should be had, was at liberty to endorse the postea, as to any special matter that might arise on the said issue, as he should think proper.

And it was further ordered, that it should be referred to the Deputy Remembrancer to settle the issue, in case the parties should differ about the same: and, for that purpose, all deeds, books, papers and writings, in the custody or power of the said parties, to be produced before the Deputy Remembrancer, (on oath, if required,) and the same to be produced on the trial of the said issue, of which notice should be given. The cause to be continued in the paper of causes till the return of the postea, until which time all further directions to be reserved.

And reciting that the parties having proceeded to such trial in pursuance of the decree, and that the jury had found a verdict against the moduses stated in the issue, and that an order which had been obtained for a new trial had been discharged: on the cause coming on for further directions, the said decree and postea having been opened, and counsel heard, it was ordered, that it be referred to the Deputy Remembrancer, to take an account of what was due to the plaintiff from the defendant for tithes, since 1st January 1800: to make to each party all reasonable allowances in taking the account: defendant to be examined on interrogatories, touching the truth of such account, and the Deputy Remembrancer to be armed with a commission for that purpose, and one or more commissioners to issue into the country for the examination of witnesses, in aid of the account, the Deputy Remembrancer to make his report, and the cause to be continued till the coming in of that report: till which time the consideration of the costs in Equity to be reserved, and the deputy remembrancer to tax the plaintiff his costs at Law, to be paid by the defendant, all papers, &c. to be produced, &c. as before directed, on the trial of the issue. Vide *Bedford v. Sambell*, 3 Gw. 1058. *Pyke v. Doehling*, ib. 1166. *Tuell v. Welch*, ib. 1192.

Crown's debt due from B. on the bonds, the settlement being voluntary, and the particular estate not being specifically bound by the deed of 1796.

On a Writ of Extent against H. B. Deane, Esq.

On this writ of extent, tested the 5th January 1815, returnable 3d February 1813, reciting that H. Boyle Deane, and certain other persons his sureties, were indebted to the Crown by bond, dated 24th September in the 48th Geo. III. in 29,000l. and also, in other sums by other bonds of subsequent dates, an inquisition was taken at Reading, whereby it was found that the said H. B. Deane, on the 24th May 1812, was seised in his demesne, [318] as of fee, of and in certain messuages and premises in the parish of Hurst in the county of Berks, which were conveyed to him and his heirs absolutely, by lease and release of the 13th and 14th May 1812: the release made between Thomas Smith, 1st part: Joseph Hatt, and Paul Holton, 2d part: Mary Cowderoy, 3d part: John Barfield of the 4th part: said H. B. Deane, 5th part: and Henry E. St. John of the 6th part. And it was further found, that the said H. B. Deane continued and was in possession on the 5th January 1815.

St. John pleaded, that before the teste and issuing of the said extent, and before the said H. B. Deane had any thing in the several hereditaments and premises in the plea after-mentioned: to wit, on the 22d February 1800, one William Cowderoy Whitfield was seised in his demesne, as of fee, in the several messuages, tenements, hereditaments, and premises, in the said inquisition particularly described, and therein mentioned to have been conveyed to the said H. B. Deane and his heirs absolutely, by indentures of lease and release of the 13th and 14th May 1812, parcel, &c.: and that said Whitfield being so seised thereof, did afterwards, on said 22d February, by indenture, demise to Daniel Headland, his executors, administrators and assigns, said premises for the term of one thousand years: by virtue of which demise, said Headland entered 23d February, and being so possessed, died intestate on 1st March 1804, and administration was granted to Jane Headland. That afterwards, on 25th March, by a certain other [319] indenture, between Francis Loekey of the 1st part, said Jane Headland of 2d part, said Whitfield of 3d part, Thomas Smith of 4th part, and John Barfield of the 5th part, said Jane Headland did assign said premises to said John Barfield, for the residue of the said term, upon trust, for securing to Thomas Smith a sum of money and interest, and subject thereto, in trust, to at end the inheritance, and to protect the premises from mesne incumbrances. That afterwards, on 14th May 1812, by indenture between said Thomas Smith, 1st part: Joel Hatt and Paul Holton of 2d part: Mary Cowderoy, single woman, of the 3d part: said John Barfield of the 4th part: said H. B. Deane of the 5th part: and said Henry Ellis St. John of the 6th part, the said John Barfield did assign, transfer and set over unto the said Henry E. St. John, his executors, administrators and assigns, the said messuages, tenements, &c. to hold the same unto the said H. E. St. John, &c. from thenceforth, during all the rest, residue and remainder of the said term then to come, &c. in trust, nevertheless, for the said H. B. Deane, his heirs and assigns, and to be assigned and disposed of as he or they should direct or appoint: and in the mean time to attend, wait upon, and go along with the freehold and inheritance of the said premises, to bar, dower, and protect and defend the said hereditaments from mesne incumbrances subsequent to the creation of the said term. By virtue whereof the said H. E. St. John on, &c. entered, &c. and was, and continually from thence hitherto hath been, until the taking and seizing thereof by the said [320] sheriff, lawfully thereof possessed. And the said H. E. St. John being so possessed, and the said H. B. Deane being so seised thereof, as in the said inquisition mentioned, afterwards on the 29th June 1812, said H. B. Deane did, by indenture of bargain and sale, for the considerations therein mentioned, bargain and sell said premises, &c. unto George Deane and John May, to hold the same to them and their assigns from, &c. for one whole year, by virtue whereof, and by force of the statute, &c.: and afterwards (on 30th June) the said George Deane and John May being so thereof possessed, by a certain other indenture made between said H. B. Deane of the first part: Lucy Deane, widow and relict of Henry Deane, deceased, and the said H. B. Deane, and Elizabeth his wife, then late Elizabeth Wyborn, spinster, of 2d part: George Deane and John May, 3d part: and Ralph Deane, and said H. E. St. John of the 4th part, said H. B. Deane being so seised as aforesaid, for the considerations therein mentioned, did grant and confirm unto said George Deane and John May, and their heirs, the said several messuages, &c. to hold to them, their heirs

and assigns, for ever, to the intent that the same might be settled to the several uses, and upon the several trusts, and under and subject to the several powers, mentioned, expressed, and directed to be declared, in and by a certain indenture of settlement, bearing date the 2d day of September in the year 1796, or as near thereto as the death of the parties, the change of interests, and other intervening circumstances, would admit. And it was by the said in-[321]-denture of release further witnessed, and thereby covenanted, declared and agreed between all the said parties thereto, and the said H. B. Deane did thereby direct and appoint that the said H. E. St. John, and his executors and administrators, should thenceforth stand seised, and be possessed of the said term of one thousand years, In trust for the said George Deane and John May, their heirs and assigns, to attend, &c. and to preserve, &c. And said H. E. St. John further saith, that the said several uses and trusts mentioned, expressed, and declared in and by the said indenture of settlement, bearing date 2d September 1796, and mentioned and referred to as aforesaid in said indenture of 30th June 1812, were as follows: that is to say, To the use of said Henry Deane and his assigns, for life (without waste :) remainder to the use of the said Lucy Deane his wife, and her assigns, for life; remainder to the use of the said H. B. Deane and his assigns, for life, (without waste :) remainder to the use of the said Elizabeth Wyborn and her assigns, for life; with remainder to the use of the said George Deane and John May, and their heirs, during the natural lives of the said H. Deane, Lucy his wife, H. B. Deane, and Elizabeth Wyborn, and the life of the longest liver of them, Upon trust, to preserve, &c. but nevertheless to permit and suffer the said tenant for life to receive and take the rents and profits of the messuages, lands, tenements, and hereditaments, to be purchased with a certain sum of

1., and immediately after the decease of the survivor of them, to the use of and in trust for the child, if only [322] one, or if more than one, then all and every, or (exclusive of the other or others of them) any one or more of the children of the said H. B. Deane, on the body of the said Elizabeth lawfully to be begotten, or the issue of all or any of such child or children to be born in the life-time of the said H. B. Deane and Elizabeth Wyborn, with such limitations, over and upon such contingencies, and subject to such conditions and restrictions, as the said H. B. Deane and Elizabeth Wyborn jointly, during their lives, by any deed or instrument in writing, to be executed in presence of two credible witnesses, should absolutely, and without power of revocation and new appointment, to be as therein mentioned, jointly direct, limit or appoint; and in default of such direction, limitation and appointment, and subject thereto, and as to such part or parts of said messuages, &c. to be purchased with the sum of

1. therein mentioned, and also of the estate and interest therein, to which such joint direction or appointment should not extend, then as the survivor of them the said H. B. Deane and Elizabeth Wyborn, notwithstanding her coverture by any future husband, by any deed or instrument in writing, executed in the presence of two credible witnesses, or by his or her last will and testament, signed and published in the presence of three credible witnesses, should direct, limit, or appoint; and in default of such direction, limitation, or appointment, to the use of the first son of the said H. B. Deane, on the body of the said Elizabeth Wyborn lawfully to be begotten, and the heirs male of the body of such first son lawfully [323] issuing, with remainder to the use of the second, third, fourth, and fifth, and all and every other son and sons of the said H. B. Deane, on the body of the said Elizabeth Wyborn to be lawfully begotten, severally, successively, and in remainder, one after the other, as they respectively should be in seniority of age and priority of birth, and the heirs male of such sons lawfully issuing, with remainder to the use of the daughter, if only one, and if more than one, then all and every the daughters of the said H. B. Deane, on the body of the said Elizabeth Wyborn to be lawfully begotten, share and share alike, as tenants in common, with benefit of survivorship in manner therein mentioned, with remainder to the use of the said H. B. Deane, his heirs and assigns for ever. And the said H. E. St. John further saith, that after the making of the said indenture, bearing date 30th June 1812, the said H. B. Deane and Elizabeth Wyborn intermarried, and the said H. Deane and Lucy his wife respectively died, to wit, on the 2d day of September 1796, at Westminster aforesaid; and that before and at the time of the issuing and teste of the said writ of extent, the said H. Ellis St. John was, and from thence until the issuing thereof, hath been possessed of, and still is entitled to the said several messuages, &c. for the residue and remainder of the said yet unexpired term

of one thousand years therein, in trust for the said George Deane and John May, their heirs and assigns, to attend, &c. in order to preserve, &c. : and this the said H. E. St. John is ready to verify : Wherefore he prays judgment, and that the hands [324] of our said Lord the King be removed from the possession of said messuages, &c. whereof, &c.

Demurrer and joinder.

Nolan, in support of the demurrer, stated the question to be, shortly, whether the trustee of the term assigned to attend the inheritance, is entitled to set it up as an available claim against the Crown, and thereby protect the inheritance of the Crown debtor's estates from the Crown's debt : and submitted, that whether it were a legal or trust estate, it would be affected by a debt due to the Crown.

He admitted that if the King's debtor, possessed of a term of years of any chattel, real or personal, should dispose of it to another, bona fide for a valuable consideration, the sale would bind the King, on the authority of *Fleetwood's case* (8 Co. 171).

But he submitted that it could not be the effect of the conveyance of the term to the uses of the settlement of 1796, that it should operate to protect the inheritance against the debt due to the Crown ; and he cited *Ford and Sheldon's case* (12 Co. 2), where it is held, that "if an accountant to the King purchase lands in the names of others, the King shall seize those lands for money due unto him : " and also *Sir Edward Coke's case* (Godbolt's Reports, 289), which was this : Sir [325] Christopher Hatton, whilst entitled by grant of Queen Elizabeth, to the reversion of the office of remembrancer and collector of the first fruits, being seised in fee of divers manors, lands, &c. covenanted to stand seized thereof to the use of himself for life, and afterwards to the use of his sons severally in tail, remainder to the heirs of his eldest son in fee, with power of revocation during life. Having afterwards become possessed of the said office, and thereby indebted to the Queen, the question was, whether those lands might be extended for the debt, and it was held that they were. Dodderidge, Justice, and Tanfield, Chief Baron, were of opinion, that Sir Christopher Hatton having the fee, the conveyance being revocable during his life, the lands were extendible till his death ; and Hobart, Chief Justice, considered it not material that the inquisition should find the deed to be with power of revocation, and he held, that a revocable conveyance was sufficient to bind the parties themselves, but not the King, and that the lands were liable, into whose hands soever they come.

It cannot be necessary to shew, that where a term attends the inheritance, it is considered as part of it, and subject to the same conditions. It is no longer a term in gross.

In *The Attorney General v. Sands* (Harden, 488), it was held, that a term attendant on the fee is not forfeitable. Hale, Chief Baron, says, in that case. [326] "A trust of a term that follows the inheritance, may be resembled to a box of charters, which go to the heir with the land that they concern, 4 H. 7 W. : but if the owner grant them over, then they shall go to the executors of the grantee."

There is also a case in *Precedents in Chancery* which is precisely in point. *How v. Nicholl* (Prec. in Ch. Case 111, p. 125), where a man having a term in gross, purchased the inheritance : and the term was declared to attend the inheritance. Then he becomes receiver of the King's revenue. He was held liable from the time of his becoming receiver, and that the King should have the benefit of the term ; but (it is added) if the term had been mortgaged to one who had no notice of its attending the inheritance, he should have held it against the King. In this plea it is not alleged that St. John had no such notice.

In the case of *The King v. Smith (k)*, the debt was by simple contract.

Richardson, in support of the plea, submitted, that a term, though assigned to attend the inheritance, is not incapable of being severed for some purposes : and that the purpose for which this term had been assigned was one of those, and would be protected by that assignment, which was for the interest [327] of H. B. Deane's wife, and the uses of the settlement in 1796, although the life-estate, and all beneficial interest of H. B. Deane in the lands, might be affected by the extent. According to the doctrine in *Willoughby v. Willoughby* (1 T. R. 763.—Coll. Jur. vol. 1. p. 349) the

(k) Wightwick's Rep. 34.—In that case, the principal authorities on the point of the Crown's debt affecting the debtor's lands, in the hands of a purchaser, are brought together.

uses of the settlement of 1796 (being long before Deane had entered into any engagement with the Crown,) would be protected by the assignment of the term. The marriage was a valuable consideration, the articles and assignment were *bonâ fide*, and there was no notice of the Crown's debt. A judgment creditor would be precluded under the same circumstances, and the Crown cannot be considered as in a better situation.

THOMSON, Chief Baron. The settlement of 1812 was voluntary, and there is no covenant in the articles of 1796, which specifically binds these lands. The assignment of the term therefore to St. John, cannot defeat the right of the Crown.

Per Curiam. Judgment for the Crown.

[328] *SHAW v. JOHN TYTHERLEIGH* (sued by the Name of John Tyther Leigh). 1816. A subp. ad resp. and attachment for want of appearance, in both of which there is a mistake in the defendant's surname, not sufficient ground for a rule to shew cause why the proceedings should not be set aside, although the defendant give the plaintiff notice on being served with process, that he will move the Court to set it aside if proceeded in, and tender the plaintiff his demand.

Dauncey moved to set aside the proceedings in this cause, for irregularity. The defendant had been served with a subp. ad resp. in the name of Leigh, (as above,) returnable in fifteen days of Easter. On the 11th of April he gave the plaintiff notice, that if he proceeded in the action, the Court would be moved to set aside the proceedings on the ground of the misnomer: and at the same time tendered him the full amount of his demand. The plaintiff had delivered in a bill of particulars of his demand, wherein he had called the defendant by his right surname. On the 25th day of May instant, the defendant was attached for default of appearance, by warrant from the Sheriff of Stafford, by the name of Leigh.

The Court refused to grant the rule.

[329] *SIR F. CUNLIFFE, BART. AND ANOTHER, v. TAYLOR AND OTHERS.* Monday, 20th May 1816. The lessee of a rector, in whose lease there is an exception of various small tithes nominatim, and of all the tithes belonging to the vicar, is not entitled to tithe of potatoes, although he has always received some of the small tithes in kind, not mentioned in the lease, speciatim, either as demised or excepted, and particularly for geese and pigs: his general right being generally abridged by the operation of the particular exceptions in the lease, which was held to carry the tithes of articles of modern introduction to the vicar: for that it was not to be inferred, from the lessee of the rector having received certain articles of small tithes, that he is entitled to take tithe of potatoes, although the vicar was not entitled to all the small tithes, nor had enjoyed the tithe in dispute. The ecclesiastical surveys are admissible to prove an ancient endowment, and, aided by perception of small tithes, (though not of all,) will give a vicar a right to tithes of articles of modern introduction against the lessee of the rector.

[See *Masters v. Fletcher*, 1830, Younge, 25.]

The plaintiffs, as trustees of Sir Richard Brooke, lessee of the tithes under the Dean and Chapter of Christchurch, Oxford, who were seised of the rectory and parsonage of Runcorn, in Cheshire, filed this bill against the defendants, occupiers of lands in the several townships of the parish of Runcorn, and the vicar of the said parish, for the tithe of potatoes.

The defence set up was, that the vicar of the parish was entitled to the tithe of potatoes, if titheable.

The evidence for the plaintiff consisted of the lease of the rectory*, and parol

* The lease was for three lives (rendering rent) of all that their rectory or parsonage of Runcorn, in the county of Chester, and all their houses, barns, glebe lands, tithes, fruits, profits, advantages, commodities and appurtenances whatsoever, to the said rectory belonging: except, and always reserved unto the said Dean and Chapter and their successors, the gift, advowson and patronage of the vicarage and

testimony of having [330] uniformly received the tithe of geese and pigs, colt, and some few other trivial small tithes, and smoke-penny and egg-money, and in some instances the tithes in question, by composition; but it also appeared that, on a remonstrance from the vicar, that tithe was no longer demanded.

On the part of the defendants, the vicar proved perception of many articles of small tithes, (all the witnesses admitting that the tithe of geese and pigs was payable to the rector, and was paid to the lessee,) particularly calf, wool, lamb, and three-pence for man and wife: and that he (the vicar) had lately, in some instances, received the tithe of potatoes.

[331] Martin, and Cooke, for the plaintiffs, put the case on the principle of a rector having a right to all the tithes to which the vicar could not shew himself clearly entitled: and submitted, that the exceptions in the lease were so minute and particular, as to prove that the lessee was entitled to all the tithes which were not expressly reserved, as the Dean and Chapter had demised, as largely as they could, all their rectory: and against the lessee's right, the vicar must prove himself entitled by endowment or perception to this particular species of tithe, or it must be taken to remain in the rectory, and to have been demised to the lessees. — That usage was the only ground on which the vicar could, in the present instance, rest his case, as the ecclesiastical survey [332] only proves (and that not satisfactorily) that an endowment had formerly existed, but does not shew of what articles: and therefore his right cannot be carried beyond the usage against his rector, who is never called on to shew his right, which is general. — That the reservations made in the lease of certain titheable articles by name, must not necessarily be taken to have been made in favour of the vicar: nor can they be used in diminution of the rector's right, without proof of perception. There is also in this case strong evidence of usage in favour of the plaintiffs, for they have constantly received tithe of pigs and geese, which are small tithes, and in some instances several other vicarial tithes: and the perception of such small tithes is the criterion of the right to tithes of modern introduction, and is the only medium of deciding the question to whom such tithes belong and are payable.

parish church, and the presentation of a clerk to be vicar thereof; and all lands, tenements, meadows, rents and services, with their appurtenances, in Newton near Daresbury, in the said county of Chester: and also all manner of grain and sheaves of corn or grain, increasing, &c. in the villages, hamlets, or fields of Newton aforesaid, Hull, Appleton and Over Whitley, in the said county: and all hay and grass titheable in Newton and Hatton, near Daresbury aforesaid: and also all and singular the Lenten-tithes and profits coming thereby, of the Lent-book or Lent-roll, in Daresbury aforesaid, parcel of the said rectory: and all the tithes, as well of corn and sheaves of corn, and grain, and grass, and hay, in Acton Grange and Daresbury aforesaid, and also of a certain piece of land (therein particularly described) in or near Acton Grange: and also all timber trees, woods and underwoods, on the said demised premises, with liberty to fell and carry away the same: and also except all the tithes of wool, lamb, flax and hemp, and all the offerings or oblations at Easter, and all tithe calves yearly coming, renewing, arising, or increasing of or in the titheable places of Runcorn aforesaid, or any part thereof: and also all and all manner of tithes, predial or personal, coming, growing, renewing, arising or increasing of or in the town, village, or fields of Weston, in the parish of Runcorn aforesaid: and all and all manner of other tithes whatsoever, which the then vicar or any other vicar for the time being of the parish church of Runcorn aforesaid, in right of his or their vicarage of the same church, did then or at any time theretofore had peaceably or quietly received, perceived, possessed, or taken and had, or which to the then vicar or any other vicar for the time being of the said parish church of Runcorn aforesaid, in right of his or their said vicarage, then were or at any time theretofore, by ancient composition, or any custom or prescription within the said parish of Runcorn aforesaid, or the members thereof, had been belonging or in anywise appertaining.

The other documentary evidence consisted of certain leases formerly granted by the rector, and the accounts of the bailiffs of the monastery.

On the part of the vicar, an ecclesiastical survey was produced, (recognizing the existence of the vicarage, and an endowment of small tithes and oblations,) and terriers.

And as nonuser will not defeat a vicar's right, so also it is no answer to the claim of a rector: and there is no difference made in the cases, between a lay and an ecclesiastical rector. If, in this case, where both rector and vicar prove perception of some of the small tithes, there should be any doubt to whom the newly introduced articles are payable, the rector would be entitled to the benefit of that doubt, and would be entitled to an issue, if not to a decree.

Danncey and Whetherell, for the vicar, contended that a vicar having proved his endowment, stood, as to vicarial tithes, in loco rectoris, and on the same common law right, and thus put the lessees of his rector to strict proof of their title: [333] and it is no answer to a vicar, to say that he has never received any particular species of small tithes.

The case of *Kennicott v. Watson* (2 Price's Rep. 250) is precisely the same as the present: and the parties here have relied, on both sides, on similar proofs, the grant of the rectory on one hand, and the ecclesiastical survey on the other: and the argument proceeds on the same question, of what tithes are due to the vicar, and what to the rector. In that case, "Vicaria" was held to carry all small tithes, and that the vicar was entitled to demand, under his endowment, those which had never before been paid. The rector's right to any small tithes, must arise in consequence of some special reservation, and it ought to be shewn to what particular articles that reservation was applicable: and if usage be the only means of that proof, it must be confined to the usage, and cannot go beyond it. In this case, then, the rector's right would be confined to geese and pigs, and some small personal dues.

Martin, in reply, distinguished the present case from *Kennicott and Watson*. In that case the rectory had not been granted, as in this, but merely the tithe of corn and grain. There, too, it was shewn, that no claimant had ever received any small tithes in derogation of the vicar's right: here the plaintiff has enjoyed some of the vicarial tithes. In that suit the rector was not made a party; and it is [334] quite a different thing, where the vicar's right is set up against the rector, or merely against the landholder. The only question in that case was, whether a vicar, having a right to small tithes generally, was not entitled to claim agistment from the occupier, and that was the whole; and although the discussion occupied several days, it might have been disposed of in a very short time. If the rector had been a party there (although that was argued as a last resource,) no one could be dissatisfied with the decision. The usage was insisted on there; and without it, the ecclesiastical survey would not have been held to have been tantamount to an endowment. That case is therefore considerably in favour of the present claim; for it decides, that a vicar cannot prevail against a rector but by proof of enjoyment.

THOMSON, Chief Baron, (having stated the case, and the plaintiff's title, as trustees for the lessee for lives, the effect of the documents deducing the title of the lessors from the priory of Norton, and the parol evidence of perception,) commented much on the peculiarity of the lease having so many exceptions; and, amongst other observations, his Lordship remarked, that some of those reservations operated strongly in favour of the vicar, particularly the exception of all the tithes of wool, lamb, flax and hemp, and all the offering money or oblations at Easter, and all tithe calves yearly coming, &c. in the titheable places of Runcorn; and all and all manner of tithes whatsoever, which the then vicar or any other vicar for the time being of the parish church of Runcorn aforesaid, [335] in right of his or their vicarage of the same church, had then or at any time theretofore peaceably and quietly received, perceived, or taken and had, or to them in right of the said vicarage then and theretofore, by ancient composition or any custom or prescription belonging, plainly (said his Lordship) alluding to some species of tithes of which the vicar had been formerly endowed, though there is nothing said as to tithes so specially excepted in the lease. That lease was for three lives; and here it may be proper to mention a piece of evidence of great importance in this defence. That is the ecclesiastical survey, made when the rectory belonged to the religious house, by which this vicarage clearly appears to have been endowed at that time. And that document shews the endowment to have been general, from the words "decimas minutas & oblationes," comprehending more than wool and lamb, and the other tithes specified in the reservation; and is therefore sufficient to put the rector to proof of a title to the tithe claimed. And those surveys are of great authority, to shew of what the vicarage consisted at the time when they were taken. Then the accounts of the bailiffs, on the dissolution of the monastery,

are used to shew that the monastery had some of the small tithes. An observation was made on that, as accounting for the rector receiving tithes of this description.

The plaintiff then read the depositions of his witnesses, to shew something of a permanency of small tithes by the lessee and his ancestors, particularly pigs and geese. —(His Lordship then went [336] at large into the parol evidence of perception of tithes by the plaintiff, as far as it went to prove perception of small tithes in kind.)

The defendants also produced parol evidence of a strong nature, to shew the vicar's receipt of many sorts of small tithes in the different parts of the parish.

On this evidence the Court are to decide, whether the plaintiff, as lessee of the rectory, has made out a title to demand from the defendants the tithe of potatoes. It is clear that the lease contains no particular grant of any small tithes whatever; and it appears, that all that the monastery had was the great tithes, and some Easter-rolls, and pigs and geese. As to the rolls, the lessee cannot derive title under them, because they are expressly excepted in the lease. It appears by the ecclesiastical survey, that the vicar was endowed generally of small tithes and oblations, and that would be sufficiently comprehensive to carry all the small tithes that then existed: and all titheable articles of modern introduction would follow the right to such small tithes in general: and therefore the rector is called on to shew an adverse title.

His strongest evidence for that is his having received the tithe of pigs and geese. There is no exception of those articles in the lease, and that may account for his receipt of them: and, on the expiration of the lease, the college will become entitled to them: but it is by no means sufficient [337] to infer, from the plaintiff's having received such tithes, that he is therefore entitled to all small tithes which have not been received by the vicar. The reservation in the lease of the small tithes payable to the vicar is express: and whether any of the small tithes were excepted as due to the vicar, or as not due to the college, it makes against the lessee's claim either way. On the whole, therefore, we think it is plain, that in this case the rector has no title to this species of newly introduced tithe. The documentary evidence is entirely against the plaintiff: and the usage in his favour, as far as it goes, is explained. His perception of other tithes was confined to his own tenants only: and, after a remonstrance on that account from the vicar, he received them no longer.

This is not, therefore, the case of a rector claiming generally, and having a general *prima facie* right to all the tithes: because the instruments, confirmed by the usage, shew that his right was limited, and that so clearly, as to make it unnecessary to send the case elsewhere for the sake of further enquiry: and therefore we shall dispose of it at once, by dismissing the rector's bill, with costs.

[338] THE HONOURABLE AND REVEREND PIERCE MEADE, Clerk, AND OTHERS, Devisee and Representatives of the Bishop of Dromore, Deceased, v. CONINGSBY NORBURY, ESQ. Monday, 20th May 1816.—A grant of the tithes of land will not be presumed from long non-payment, although the lands be shewn to have been once in the possession of a former lay-impropriator, unless some evidence of the existence of a grant be offered, or enjoyment of the tithes be shewn by at least something like actual permanency, or a dealing with the tithes as owner.—Nor will evidence of retainer only be sufficiently strengthened to support such a presumption, by its being shewn that a former impropriator had declared the lands in question to be exempt from the payment of tithes, or by instances of exception of the tithes in leases, by the impropriate rector.—Wood, B. dissentiente.—A church being void and dilapidated, is no ground of discharge from the payment of small tithes to the impropriate rector, on the notion of an agreement having been entered into between the rector and the parishioners, by which the ecclesiastical duties have been dispensed with in consideration of an abandonment of the small tithes.

(By original and supplemental Bills.)

The original bill filed in this cause, in Easter Term 1810, stated, that the then complainant, the Bishop of Dromore in Ireland, was seised of the impropriate rectory and parsonage of the parish of St. Nicholas in Droitwich (Worcestershire,) and thereby entitled to all manner of tithes, great and small, arising, &c. within the titheable places of the said parish.

That from the time of plaintiff's seizin, the defendant held and occupied a certain farm and lands in the said parish, consisting of about thirty-three acres, for which he had regularly paid tithe by an annual composition, till Michaelmas 1807; but that since that time he had refused to pay the plaintiff such composition for the small tithes: and that, besides the said lands, the defendant occupied other [339] lands called the Lower Friars, (about seven acres,) on which he had reaped and mown grain, pulse, hay, and clover, and had agisted barren cattle, the tithe of which he had not paid.

Prayed an account and decree for the single value of all the small tithes from, &c.

The defendant, by his answer, denied the title of the plaintiff to all tithes as impropriate rector; admitted his own possession of the lands mentioned in the bill, but contended, that the composition which had hitherto been paid, was in satisfaction to the complainant, or his agents, for the great tithes only, and denied that he was entitled to small tithes. And he alleged, that in case any small tithes were payable, the rector would be bound to contribute to the repair of the church, and to provide some ecclesiastical person to perform the duties within the said parish, to whom such small tithes would have been payable, if due at all: and that, as no such person had been provided within memory, there must, therefore, at some former period, have been an agreement between the then impropriate rector and the parishioners, that in consideration of his foregoing the small tithes in the said parish, he should be relieved from the duty of serving and repairing the church. In proof of which (the answer alleged,) there had been no service performed in the said church in the memory of any person living, except in two instances, within the last thirty years, of two persons having been buried in the church-yard; that the church itself was [340] dilapidated, and that the tower, with a bell therein, and the outside walls of the old church, were standing till within a few years; but that the walls and bell had lately been pulled down by the orders of the complainant, for the purpose of disposing of them for his benefit; and that the parsonage house had, till about ten years ago, been standing, and was inhabited, but that one of the late lessees of the tithes had since pulled it down and disposed of the materials. And that, in further evidence of such agreement, there had never been any small tithes in kind, or any composition in lieu thereof, paid in the memory of any person living, except that two of the late lessees had demanded and received from some cottagers, or small householders, a trifling composition in lieu of vegetables growing in their gardens: and submitted, that the complainant was not, under the circumstances, entitled to any small tithes, or that if he were, it was his duty to procure the said parish church to be served, and contribute to its repairs, and rebuild the parsonage house.

The defendant also admitted that he had occupied the lands called the Low Friars, and that they were within the said parish of St. Nicholas, on which he had cut hay and agisted cattle, and had paid no tithe: but he pleaded an adverse title to the tithes of the said lands, derived by mesne conveyances from the Crown, in whom they had become vested on the dissolution of the priory of the Augustine Friars in Droitwich, in whose possession they had formerly been, exempting them [341] from the payment of all tithes, as well great as small: and they alleged as evidence thereof, that no tithe had ever been paid for the said lands, either in kind or sub modo.

The parol evidence on the part of the plaintiff (who deduced his title to the impropriate rectory by descent from Sir John Packington, to whom, it also appeared, these lands had been conveyed by the original grantees in the reign of Queen Elizabeth,) tended principally to shew, that both the great and small tithes had been always considered as included in the composition which had been paid to the plaintiff, and as due to him in quality of lay impropriator, and not as vicar, or to any other ecclesiastical person, there having been no such person within memory: and that no claim to any of the small tithes had ever been set up by any other person. And several old leases of the great and small tithes, by plaintiff's predecessors, were produced. In some of those leases there was an exception of the tithes of the lands called the Friars.

Dauncey, Roupell, and Whetherell, for the plaintiff, submitted that, in the case put by the defence as to the thirty three acres, of the church being dilapidated, and no service performed, whence the presumption of an old agreement had been inferred, the endowment, if there had ever been any, would have reverted to the rector: and they insisted, that they could not be driven to that argument, till the defendant had given evidence of a vicarage having once subsisted, and of an endowment: and that,

as the case at present stood, the [342] rector's common law right must be combated by the defendant, the plaintiff being admitted to be impropriate rector.

As to the defence of the seven acres being church land, they contended, that the priory of St. Agustin's having been one of the smaller monasteries, was not exempt from the payment of tithe : and that as to the exception of the tithes of those lands, in some of the leases from the impropriator, that was so far from proving (as it would probably be contended it did) that he had not the tithes, as to be rather evidence that he had them : for unless he had, there could have been no necessity for excepting them.

Martin, and Hall, for the defendant, ultimately admitted, that if the plaintiff's title to the impropriate rectory were thought by the Court to have been proved, the defendant (having no evidence to impugn it) had no defence to the claim, as far as regarded the thirty-three acres.

The question was thereby confined to the claim of tithes for the seven acres, called the Friars Lands. To that demand the substance of the defence was, that as an impropriate rector might convey lands free of tithe, the Court would presume, from the absence of proof of tithes ever having been paid for such lands, that they had been originally so conveyed : for it was in evidence that Sir John Packington had purchased the land for which the exemption was now claimed, from the grantees of the Crown, and that he had been himself the impropriator of these tithes : and it was submitted, that the [343] argument of the exception in the lease proving a title in the lessor to tithe in the lands excepted, required that it should have been in form of a reservation or keeping back of such tithes. It was much urged, that this defence did not stand merely on non-payment of tithes, (whence alone, perhaps, the Court would not have inferred a grant :) for besides the proof that these lands were once in possession of the lay impropriator, who might, therefore, have granted them free of tithe, it was also in proof, that a former impropriate rector (Cleveland) expressly disclaimed all right to tithe of these lands. Thus then stands the case for the defendant. No tithes having ever been paid, coupled with the declaration of Cleveland, the former impropriator, that they were tithe free, (which declaration was proved to have been made to the lessees of the tithes, at the time of their having been let,) and with corresponding exceptions of the tithes in the leases, while both plaintiff and defendant claimed their title, the one to the tithes and the other to the lands, from one and the same person, the Court are now bound to presume that the tithes had been conveyed with the land.

Cur. adv. vult.

20th May.—The Court now delivered their opinions, seriatim.

RICHARDS, Baron.—(Having stated the case, and observed, that the plaintiff, as impropriate rector, was *prima facie* entitled to all the tithes throughout the parish, which he had, in point of fact, received.)—If I understand the answer, of which I have some [344] doubt, the defendant contends, that he is entitled to an exemption from tithes : but he offers no evidence to support his right. Then, as to the seven acres, the defence most likely to excite the attention of the Court is a supposed grant of the tithes of that land to those under whom the defendant claims. The answer at first led me to believe, that the defendant intended to rely on an exemption founded on other grounds.

It does not appear when Sir John Packington first became entitled as impropriate rector. Whilst he was, he certainly might have granted the tithes. The seven acres in question were conveyed to him in the 2d Edw. VI., and that conveyance is in existence : but it is clear that he took no tithes by it. Then, as he took nothing but the land by that instrument, the grant of the tithes to him is quite consistent with it. There is no other ground for supposing that the tithes of the seven acres passed with the land, except that of non-payment. Now, prescription in non-decimando is no more a valid defence against a lay impropriator, than it is against an ecclesiastical rector. That is the law, and it can only be altered by the Legislature. Tithes are due to some one, unless a legal exemption be shewn, and non-payment does not give a legal right of exemption.

Then it is said that this defence is not bottomed in non-decimando, but on grant : but in that case the grant must be shewn, or some evidence given of its existence : and in an answer, consisting of several defences, it is not enough to say that some person [345] entitled to the land and tithe conveyed both, and that that is to be presumed

from non-payment. Such a defence, in reality, amounts to no more than non-decimando. What evidence would support such a defence, is not the question here, where there is no evidence at all. In all the cases (most of which are noticed in *Strutt v. Baker*) (4 Gw. 1430) there is strong evidence of the adverse claimants being in perception of the tithes, which would otherwise be due to the rector, and of their dealing with them as their own. Here there is no evidence of either one or the other. In other cases the perception has been of that sort which could not have been lawful without grant; but here the sole question is, whether non-payment is evidence of grant.

The case of *Nagle v. Edwards* (3 Austr. 702) was precisely the case now before the Court. In that case, from the short report in Anstruther, where the arguments are not given, we have not the benefit of what was said in that case, though many defences were set up. Mr. Hall relied principally on the presumption of a grant; but the Court decided unanimously in favour of the plaintiff, and on the same principles by which I am governed in the present case, which is under precisely the same circumstances.

The short sum and substance of the case is this: here is an improper rector who is *prima facie* entitled to tithes throughout the whole parish. Then there is a spot of land which has paid no tithes. The proprietor claims exemption as general owner. He [346] does not prove perception or usage; and all his defence amounts to non-render merely. There can be no doubt about the law on such a case, after the decision in the case of *The Corporation of Bury St. Edmunds v. Evans* (2 Gw. 757).

It is impossible to conceive, if the defendant or those under whom he claims had any such right as is contended for, that there should never have been any such exercise of it as would have shewn perception, or something tantamount. I am clearly of opinion, therefore, that the plaintiff, as improper rector, is entitled to tithe of these seven acres of land, unless some stronger defence be set up than mere non-payment.

As to the evidence of the lessees of these tithes, that Mr. Clieveland (a former impropiator) had told them that this land was tithe free, (which is brought forward to give this defence the appearance of not being merely non-decimando,) I must observe, it is most extraordinary that none of the instruments signed by Mr. Clieveland say one word of this; and I think, therefore, that such evidence, unsupported by those instruments, is too slight. But suppose Mr. Clieveland had said so, it might have been in ignorance, and the law would not allow him to give evidence to destroy his right; and I mistake this case, if any stress ought to be laid on such a declaration by him.

The lease from the Bishop of Dromore executed in 1801, excepting the land in question, is certainly [347] more decisive evidence than Mr. Clieveland's declaration; but it is impossible to think that the bishop meant by that exception to acknowledge that the lands were tithe free, or that the title to tithe was in some other person; for there might have been many good reasons for such an exception: such as a wish to take them into his own hands, or, in a case of doubt, not to involve his lessee; and it is not many years afterwards that he files this bill (1809). The conversation and lease therefore are as nothing in this case. (Having re-stated the point on which the question depended, and observed that the grant of the land, without more, was rather negative evidence against the supposed grant of the tithes, his Lordship concluded with saying,) I am of opinion, therefore, that in fact, and in law, this defence, in the absence of other evidence, is nothing more than a plea of non-decimando, and as such, not an answer to the plaintiff's claim.

Wood, Baron. I am sorry to be compelled to differ from the rest of the Court, as I do in the present case.

I freely admit, that if the cases of *The Corporation of Bury v. Evans*, and *Nagle v. Edwards*, be founded on the law of the land, I should have nothing to say. But it is those very decisions which I combat, and that because they are not founded on rational and legal principles. They hold a doctrine which would be productive of infinite mischief and injustice to every subject of this country, by depriving them of their rights, derived by succession, after long enjoyment by their ancestors.

[348] This question is, whether a grant, from persons capable of granting, shall not be presumed from the fact of long enjoyment; and it is on that general principle that I differ. If long usage be sufficient to raise such a presumption in all other cases, why not in the case of tithes. There I take my stand.

It is a most important question for the public, and particularly so to the landholders; and therefore, I shall take the liberty of entering into a review of all the cases, and expressing my decided dissent

The principal decision is that of *Nagle v. Edwards*, in 1796, and that is similar to the present; I may say, it is precisely the same case. There the Chief Baron Macdonald says, that "it is clear the defence of a grant to be presumed from non-payment of tithes, could never be set up in any shape against an ecclesiastical rector; and that whatever doubt there may at first have been on the point of a lay impropiator having the same advantage, three successive decisions upon it have fully established that there is no difference between a lay and ecclesiastical rector." On that I shall observe, that the difference is very great: for a spiritual rector could not alienate, and therefore it would be absurd to presume a grant against him; but that is not the case with a lay impropiator. The first case cited in support of the doctrine in *Nagle v. Edwards* is *Benson v. Olive* (Bunb. 284), but there was no grant set up there. The plaintiff's title was admitted. The defence was that the land was exempt, as being parcel of one of the greater [349] monasteries: and the Court decided, that the admission of the general right put the defendant upon proving his exemption; and could they decide otherwise? That case, therefore, does not apply to this, or to that of *Nagle v. Edwards*, for it does not decide that long non-payment of tithes will not justify presumption of a grant from the lay rector. The next is *Charlton v. Charlton* (2 Gw. 715.—Bunb. 325); and I do not deny what is the result of that case, that there cannot be a prescription in non-decimando set up against a lay rector, where the defence is so in form: as that "neither the defendant, or those under whom he claims, have ever paid any tithe, or modus, or composition." Here then the question is, whether this defence is in substance a prescription in non-decimando, for it is certainly not so in form. It is quite a different thing when long usage and enjoyment is set up as evidence, from which a grant is to be presumed, and which, as Lord Mansfield properly says*, may be evidence distinct from a grant. "There is (says his Lordship) a great difference between length of time, which operates as a bar to a claim, and that which is only used by way of evidence." The next, and most material case, is that of *The Corporation of Bury St. Edmunds and Wright v. Evans*, in 1739 (2 Gw. 757). In that case the defence appears to be put loosely: but, however that may be, the Lord Chief Baron says (page 766), "Where any man occupies lands, which came to the Crown by the dissolution of religious houses, by virtue of [350] the statute 31 Hen. VIII., or 32 Hen. VIII., it is manifest he may insist on a discharge by prescription; for," (he adds,) "the religious houses having been capable of a discharge by bull, order, or prescription, the patentees of any part of the possessions belonging to such houses, are enabled, by a special clause in the Acts, to enjoy the same as amply discharged from tithes as the ecclesiastical person did on the dissolution." Those are the principal cases on the subject of prescribing against a lay impropiator; but they have been followed by several others. It was considered law, in the case of *Lord Petre v. Blencoe* (in 1797) (h). There the defence was length of non-claim, the rectory having been in the hands of laymen. In giving judgment, Lord Chief Baron (Macdonald) says, "It is now established by many cases too firmly to be disputed, that mere non-payment is not, even among laymen, any answer to the demand of tithes. These determinations are perhaps to be lamented. I should have liked better to have found, in regard to tithes, the same principle of decision which regulates the title to every other lay-fee. If non-payment for any length of time forms no presumption of a grant of tithes, then the length of enjoyment, which in all other cases is the best possible title, serves only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased." That argument, against the doctrine [351] now laid down, is unanswerable, although the Chief Baron says afterwards, "But the cases prevent us from deciding on the ground of such a presumption."

Now certainly, if decisions, whether right or wrong, make law, these have done so; but I contend against them, as I have a right to do, because I hold a different opinion. Judges can not legislate, nor have their judgments the force of law, and if

* In the case of *The Mayor of Hull v. Horner*, Cowper, 108.

(h) 3 Anstr. 945.—4 Gw. 1484. This case was decided in 1797, subsequent to all the other cases in the books, except *Berney v. Harvey*, 17 Ves. 119, in 1810.

doubtful, they should be examined to the bottom, that it may be seen whether they are founded in justice and the law.

In the case of *Jennings v. Letts* (3 Gw. 952), Lord Chief Baron Parker has certainly carried this doctrine of non-presumption a great way: he says (page 957), "The instrument or deed of exemption, or alienation or discharge, ought to be produced. But then it is objected, shall a man be liable to pay tithes, if he loses his deed of discharge or alienation, so as not to be able to give any legal evidence of it? I am afraid he will." But in the case of *Fanshawe v. Rotherham* (3 Gw. 1179), it is said by Lord Keeper Henley, who also holds it to be necessary to produce the deed of exemption, "I would not be understood as if a judge would in all cases expect the production of the very deed or grant of exemption, but the best evidence the nature of the case will admit." And that is [352] certainly the true rule of law. He then decides that case in favour of the prescription.

Then it is said, that there is no evidence that a grant ever did exist. It may be impossible to give such evidence in very many instances, for deeds will perish, and witnesses cannot be kept alive for three or four hundred years: and it would be monstrous to say, that the proof of the existence of such deeds shall not be supplied by evidence of long usage and enjoyment.

I shall now proceed to shew how far the Courts of Law have gone in presuming grants, which they have done from the earliest times:

In the case of *Crimes v. Smith*, in 30th Elizabeth (12 Co. p. 4), where the validity of the impropriation was questioned because a vicarage had never been endowed, according to the condition of the original grant, (and that appeared from the grant itself) it was held, that it should be presumed that the vicarage, in respect of continuance, was lawfully endowed; and the Court said, "It would be a dangerous precedent to examine the originals of impropriations of parsonages, and the endowments of vicarages, for that the originals of them in time will perish." So that here we are told we may presume every thing from continuance, and why not a grant of tithes. In *Belle v. Beard* (ib. p. 5), also, objections being taken to the title to an advowson, it was resolved, that in respect of the [353] ancient and continued possession, it should be intended that there was a lawful grant of the King in fee, and that all had been done which might make the ancient impropriation good, and that because (as it was said) records, letters patent and other writings consume, or are lost or embezzled: for otherwise ancient and long possession would hurt the title of the owners of the rectory. There it might have been objected, that the Crown's grant, being matter of record, could not be prescribed for; and if you may prescribe against the Crown itself, why not against the grantees of the Crown? The principles of those cases are equally applicable to the case now before us. — (His Lordship then took a minute view of the cases of *The King v. Carpenter* (2 Shower, 47)

The Mayor of Hull v. Horner (Cowper, 102) *Pouch v. Millbank* (1 T. R. 399, Cowp. 103) *Oswald v. Skinner* (4 Gw. 1513) in which last Lord Kenyon said he must tell the jury, that from a possession of two centuries and a half they might presume any conveyance from the dean and chapter: and he was of opinion that the tithes did pass, although there were no words of conveyance of the tithes — and *Lady Dartmouth v. Roberts* (16 East, 331), as having established the principle of long usage and enjoyment being presumptive evidence of grant.)

There is another case which I consider very important. It is that of *Read v. Brookman* (3 T. R. 151), where [354] the question was on demurrer, whether a deed might be pleaded as lost and destroyed by time and accident, instead of with profert, which had always been considered indispensable. It was at that time, therefore, thought to be an insuperable difficulty, and the Court gave the question great attention: when seeing how much it would militate against reason and justice, if not allowed, they admitted it on a principle of necessity, contrary to the rule and acknowledged practice. If then, in favour of reason and justice, the rules of the other Courts are made to bend to necessity, why should this Court alone persist in an exemption in favour of tithes, against the common right of the land-owner. That this doctrine of the Court of Exchequer has not given satisfaction in the other Courts of Westminster Hall, may be inferred from what was said by Lord Mansfield, in the case of *Franklin v. Holmes* (3 Gw. 1229), wherein his lordship declared, that he was not satisfied with the doctrine, that a composition real could not be proved by presuming a grant before the 13th Eliz.; and, for that reason alone, made the rule for a new trial absolute.

So also in the case of *Rose v. Calland* (5 Ves. 186; and 4 Gw. 1622), the Lord Chancellor Loughborough expressed himself dissatisfied with this doctrine of the Court of Exchequer, of non-presumption of grant against a lay impropriator. There remains one other case, which was before this Court in 1743, only four years after [355] the case of *The Corporation of Bury v. Evans*, and is reported in Gwillim, that is *Fanshaw v. More* (2 Gw. 780). It appears that no judgment was then given; and I cite it merely for the strong opinion expressed against this doctrine by Baron Clarke. The Lord Chief Baron, indeed, says there, that "A grant is not to be presumed because it is against the canons." What that means I do not know. He adds, "that such doctrine is not inconvenient, for 'grants of tithes may be preserved by enrolment.'" But will enrolment preserve them against fire, or from being taken away? He also says, "An Act of Parliament was attempted to remedy this, by Sir George Heathcote, about fifteen years before, which miscarried." I hope, if another Act of Parliament should be thought necessary, that it will not again miscarry. Baron Carter was of the same opinion, it is said, citing *Benson v. Oliver*, which I have already shewn has nothing to do with the question; Baron Reynolds doubted; but Baron Clarke thought it a most important question to be reconsidered, and he says, that "though the authorities against such a prescription are very great, yet the reason of them grows weaker every day." That is, as the period of the reformation becomes more distant. He adds, that no care can always preserve grants, and expresses himself altogether dissatisfied with the doctrine, because the reason of the thing is strong against the authorities; and that, "although authorities ought in general to prevail, for convenience and the security of property, yet, in this particular case, those [356] objects would be more promoted by overturning than pursuing these resolutions, which have been of real disservice to the clergy, by encouraging them in bringing bills, on the bare chance of the defendant's failing to support his title to exemption." On all these grounds, I am of opinion that in this case a grant from the lay impropriator ought to be presumed.

There is also another objection, for it appears to me, that this is a case wherein the plaintiff's right is barred by the statute of limitations, 32 Hen. VIII. c. 2, sec. 7, whereby impropriations are put on the same footing in the temporal Courts with other inheritances. In 1st Institutes, vol. i. lib. 2, c. 12, 159 a. Sir Edward Coke says, that "tithes or other ecclesiastical duties, that came to the Crown, by the statute of 27 Hen. VIII., 31 Hen. VIII., 37 Hen. VIII., and 1st Edw. VI., are by those statutes, and this of 32 Hen. VIII., and of 1st and 2d P. and M., in the hands of laymen, temporal inheritances, and shall be accounted assets, and husbands shall be tenants by the courtesies, and wives endowed of them, and shall have other incidents belonging to temporal inheritances." They are therefore barred and bound by the statute of limitations, as other tenements or hereditaments are. The words of the Act are, "where any person entitled to any interest in tithes, &c. shall hereafter fortune to be disseised, deforc'd, wrong'd, or otherwise kept, or put from (those words are applicable to retainer,) "their lawful inheritance, estate, seizin, possession, occupation, term, right, [357] or interest, of in or to any parcel thereof (that is, any part of the impropriate rectory,) by any other person pretending to have interest or title in or to the same." Now these tithes are sued for as parcel of the impropriate rectory, from which the impropriator has been kept, and retainer is possession, within the meaning of the Act, as much as if there had been actual pernaney. Tithes are not casual profits, but annually renewing and increasing; and, if they are withheld, the amount can be ascertained. It is a common thing to buy tithes of the impropriator, to go with the land, and then the land becomes tithe free, and nothing more is heard of the tithes. I think, therefore, that this is a case to which the statute of limitations applies; and if the plaintiff's legal right be barred by it, he can have no remedy in Equity.

These are the observations which have occurred to me on the general doctrine of the case. I will now consider the particular circumstances. Presumption of a grant would not be justified by mere non-payment of tithes; but it is carried further in this case. It appears the prior's lands were subject to tithes at the dissolution, for this was one of the lesser monasteries. They were afterwards conveyed to Sir John Packington, and in that conveyance they were said to be subject to the payment of tithes. He may fairly be said to be at that time impropriator; although it does not appear when he became entitled to the rectory. These lands were afterwards conveyed away by persons claiming under Sir John Packington, to persons under whom

the defendant [358] claims; and what is there to raise the presumption that the tithes were not conveyed with the land? Then three leases are produced of this inappropriate rectory; and one must suppose, that the lessees would have taken the tithes of these lands if their leases had authorized it, yet there is no evidence that they ever did. In addition to all this, there is in the declaration of Mr. Cleveland, who was at one time an impropiator of this rectory, that these lands were tithe-free; meaning clearly, that they were not liable to pay tithes, and not as being merely exempt from belonging to the abbey. Then, in some of the plaintiff's own leases of the tithes of this rectory, he makes an express exception of these lands. This case then does not stand solely on mere non-payment of tithes, and is therefore much stronger than that of *Nagle v. Edwards*, where there was no evidence of the lands claiming exemption ever having been united to the inappropriate rectory, and here we have at least sufficient evidence to presume it. On the ground, therefore, of there being evidence to other points in this particular case, which strengthens the prescription, as well as on the general principles, I think there should be a decree for the defendant, unless the rector asks an issue.

GRAHAM, Baron. My mind had been long in suspense on this case, but on very different grounds; and my opinion does not make it necessary for me to disturb the manes of the learned and venerable judges who have formerly sate in this Court. The inclination of my mind is with the decisions which have been pronounced, as I think, with great propriety, on the cases that have been so often considered by the Court. I shall not go further back than the case of *Bury St. Edmunds v. Evans*, wherein all the former authorities were reviewed. There is a slight, but not very material difference, in the report of that case in Gwillim and in Wood. The defence set up there was precisely the same as here, and the arguments now used by my brother Wood, were then brought forward in support of it. The Court, in that case, held that lay impropiators were on the same footing with ecclesiastical rectors: the statute had given them the same remedy in the Spiritual Courts; and in many cases they sustain the same characters. The Lord Chief Baron Comyns, therefore, treats such a plea as hardly deserving notice. And surely no man in his senses would plead non decimando beyond living memory in that form, when he might, by shewing usage for a number of years, set up thereon a presumed grant: but that cannot be done, for it is in all cases necessary to shew some traces of a grant, to support such a presumption. In the case of *Jennings v. Lettis* (4 Gw. 952) there was the same plea; and Lord Chief Baron Parker, towards the conclusion of his judgment, says, that a grant cannot be presumed unless some deed be produced; meaning that some reason should be given for its non-production, or some traces of its existence shewn. But then we are referred to the case of *Fanshawe v. Rotherham* (4 Gw. 1177), as if Lord Keeper Henley had differed from Lord Chief Baron Parker. That must have been a very different case from the other; and although it does not appear in [360] what character, or under what title, the rector sued, the defendant might have been entitled to tithes in perannuity; for the term possessed is ambiguous. The Lord Keeper does indeed intimate a doubt, as to the reason of the rule of there being no prescription in non decimando against a lay impropiator, but he expressly holds himself bound by the decisions; and the authority of that case is in general against pleas which have the effect of non decimando, and is consistent with the law of this Court. And as Lord Keeper Henley felt that the doctrine of disallowing the plea of non decimando was well established, he must also have perceived the absurdity of admitting it, in substance, under a mere change of form. As to what was said in that case of the necessity of producing the grant on setting up such a defence, this Court does not require that the deed of exemption should be actually produced; but there must be evidence of the former existence of such a deed, and some reason shewn, from loss or otherwise, why it cannot be produced.

In the case of *Scott v. Arrey* (4 Gw. 1174), the distinction was taken between the perannuity of tithes and mere non payment. So also, in the case of *Urendon v. Skinner*, the tithes never had formed part of the rectory. Those cases, therefore, do not militate with the rule, that the defence of a presumption of grant from the impropiator, cannot be supported by simple non-payment of tithes. It certainly struck me at first, that the plaintiff had stated his title too generally; but that statement is so clearly borne out [361] by evidence of perannuity, that the defendant is called on for an answer.

Then what answer has he given? I had originally thought, with my brother Richards, that the defence was, that these lands were tithe-free, on the notion that they were privileged lands: but finding that such a defence must be unavailable, the defendant's counsel have taken a different course.

It is not proved when the rectory was granted: but in the 24th Hen. VIII., the site of the house of the Austin Friars, which was seven acres and a half, the lands now in question, was granted to Pye and Brown. There is no mention made in that grant of tithes, and they appear to have belonged at that time to an ecclesiastical body, and therefore could not then have been granted by the Crown. In the 2d of Edw. VI. this land was by them conveyed, by the same description, to Sir John Packington; but there also, there is no trace of the tithes being granted, although that is the ground on which the presumption is to rest. In the 4th Edw. VI. there was some doubt of the validity of the grant, and the grantees were called on, by *scire facias*, to shew their title; when these lands were found to have been conveyed to the Littleton family; but still nothing is said of tithes. There is not, therefore, any unity of possession proved: and if we were to send this case to a Jury, under these circumstances, on the ground of a presumption of a grant of the tithes, we should, by so doing, strongly prejudice their minds in favour of the defendant. There is [362] not a single document or other evidence produced, to shew that the tithes were ever considered to belong to the defendant, and it rests entirely on non-payment; and although non-payment might, in some circumstances, be made by evidence to resemble perjury, in this case nothing like it has been shewn; for the supposed disclaimer of the impropiator, and the exception in the leases, amount to nothing, as there are various ways of accounting for such circumstances. I think there is no occasion, therefore, for any further inquiry.

THOMSON, Chief Baron. The only question remaining is, as to the tithes of the Friars lands; and it is, whether non-payment, supported by the circumstances of this case, is sufficient ground for inferring a grant of the tithes from some former impropiator to some former owner.

Undoubtedly, if such a grant had existed, the defence would not have been a prescription in *non-decimando*; but still the question will be, what is to be considered sufficient evidence of such grant. Mere non-payment would clearly not be such evidence. Retainer alone, amounts to nothing more than *non-decimando*.

The cases which are to be found on this subject ought not, certainly, to be lightly treated: they were decided by very able men; and having often come under the consideration of the Court, they have always been held to be law. Though some Judges elsewhere may have expressed a disapprobation of those cases, [363] yet I am not aware of any counter decision ever having been made, and until they are overturned by the highest authority, they must be the law of this and every other Court; for I know of no distinction between the law of one Court in Westminster Hall and another, as it regards questions of tithes. The Lord Chancellor would not compel a purchaser to take a title, against the case of *Nagle v. Edwards* (c); and Lord Northington has also adhered to that decision. And, in *Rotherham v. Fenshaw*, it is decidedly settled that there can be no presumption against a lay, more than an ecclesiastical rector. We do not, however, say that it is in all such cases necessary to produce the grant: but it must be shewn that such a grant did exist, by other evidence than mere non-payment. It is analogous with the case of composition real (d), where the Court always expect evidence of a deed having existed to be given.

I remember, in a case which was argued when I was at the bar, the Court refused to grant an issue, on the question of whether the long payment of a sum of money, which had been originally stated to have been paid as a *modus*, was not, in fact, such an usage as was evidence of a composition real, but sent them down on the *modus*. That was the case of *Smith v. Goddard*.

Now what is the evidence of usage here, to infer that any such deed ever existed. It is not shewn [364] that Sir John Packington ever conveyed the tithes of these lands or at what precise period he himself had them.

The defendants to the Crown process pleaded a title by conveyance of the land, without one word about the tithes; and the inquiry would certainly have extended

(c) *Rose v. Calland*, Gw. 1622.

(d) Vide *Chatfield v. Figer*, ante, vol. i. 234.

to the tithes, if they had had them : for so far from neglecting that object, the Crown called on the defendants, by the same record, to account for their possessing other lands in another county (Shropshire), and for the tithes of those lands also ; and if they had had both, therefore, in this case, it is probable that they would have been called on to defend both.

As to the authorities which have been cited where the doctrine of presumption has obtained, I make this observation. In all those cases the defence was an actual enjoyment of tithes, and not a mere retainer. In the case of *The Mayor of Kingston upon-Hull v. Horner*, although the plaintiffs were not a corporation by prescription, a grant of tolls was presumed. But that was a case, the object of which was to support a claim of right, on the ground of long enjoyment. It is the same thing also in cases of right of way, defending the possession of the thing possessed, and referring, in support of it, to the evidence of long enjoyment. So it was in *Scott v. Airey*, which is distinguishable from all the cases of non-decimando, because the defendant was in actual perception of the tithes, and they had been made the subject of family settlements, and had been received in specie. Then in the case of *Orendon v. Skinner* (Gw. 1513), Lord Kenyon (having the abstract of the title, and the opinions which had been given on both sides, before him,) takes the same distinction. It is true, he says, the title cannot be disturbed, "because the portion of tithes had been severed from the rectory ever since the conquest ;" but, he adds, "if these tithes had been part of the rectorial tithes, no time would have barred the rector."

In the case of *Jennings v. Lettis* (Gw. 959), which has been alluded to, a very elaborate judgment was delivered. There the land for which the exemption was claimed, and the inappropriate rectory, had been once in the same hands ; but it was held, that without some evidence of a grant, it could not be allowed to be presumed. The Lord Chief Baron says, "The non-payment of these tithes to the plaintiff, and those under whom he claims, is to raise a presumption in favour of the defendant ; and granting by family settlements, and levying fines, and suffering recoveries of them, is to strengthen that presumption. But still the defendant's case rests upon presumption, and will not give his landlord any title to the tithes ; and, turn this case in your thoughts as much as you please, it will come to no more than a non-decimando ;" and so I say here.

As an allusion has been made to an opinion said to be expressed by the Lord Chancellor, in disapprobation of the cases decided in this Court, I will [366] cite the case of *Berney v. Hursey* (17 Ves. 119), which is probably the latest case on the subject. The defence there was, a retainer of the tithes by the occupiers, for more than sixty years before the death of the plaintiff's predecessor ; and that time was probably fixed on in allusion to some statute of limitations. The Lord Chancellor, in his judgment, adopts the universal distinction of actual peramancy and mere retainer, and considers that the latter case is not a subject to be decided by a Court of Law, unless coupled with a colour of title.—(His Lordship read the judgment reported to have been delivered in that case ;—The final result of the Lord Chancellor's opinion seems to be, that notwithstanding the doctrine had on some occasions been brought into question, he could not rashly depart from, or disturb it ; and therefore decreed the amount of tithes : and so do I, most heartily, on the present occasion. Nor can the decided cases now be departed from, without destroying every thing like certainty in the law of tithes.

Then, with regard to the question on the statute of limitations. I have never before heard of any case wherein that statute was applied as a bar to a bill in this Court, or that it was more applicable in the instance of a lay than an ecclesiastical rector. It is clear to me that the statute 32 Hen. VIII. ch. 2, proceeds wholly on the ground of disseisin, and does not extend to mere withholding or refusal to pay tithes. The eighth section is quite conclusive on that point. It gives parties, labouring under certain incapacities [367] to prosecute their rights at the time of passing the Act, the same advantages for six years after the removal of such incapacities, which they might have had before the making of it. Now it is clear that there was at that time no remedy, by suits of such description, as a common law right, for the recovery of tithes, such remedies having been given by the subsequent statutes of the 32 Hen. VIII. ch. 7, and 2d and 3d Edw. VI. ch. 13 ; but those statutes have nothing to do with suits here. There must therefore be a decree for an account of these tithes, as prayed, with costs.

RICHARDS, Baron, here took occasion to observe, that the opinion said to have been expressed by Lord Loughborough, in *Rose v. Calland*, must have been altogether extrajudicial: for that it was impossible that any such question could legitimately have arisen in that case. There could have been no fair inquiry before the Master whether the land was tithe free, because the person claiming the tithes was not before the Court, for he was not a party to the record.

[368] THE KING (IN AID OF HUGHES) *v.* WILTON. Wednesday, 22d May. Friday, 26th January 1816. —A debt due to the Crown for duties payable in respect of post horses, income tax, stage coaches, and assessed taxes, is not a debt of such a nature as will entitle the Crown's debtor to an extent in aid, against his own debtor.—Nor will a Baron (semble) if aware of the nature of such a debt, grant a fiat; or, if by inadvertence he should, the Court will set it aside in a subsequent stage, quia improvide emanavit, without requiring the defendant to plead.

Abbott moved for a rule to shew cause why two extents, which had been issued by Hughes against the defendant, should not be set aside for irregularity, and that he should pay the costs of the application.

The objection on which the motion was founded was, that under the circumstances which appeared on the face of the affidavits, on which the commissions had issued, the prosecutor was not in a condition to call for the extraordinary aid of the prerogative process: for that none of the debts which he had sworn to be due from him to the Crown, were of that nature which would entitle him to an extent in aid.

Those affidavits were in substance as follows:

The first of them stated, that the deponent (the prosecutor of the extent, describing himself to be an hotel-keeper at Cheltenham,) was indebted to the Crown in the sum of 75l.; viz. 20l. part thereof, for the duties payable by him in respect of post horses, between the 14th October then last, and the 4th of the then instant November: 25l. for the tax payable in respect of property, commonly called the income tax, from Lady-day to Michaelmas then last: and 30l. for duties payable in respect of stage [369] coaches, from the 19th June to the 30th October then last. It then stated that the defendant was indebted to the deponent in the sum of 75l. for money lent in May then last, and that he (deponent) had received no security or satisfaction therefore, except the bills and acceptances of the said defendant, which were then over-due, and unpaid.

The other affidavit stated, that the defendant was indebted to the Crown in the sum of 52l. 13s. 4d.; viz. 5l. 4s. for the duties payable by him in respect of post horses, between the 5th and 12th November then instant; 13l. for certain assessed taxes, payable at Michaelmas then last: and 34l. 9s. 4d. for duties payable by him in respect of stage coaches, from 4th October to 12th November. And that the defendant was indebted to him in 49l. for money lent and advanced, and for rent and chaise-hire; with the usual allegations of insolvency, &c. &c.

It was now submitted, that if an extent were to be allowed in such cases as the present, it would always be resorted to, instead of using any other process: for there is scarcely a man in the kingdom who would not be in a condition to obtain the advantage of an extent if this were well founded: but it was insisted, that it never could have been intended by the Legislature to apply it in aid of such debtors.

[Wood, Baron, observed that if he had been aware of the nature of the debt when the fiat was applied for, he would not have granted it.]

[370] Dauncey, rising to shew cause, on the 9th February, was stopped by the Court, who ordered it to stand over till the Crown officers had been served with the rule, which was therefore enlarged till the next term.

Tuesday, 7th May.—The Solicitor General now attended on the part of the Crown, and disclaimed any desire, as far as the revenue was concerned, to support the extent in the present instance. He stated that it was the object of the Crown officers, that the prerogative process should be supported in all cases where it was employed for the benefit of the public service; and that it was equally their object that it should not be abused, by being perverted to private purposes alone. And he submitted, that the Crown, through the medium of this Court, possessed, and might exercise, a controlling power over that process with which the Crown was armed for

the protection of the public interest. The statute of 33 Hen. VIII. ch. 39, sec. 55^{*}, has given to this Court a discretionary jurisdiction in the case of process awarded for the recovery of the King's debts. Subsequent to that statute, this Court has been from [371] time to time in the exercise of that discretion so given them, and has established certain rules and orders, for the purpose of regulating the mode of proceeding in such cases, and of checking abuses. The Court therefore may enquire, in all cases, whether the party suing an extent is in a situation to entitle himself to the Crown process: and where he is not, they have power to set it aside. If the sanction of the Crown officers were necessary to an extent in aid, it would certainly not in the present instance have been granted.

Danneey, in support of the extent, contended, that it was not in the discretion of the Court to say, that a debtor to the Crown (having put his debt on record,) should not have an extent in aid. According to the argument of the Solicitor General, this is made a most important question: for it goes the length of saying, that a simple contract debtor is in no case entitled to an extent in aid without the sanction of the officers of the Crown. It has always been considered at the bar, and allowed by the bench, that a bona fide debtor of the Crown has a right to put his debt on record, by means of procuring an extent against himself, and he then becomes entitled of common right, to an extent in aid against his debtor: and there has never been an instance of a Baron refusing, in his discretion, to grant a fiat under such circumstances (*a*).

[Graham, Baron. I do not agree to that pro-[372]-position. A Baron is entitled to exercise a discretion by the express words of the statute, and I think this is the sort of case wherein he ought to use it; for it is at least a novel proceeding for a debtor of the Crown thus to gain an advantage by this proceeding, merely in consequence of his own personal default.]

When the simple contract debt has been once put on record, there is no difference between such a debt and a debt by bond, except as affecting the lands of the debtor; and whatever alteration it may hereafter be thought expedient to make in the law in that respect, by the Legislature, the Court is at present bound by what has always been the constant and uniform practice. It is impossible that the Court should be expected, if they had the power, to discriminate between the various descriptions of simple contract debts, and to say which shall entitle the debtor to the Crown process, and which shall not.

These are traversable proceedings, and whatever can be urged against them may and ought to be pleaded; but the present attempt is to set aside the extent altogether, on motion, on the ground that a sufficient debt is not owing by the prosecutor to the Crown, which can only be ascertained by the result of a traverse.

It has been said, that the sanction of the law officers of the Crown should be in all cases necessary to the issuing of an extent; but, however that [373] may be matter of consideration in future times, it is certainly not at present necessary, although it has been sometimes recommended by the Court.

Peake, in support of the rule, submitted, that the defendant had been advised to seek the present object by motion, to avoid the ruinous expense which must necessarily attend the more formal course of pleading to the extent: for the Crown being the party, though only nominally, the defendant would not be entitled to costs; and that is a strong reason why the Court should be cautious of issuing such extents in the first instance.

This is obviously a mere experiment. An extent has never before been issued under such circumstances, and for such debts; and that alone is a signal proof, that it is by the course of the Court impracticable.

The statute of 33 Hen. VIII. is confined to specialties and debts of record.

[Graham, Baron. The Court have always construed that statute as comprehending simple contract debts.]

And every such several suit and suits (for any debt or duties growing due in the several offices and courts of the King's Exchequer, &c.) shall be made in every of the said several offices and courts, under the several seals of the said several courts, by capias, extendi facias, subpoena attachments, and proclamations of allegiance, if need shall require, or any of them, or otherwise, as unto the said several Courts shall be thought by their discretions expedient for the speedy recovery of the King's debts.

(a) *Ree v. Blatchford*, Anstr. 165, 166.

Then a material distinction arises between such debts as are due to the Crown from persons especially entrusted by the Crown in some official character, or otherwise where confidence is reposed, (as in the case of those who become debtors to the King by having possession of money due to the Crown [374] from third persons,) and such debts as are due from private subjects who have no intercourse with the Crown, nor are entrusted in any other way than by being suffered to become so indebted on their own account. The former ought, for the protection of himself and the public, to have the privilege of making himself a debtor on record, for the purpose of obtaining an extent in aid: the latter ought not, unless the officers of the Crown had first proceeded against them, and then only because it would be really an extent by and for the benefit of the Crown.

The Solicitor General, in reply, insisted that this process being one which was exclusively instituted for the benefit of the Crown, and was sued out at the suit of the King, and in the name of the King, the officers of the Crown ought to be invested with a control over it in any stage of the proceeding, and might abandon the prosecution of the suit at any time, as they might a public indictment or information, which cannot be proceeded in after a *nolle prosequi* by the Attorney General, even though it should be corruptly obtained.

The proceedings in the present instance, if well founded, would create a perfect anomaly in the law, establishing that any one who should be, by any means, indebted to the Crown, in however small a sum, might procure an extent to be issued against himself, which would entitle him to an extent in aid, and give him a priority as to all the other creditors of his debtor: and, it is said, he would be entitled to that advantage of common [375] right, and independently of the Crown or the Crown officers. The case of *The King v. Blotchford*, which has been cited, does not decide any thing which would go to establish such a doctrine: and there may have been many particular circumstances in that case which might have influenced the decision, even as far as it goes, of which we are not informed by the report. That case, however, is also an authority to shew that the Court exercises a control in matters of extent, as it notices that rules had been made with regard to the issuing the process, without observing which, it could not have been granted. The foundation of all the rules which were made in Hilary Term 15 Ch. I. was expressly to prevent the abuses which had become prevalent. Such restraints, therefore, having been from time to time put on this process, in the hands of Crown debtors, sufficiently proves that the right to use it is not a common right of the subject. Those rules were followed by one in Michaelmas Term. 3d William and Mary, whereby the Court ordered, that no extent should issue on bonds to the Crown, before one of the Barons of the Court should have been attended with the bond. Such a rule has the effect of precluding the party to the bond from suing out an extent, without the consent of the officer of the revenue department, in whose custody the bond is kept.

The Crown, therefore, through the medium of this Court, has a power of withholding the extent, [376] and of saying in what particular cases only, it shall be issued, and the subject has not the indefeasible right which it has been urged that he has, of using the Crown process without the consent of the Crown, and even against the interest of the Crown. If the subject really had such a right, he might, by electing to proceed against himself by extent, often deprive the Crown, (which cannot have two remedies at once,) of a more summary course. For instance, in the case of taxes, the act gives the collector a speedy method of proceeding by distress; but if an extent has been issued, that remedy is thereby defeated. The right, therefore, must be taken to exist, with this qualification, that the Crown consents to let its debtor use its process, or at least that it does not dissent.

The doctrine of a common general right being thus disposed of, the next question is, as to the species of debt which must be due from the party prosecuting the extent, to entitle him to the process. It is not every *bonâ fide* simple contract debtor to the Crown who is entitled to it. The substance of the argument on this part of the case was, that the debt must be such a one as bespeaks a trust on the part of the Crown, and a responsibility on the part of the debtor; whereas here there is no such thing. It is a mere common debt, for common taxes, for the recovery of which a peculiar

* Vide *Rex v. Sly*, ante, p. 164.

mode of proceeding is pointed out by the statute, which the debtor ought not to be permitted to supersede by causing an extent to issue against himself.

Cur. adv. vult.

[377] THOMSON, Chief Baron, having recapitulated the material points of the case, and stated the objections which had been taken to this extent, now gave judgment as follows :

We can find no instance of an extent having ever been issued, founded on debts of such a nature as those on which this writ has been obtained, after a diligent search having been made in the office by our direction, for precedents ; and the prodigious inconvenience which would follow, from permitting this process to be issued by persons indebted to the Crown in the way in which this person is, so as to give such debtors to the Crown an undue preference, inclines us to be of opinion, that the present case is not one in which we ought to permit the Crown process to be used.

This is not the case of a person indebted to the Crown under circumstances which form the usual foundation of extents in aid ; but the only ground in this instance, is an ordinary debt due to the Crown, of small amount, arising from certain current duties being unpaid. So that, if this were permitted, almost any person whatever who should be in any manner indebted to the Crown, (as almost every individual is at all times, for taxes of some description,) and that to the smallest amount, would be entitled to the benefit of this extraordinary proceeding ; and in cases of insolvency would gain a priority over the other creditors of the debtor, for any debt, however large, though their own debt to the Crown should not exceed four or five pounds.

[378] To give an instance of an extreme case, every beneficed clergyman would be entitled to this process at any time against his debtor, because the beneficed clergy are at all times of the year indebted to the Crown, in respect of their tenths, though not amounting perhaps to more than forty shillings a year in the whole. Such a doctrine could not but be pregnant with the most mischievous consequences.

It was urged, that the ground of this motion is properly the subject-matter of plea, and not of a summary application to set aside the extent ; but I cannot see how it could be pleaded, because the debt on which the extent is founded could not be traversed by the defendant, as no doubt Hughes was indebted to the Crown at the time of issuing the extent, in the manner stated in the affidavit.

The question now before the Court is, whether, being so indebted, the prosecutor had thereby become entitled to sue out an extent for the purpose of recovering his own debt from the defendant. We are clearly of opinion that he was not so entitled ; and therefore we think, that this extent should be superseded, quia improvide emanavit.

Rule made absolute.

[379] EX PARTE HIPPLESLEY. Wednesday, 22d May 1816. — The allegation, required to be made in the affidavit to found an extent in aid, “that the debt has not been sued for in any other Court,” cannot be dispensed with ; nor can the Crown’s accountant be permitted to abandon another mode of proceeding, previously elected by him for the recovery of his debt, for the purpose of enabling him to make that allegation. — The Crown’s debtor cannot have a *diem clausit extremum* in aid after the death of his debtor, against the estate, unless the debt have been found in the life-time of the deceased.

Damney applied to the Court for a writ of *diem clausit extremum*, on a special affidavit framed to meet the particular circumstances of the applicant’s case. Sheppard was indebted at the time of his death to Hipplesey, upon simple contract ; and administration having been granted to another creditor of Sheppard’s in the same degree, that creditor had thereby obtained the advantage of an administrator’s privilege of retainer. Hipplesey then filed a bill for relief by means of the interposition of a Court of Equity ; but having been afterwards advised that he might have sued an extent, (*diem clausit extremum*,) by reason of his having given a bond to the Crown as a maltster, he abandoned his suit in Equity for the sake of that object.

The difficulty then arose on the practicability of his making the usual affidavit, with the necessary allegation, that the debt had not been sued for in any other

Court: and in consequence of that difficulty, the present motion was made in open Court, on an affidavit detailing all the facts at length, in addition to the usual statements, with an allegation, that the suit which had been commenced in the Court of Equity had been since abandoned: when

The Court held, that the applicant could not [380] be permitted, after having made his election to proceed in another manner, to abandon that proceeding for the purpose of the present object, and that the allegation could not be dispensed with, or even so modified as was now proposed.

THOMSON, Chief Baron. It is quite impossible that we can grant this application.

There is another ground of objection: a *diem clausit extremum* may certainly issue at the instance of the Crown, against the estate of its debtor in a proper case, but never in aid, unless the debt has been found in the life-time of the debtor. The case in *Parker (a)* is decisive on that point*.

Motion refused.

[381] THE ATTORNEY GENERAL v. POUGETT. (Demurrer) Wednesday, 22d May 1816.—Unless a vessel has proceeded out of the limits of the port with her cargo, it is not such an exportation of the goods as will protect the cargo from duties subsequently imposed on the exportation of goods of the same nature, although she is not only freighted and afloat, but has gone through all the formalities of clearing, &c. at the custom house, and has paid the exportation duties. And all such new imposts as are laid on such goods attach while the vessel is water-borne within any part of the port.—An Act of Parliament made to correct an error by omission in a former statute of the same session, has relation back to the time when the first Act was passed.

Scire facias, tested 12th November, (54th of the King) on bond to the Crown dated 4th May, 53 Geo. III., for 1090l., reciting an order of the Treasury of the 1st May 1813, permitting certain vessels to depart with hides shipped previous to the passing of the Act of Parliament of the 15th April then last, imposing new duties on hides, upon security being given for the payment of the said duties, if the said hides, so shipped as aforesaid, were liable thereto: and that the defendant had shipped on board one of such vessels (the “*Henrietta Nicholls*,”) for Ostend, 4540 hides, weighing 130,544 pounds: conditioned that the defendant or his surety should, on demand, pay to the collector inwards of the customs at the port of London, all and every the duties of customs so imposed by the said Act of Parliament, if liable thereto.

Plea, that the said hides, so shipped, &c. for exportation, were not, nor were any of them liable to the duties imposed by the said Act, as in the said condition mentioned.

Replication, *precludi non*, because the defendant, before the making of the said writing obligatory, and before the suing out of the said writ of scire facias, shipped and put on board the said vessel, to [382] be exported to Ostend, beyond the seas, (the same being a place under the dominion of the person exercising the power of sovereignty in France,) divers large quantities, to wit, 4540 foreign hides in the hair, not tanned, tawed, curried, or otherwise dressed, weighing 130,544 pounds, to wit, on the 25th March 1813, at, &c.: and that the same hides then and there continued so shipped on board the same vessel, in the same port, and not exported from and out of this kingdom, until after the passing of the said Act of Parliament in the said condition mentioned: and that the same hides were before the suing out of the said writ of scire facias, to wit, on the 6th May 1813, at, &c. exported from and out of this kingdom in the said vessel. And that, by virtue of the said Act of Parliament, in the said condition mentioned, and of another Act of Parliament of the 53d Geo. III. made and passed, amongst other things, to explain and amend the said last mentioned

(a) *Rex v. The Estate of Henry Boon, Deceased*, p. 19.

* There arises, perhaps, another objection to the application, from the necessity of the allegation of some act of insolvency, which would be often difficult after the debtor's decease.

Act, the same goods became liable to the payment of certain duties of customs to the amount of 545l. ; and that some were then and still are wholly unpaid

Rejoinder,—That although the said hides in the said condition and replication mentioned, were shipped and put on board the said vessel, in the said port of London, to be transported to Ostend, and so continued, &c. until after the passing of the said Act ; and although, before the issuing of the said writ, said vessel departed with said hides to Ostend, yet the said hides, and every of them, were so shipped and put on board the said vessel long before [383] the passing of either of the said Acts of Parliament, in the said replication mentioned :—and that long before the passing of either of the said Acts, to wit, on the 22d March 1813, the said vessel was duly entered outwards for Ostend aforesaid, at the custom-house.—And that, before the passing, &c. to wit, on 25th March 1813, the said hides were duly entered and cleared at the custom house as goods to be shipped on board the said vessel, and to be duly exported as aforesaid. And the said defendant further saith, that according to the rule established in collecting the duties of customs, the duties payable upon goods exported are levied and paid at the time of the entry of such goods outwards, at the custom-house of the place where such entry is made. And that, on the making the said entry, and before the passing of either of the said Acts of Parliament, he duly executed the usual bond for the due exportation of the said goods, and that the same should not be re-landed in this country. And that the said hides, after they had been so entered, were shipped for the purpose aforesaid, and were not afterwards re-landed, but remained on board for the purpose of being transported to Ostend, according to the entry thereof, until the said vessel afterwards, and after the said treasury order, departed from this kingdom to Ostend. Therefore defendant saith, that the said hides were not liable to the duties imposed by the said Act of Parliament.

Demurrer to the rejoinder, and joinder in demurrer.

[384] Tuesday, 21st Nov. 1815.—Roe was heard in support of the demurrer, and Copley, Serjeant, for the rejoinder, when the Court ordered a second argument—

18th May 1816—In which Walton argued for the demurrer, and Best, Serjeant, contra.

The counsel for the Crown contended, that what was alleged by the rejoinder to have been done, did not amount to an exportation of the hides ; and that therefore they were subject to the new duties imposed on the goods, while the vessel was in the port, by the 53 Geo. III. ch. 33 *, that

The question whether the hides so shipped are to be considered liable to the additional duty, would depend entirely on the construction which the Court should give to the word “exported,” as used in the statute. In common parlance, it means carrying out of port ; and by the use of the word in various other acts, that must be also its legal sense and legislative construction. Thus the 32d [385] Geo. III. ch. 43. sec. 2, takes a distinction between shipping for exportation and exporting, by the different sense in which it employs the words when (adverting to persons beginning to ship sugar, when under the price at which the drawbacks were to cease to be allowed on exportation,) it permits them to export and receive the drawbacks on such sugar, although it might have risen in price to the sum at which such drawback was to cease to be allowed on the exportation thereof, after such persons shall have begun to ship the same, and before the exportation thereof. And the same distinction is taken in several other statutes, as the 23d Geo. III. ch. 21, which gives a bounty on the exportation of calicoes : and the 41st Geo. III. ch. 44, which enacts, that the drawback and bounties payable on the exportation of sugar, shall be paid on all such sugar as shall have been, or shall be shipped or laden on board any ship, or water borne, with intent so to be shipped for exportation, making the acts completely distinct. The same difference obtains in the meaning of the words importation and

* By sec. 1 it is enacted, that from and after the passing of the Act, there shall be raised, &c. upon goods, wares, and merchandize exported from Great Britain, the several new and additional duties of customs set forth in a schedule referred to. That schedule was defective, the quantity of raw hides, for which the duty was meant to have been payable, being omitted to be expressed. The words in the schedule are, “Hides, foreign, of all sorts, in the hair, not tanned, &c. exported to France, &c. the sum of 9s. 4d.” To rectify that mistake, by chap. 105, (after reciting the error) it is enacted, that the said sum of 9s. 4d. shall be chargeable (as was intended) on every hundred weight of such hides

entry, in the 53 Geo. III. c. 33, sec. 2. The case in *Bunbury* (Bunb. p. 79,) of *Leaper v. Smith*, was cited to shew that there could be no legal importation until the ship arrives within the limits of the port: and, by parity of reason, there can be no exportation until without the limits. *Sir Thomas Cooke v. The Attorney-General* (Parker, 266), was also cited, where it was resolved, that goods being shipped on board for exportation, without going out of port, was not an exportation. [386] And the recent case of *Williams v. Marshall*, in the Court of Common Pleas (2 Marsh's Rep. 92), was much relied on, where the question was, whether a vessel's license ceased to afford her protection: and it depended on whether she had exported her cargo by the 10th September. She had cleared at the custom-house on the 9th, but was at Gravesend on the 12th: and (it being a fair case) Gibbs, Chief Justice, reluctantly held himself bound, by the rules of law, to say that that was not an exportation.

As to the point of the retrospective operation of the Act, the case of *Latless v. Holmes* (4 T. R. 660) was relied on, where *bonâ fide* annuity deeds were set aside, because not enrolled according to the exigence of an Act of Parliament, which had not received the royal assent till four months after the execution of those deeds; and the leading case on the point of the time from whence Acts of Parliament are to take effect, of *The Attorney-General v. Panter* (6 Br. P. C. 486), cited on that occasion, in which the House of Lords held (affirming the decree of the Court of Exchequer), that a duty imposed by an Act of Parliament on the exportation of rice, attached on rice which had been exported before the Act had received the royal assent.

On the other hand it was argued, that the term exportation was one which, in cases of this sort, ought to be considered, with regard to the subject-matter, and the object of the statute, as a revenue [387] law, rather than according to any popular acceptance of the word: and that the statutes relating to the revenue should be construed to give effect to their policy and intent, with a view to the purpose for which they were made.—That according to the practice of the custom-house it must be taken, that for the purposes of the intention of the Legislature, when the duties have been paid, the hides shipped on board, and the entry outwards and clearance have been completed, the goods must be considered as exported, at least as far as the merchant is bound, for he has done all he could: and if, afterwards, he should be detained in the river by any inevitable accident, he would be free from blame, and ought to be free from evil consequences.—That it would otherwise be a most embarrassing and ruinous thing to merchants, who speculate in trade, and of course are guided in their calculations by the known amount of the duties on exportation at the time of their making a shipment, if before the vessel should get out of the river, or be actually beyond the limits of the port, they would become liable to new duties imposed in the mean time, by which their venture might be defeated and themselves ruined: for, having once shipped his goods, the merchant cannot re-land them without incurring a forfeiture of his bond, so that his case is most hard.—And that, as a merchant who had so shipped goods for exportation would not be allowed a bounty given by a subsequent Act on all such exportations, he ought not to be liable to a subsequent duty.

[388] To support the first proposition, that Courts have a discretion in construing statutes, the following dictum from *Hobart* (f) was cited: where it was said, (the inquiry being by what rule judges were guided in a diverse exposition of the same word and sentence,) "It is by that liberty and authority that judges have over laws, especially over statute laws, according to reason and best convenience, to mould them to the truest and best use."

As an authority that exportation need not be completed by passing the limits of the port, the case of custom in *Coke's Rep.* (12 Rep. 18) was cited, which was this: a merchant who had brought Bay salt to a haven in England, sold a part, and discharged them to another ship, in which they were transported again, without having been put on shore, but having been always water-borne: and it was held, that that was an importation, and subjected the goods to pay custom. In that case, too, alluding to the words of the statute 1 Eliz. ch. 11, concerning exportation, the meaning of that word is given in the viz. as being "sent from the wharf, key, or other place on the land." If, as was held there, the discharging goods out of the ship, is a putting them

upon the land, is not the loading goods on board to be construed to be a carrying out of the port?

A manuscript note of a case, on which Sir William Scott had given judgment, was also cited, in answer to that from Marshall;—the case of *The Murs*, [389] Captain Blower, in 1815;—where (it was said,) that although the license to export expired on the 8th May 1814, and although the ship did not sail till the 9th, and was captured on the 17th, Sir William Scott thought that she was still within the protection of the license, and restored her.

[Thomson, Chief Baron, having intimated that there must have been some very particular grounds for that judgment, the counsel professed themselves unable to furnish any more of the case than the mere result.]

To distinguish the case before the Court from those cited for the Crown, it was argued, that the case in Parker, of *Sir Thomas Cooke v. The Attorney General*, did not apply: because there, after the goods had been shipped on board, for exportation by a certain time, they were endorsed to another ship, and that while in the port; and therefore the drawback was lost, because they were not carried out by the ship within the time. There is a difference too, whether the goods are exported in a British or foreign ship: and they might have been endorsed to the latter in that case. The case of *Williams v. Marshall* also was said not to apply to the present, because they were diverso intuitu. That was a question on a license, in which the time of sailing from the port is most material, and of the essence of the thing; whereas in matters relating to the customs, the sailing out of port is of no importance, provided the duties be paid, and the cargo be shipped and not re-landed. There is no time mentioned in the [390] bond for the departure of the vessel, and, for every purpose of the revenue, she has departed and exported, as soon as she has received her cargo on board and gone through all the formalities, paid the duties, and obtained the custom-house cocket. The difference is, that as far as the underwriters are concerned, the word exporting, according to the terms of the license, means leaving the port and commencing the voyage. But where the revenue is interested, exportation means nothing more than taking the goods on board, not to be again re-landed, and satisfying the customs; and there lies the distinction between this case and that of licenses, with which clearing from the customs has nothing to do.

The objection was then taken on the question whether these goods were affected by the second Act. The first Act passed on the 15th April (53d of the King) and the second, on the 10th July following; and the goods were exported, in the mean time, according to either sense of the word. It was therefore contended, that as when the last Act passed, the goods were unquestionably exported, and as the first derived all its efficacy and power from that, (for without it, it would have been wholly nugatory and inoperative,) no duties were in fact imposed till after these goods had been actually exported, and therefore none were payable at all, or at most only 9s. 6d. on the whole cargo. And on that point, the case of *Gilmour v. Shuter* (2 Lev. 227) was cited; where it was determined [391] that a promise within the statute of frauds was binding, where made before that statute, though not sued on till long after it.

In reply, it was contended, that the case from Coke did not press on the Crown in this instance, because the question there was, whether goods brought into the port were liable to the duties payable on landing them; and it was determined, that what had been done there was tantamount to laying them on land. And it was insisted that the cases from Parker, and Marshall, bore the Crown out in its construction of this statute, that shipment is not exportation; that there could not be an exportation for one purpose, and not for another; that the present case was not one of greater hardship than what happened constantly to wine merchants to whom it was not convenient to take away their stock, which continues liable to all the new duties;—that the dictum from Hobart was there used in favour of the Crown; and that the Admiralty case was quite inconclusive, and furnished no answer to that of *Williams v. Marshall*: and perhaps a Court of Law might determine a question of validity of license differently from the Admiralty Court, even under the same circumstances.

To the objections arising on the subsequent Act, it was replied, that the amendment supplied by it had become incorporated with the first, and would relate back to the time when that imperfect statute had been first passed.

THOMSON, Chief Baron. This may be a question [392] tion, certainly, of considerable importance to the defendant, as far as the value of the goods and the amount of the

duty extend; but there seems to be no great difficulty in the point which the Court are called on to decide: for that amounts to no more than whether what has been done by the defendant, before the Acts passed, can be considered an exportation of the goods, on which those Acts would have imposed an additional duty if they were not exported. That is the short question. Whatever might be the meaning of the word in common parlance, the Legislature has constantly made a distinction between the acts of shipping goods on board, and actually exporting them.—(His Lordship noticed the several Statutes wherein those acts have been distinguished, which are adverted to in the course of the argument.)

The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had reference to the former Statute as soon as it passed, and they must be taken together as if they were one and the same Act: and the first must be read as containing in itself, in words, the amendment supplied by the last. Then it appears that these goods were shipped on board before the passing of the first Act, but they were not actually exported till after it had passed: and therefore the new duties clearly attached on these goods. And however hard the case may be, it is not more so than the case of *The Attorney* [393] *General v. Panter*, which, notwithstanding its hardship, is certainly good law.

There must, therefore, be judgment for the Crown.

GRAHAM, Baron. I was at first somewhat struck with the argument of the hardship of this case: but the Court must not be blinded by the hardship of particular instances.—(His Lordship then recapitulated the circumstances, and stated the question.)—Whether the ad valorem duties were payable or not, the defendant was at all events liable to the payment of the duty of 9s. 4d. on the whole cargo, on the passing of the first Act; and if he were not, the hardship would then be on the other side.

I am clearly of opinion, that what has been pleaded in the rejoinder did not amount to an exportation, according to the accepted meaning of the term, or the sense in which it has been constantly employed by the Legislature; and we cannot adopt a more liberal construction in favour of the defendant.

We are much relieved by the decision in the Court of Common Pleas; and I do not think that the imperfect note of the case before Sir William Scott, which was at best a much less solemn decision, is much opposed to it, for nothing appears in that note to enable us to see on what grounds the judgment was pronounced.

WOOD, Baron. This is a very short point, and I think not a difficult one. The question is, whether [394]—ther the goods laden on board this ship, having broken ground in the Thames, and not having left the port of London, may be said to have been exported. I am of opinion, that the goods shipped could not be considered as exported until the ship had cleared the limits of the ports. The mistake of the former Act being corrected by the Act which was afterwards passed for that purpose, had relation back to the time when the duties were originally imposed; and therefore, as there was no exportation of the goods, they are liable to the whole of the duties.

RICHARDS, Baron. Of the same opinion.

Judgment for the Crown.

REX v. HOLLIER. Wednesday, 22d May 1816.—The Court will not interfere to assist a purchaser for valuable consideration, of an estate seized under an extent against the vendor, for which he has paid the principal part of the purchase-money, and offers to pay the remainder to the Crown, or to give up the estate, on satisfaction made to himself.—Such things are matter of arrangement, and can only be effected by the consent of the Crown.

(On an Extent in Aid.)

Owen applied to the Court for an amoveas manus, on the behalf of the purchaser of an estate seized under this extent, under the following circumstances:

[395] The present extent had issued against the defendant for a debt of 10,000l. on two bonds to the Crown, dated respectively in August 1813, and July 1814. Two years and a half before the defendant entered into the first of those bonds, he sold the estate to Moggridge, on whose behalf the present application was made, for a sum of money, which was to have been paid by three several payments; the last of which

(4000l.) was payable by that agreement before the date of the first bond, on the 12th February 1812, when Moggridge was let into possession; but a satisfactory title not having been made, the conveyance was not completed when the extent issued. Moggridge, in the mean time, having laid out a considerable sum of money in improving the property, now applied that he might be permitted to pay the remainder of the purchase money to the Crown, or that he might be permitted to give up his claim to the estate, on satisfaction being made to him. The Crown, it was stated, had also seized other property of the defendant's, to the amount of more than 6000l.

The Court said, that they could not make any order in such a case, for that it was a matter of arrangement with the Crown; and they asked, why the applicant did not plead. To which

It was answered, that he was precluded by his want of legal title.

Per Curiam. The object of this motion can only be effected by the consent of the Crown.

Rule refused.

[396] THE KING (IN AID OF COX) v. GLENNY AND ANOTHER, Assignees, &c. Friday, 24th May 1816.—The Court, on motion for an amoveas manus, where the sheriff had seized debts due to the bankrupt at the teste of the writ, and paid to his assignees under a commission of bankruptcy, issued after the writ of extent, and before the taking of the inquisition, intimated that that was not regularly a subject for summary interference, but ought to be put on the record.

Owen had obtained a rule to shew cause why there should not be an amoveas manus issued, as to certain debts seized under this extent, enumerated in schedule C. annexed to the inquisition.

The affidavit on which he moved it, stated, that a doequet was struck on the 1st March; that a commission of bankrupt issued thereon, which was opened on the 18th, on which day a provisional assignment was executed; on the 30th the defendants were chosen assignees, and the assignment was executed to them of the bankrupt's effects. That the writ of extent issued the 4th March, but that the inquisition was not taken thereon till the 29th April; and that after the issuing of the extent, and before the taking of the inquisition, the debts returned in schedule C. as due on the 4th March, were paid to one of the assignees.

On these facts, and the authorities of the case of *The Attorney General v. Sir John Elwell* (Bamb. 199), the result of which is, that debts are not bound till the teste of the inquisition, and the case of *Ree v. Green* (ib. 265), which establishes that debts, are not bound by the teste of the extent, but the caption of the inquisition, the rule was granted.

[397] Fonblanque, and Dauncey, now shewed cause; taking a distinction in the present instance from the cases in *Bumbury*, which were both cases wherein the debtor himself was before the Court, whereas the present application is made on behalf of the assignees of a bankrupt. When the extent issued the bankrupt's books were not to be found; there had been a fraud practised in concealing those books, whereby the inquisition had been delayed, of which they ought not to be permitted to take advantage.

Owen, in reply, denied that the books had been fraudulently concealed, and relied on the cases cited, when

The Court intimated an opinion, that the subject-matter of the application ought to be put on the record; and that it ought to be pleaded, that at the time of the taking of the inquisition the debts were not due; and that they could not interfere in the present stage of the proceedings.

Ordered to stand over.

(This extent was afterwards compromised between the parties.)

[398] THE KING (IN AID OF HORN) v. RIPPON AND ANOTHER. Monday, 27th May 1816.—A brewer indebted to the Crown for excise duties, entitled to an extent in aid.—Quere, Whether the affidavit should not state some act from whence the fact of the defendant's insolvency might be made appear.

West moved for a rule to shew cause why this extent should not be set aside, on the ground of the debt on which it was founded not being a debt of such a nature

as entitled the prosecutor to the aid of the writ, according to the decision of the Court in the case of *The King v. Wilton* (ante, p. 368). The prosecutor in this case being a common brewer, and indebted to the Crown for excise duties ; but

The Court over-ruled that objection instantly, as the debt in that case was of a very different nature from the present, which is due for duties of excise.

He then objected that the affidavit was bad, because it stated the insolvency in too vague a manner* : the constant and indispensable practice being to allege some fact from which the insolvency is inferred.

The Court granted the rule, expressly confining it to the latter point only ; but it was afterwards discharged on another ground.

End of Easter Term.

[399] IN THE HOUSE OF LORDS.

THOMAS BULLEN, *Appellant* : THE REV. JAMES MICHEL, Clerk, *Respondent*. June 10, 12, 13, 1816.—A Court of Equity may decide conclusively in the first instance, on all causes brought to a hearing, without directing an issue to be tried, except in the cases of a bill by an heir at law and a rector. The direction of an issue by the Court of Equity is in its discretion, and its object being solely to institute further inquiry, merely for the better information of the Court itself, the order for the trial of an issue is *ex mero motu*.—So, also, it is equally in the discretion of a Court of Equity to grant or refuse a new trial of an issue directed to be tried at Law ; for the issue having been originally directed merely to satisfy the conscience of the Court on facts material to the equity of the case, it may order evidence to be received, although not strictly admissible on other trials at Law, and it will send the issue down as often as the result is not satisfactory ; or, if satisfied that the finding of the Jury is agreeable to the equity of the case, it will not order a new trial, on the ground that inadmissible evidence (strictly so called) had been received below.—Wood, Baron, dissentiente.—Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage, (whether perfect or not) are good evidence (*quantum valeant*) of their subject-matter ; although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*. And being admitted, they may be read throughout, for the purpose of proving any thing which is material to the issue, provided it is relevant, although it go to affect third persons who were not privy to it, and could have had no cognizance of the matters to which it relates.—Wood, Baron, dissentiente.—Such a book held to have been found in the proper custody to make it evidence, where it is in the possession of an owner who is so far connected with the abbey as to be possessed of some part of the former estates of the monastery ; although no part of such estate be situated in the parish in which the question between the parties to the suit arises.—The objection of *res inter alios acta* not applicable to such entries and book, when offered to furnish a counter presumption, in order to rebut a presumption raised by the other side.

The respondent, (as vicar of the vicarage of Sturminster Newton, in the county of Dorset,) in Michaelmas Term 1804, filed his bill in the Court of Exchequer against the appellant, and Charles Rabbetts, Thomas Dashwood, James Atchison, and one Thomas Williams since deceased, [400] as occupiers of lands within the said vicarage, for an account and payment of the single value of the tithes of all the titheable matters and things (except corn, grain, and wood,) had and taken by the appellant and the other defendants in the bill mentioned, since the 21st day of December 1802 : which tithes the respondent, in his said bill, claimed to be entitled to by endowment or prescription or other lawful ways and means.

The appellant, together with the said other defendants, appeared and put in their separate answers : and thereby insisted, *inter alia*, that as to a certain farm and lands called Bagher Farm, consisting of 146 acres, the greatest part whereof was in the

* The affidavit merely stated, that the defendants were, as deponent had heard and believed, insolvent, and unable to pay the debt.

occupation of the appellant, a certain modus or ancient customary payment of 5*l.* 3*s.* 4*d.* was due, and had been payable by the occupiers or occupier of the said farm to the vicar of the said vicarage for the time being, in lieu and full discharge of the tithe in kind of hay and grass seeds, and of all other titheable matters and things (except corn and grain) yearly arising, growing, renewing, and increasing upon and throughout the said farm and lands.

The respondent having replied to the answers of the appellant and the other defendants, the cause came on to be heard; and on the 5th day of May 1810, it was ordered, that it should be referred to a trial at Law upon nineteen several issues, to try the several moduses; the sixth of which said issues, so ordered to be tried, was as follows; viz. Whether from time immemorial, the occupiers or occupier of the farm and lands called Bagber Farm have or hath [401] paid, and have or hath been accustomed to pay, and ought of right now to pay, to the vicar of the parish of Sturminster Newton, on St. Thomas's Day in each and every year, a certain modus or ancient customary yearly payment of 5*l.* 3*s.* 4*d.* for, in lieu, and full satisfaction and discharge of the tithe of hay and grass seeds, and of all other titheable matters and things (except corn and grain,) yearly arising, growing, and renewing upon and throughout the said farm and lands called Bagber Farm. The appellant to be plaintiff, and the respondent defendant at law.

The cause was afterwards re-heard (22d January 1812,) on petition, as to that part of the decree which directed the issues, at the instance of the respondent (who contended, that on the evidence then before the Court, there ought to have been a decree for tithe in kind;) when the Court affirmed the decree.

At the Summer Assizes for the county of Dorset, in the year 1812, the above issue (the sixth) being selected by the plaintiff at Law, was tried before Mr. Justice Chambre, and a special jury; when a verdict was found for the appellant.

Upon the trial of that issue, Thomas Bullen, the appellant, proved by the testimony of some old persons, that no tithes in kind had, within their recollection, been ever rendered for Bagber Farm; but that certain money-payments had been, during that period, annually made to the vicar on St. Thomas's Day, throughout the parish, in lieu of the vicarial tithes. Several receipts, given by Mr. St. Lo [402] and his successors for this payment, (from 1754 to 1791,) were also produced; in which receipts it was sometimes acknowledged as "for rates, or rates for tithes," and in others, it was stated to be made "for the tithe of Bagber Farm." It appeared, moreover, upon the cross-examination of the appellant's witnesses, that a notice had been annually given in the parish church some days previous to the 21st December, that the parishioners were on that day to pay their tithes; and that the payment for Bagber, as well as the other payments throughout the parish, were on that day collected from one and the same paper, called, "The Rate Paper."

The respondent produced and proved several documents*, to shew the value of the vicarage at different periods, for the purpose of raising a presumption of the improbability of so large a proportion in value of the amount of the tithe of the whole district, having been immemorially paid for Bagber Farm alone. From some of those it appeared, that the value of the whole vicarage, including the glebe and other profits, in the year 1291, was only 10*l.*; and that in 1535, the vicarial tithes alone were worth 8*l.* 16*s.* 3½*d.* He also shewed, by those documents, the value of land in this parish at several other periods; whereby it appeared, that in the 37th Edw. III. (anno. dom. 1363) 195 acres of land in East Bagber, (being that part of the parish wherein the appellant's lands are situate,) were worth 42*s.* 2*d.* by the year, being about 2½*d.* per acre; [403] and that in the year 1474, sixty acres of land, and ten acres of meadow in Bagber, were found to be worth in all issues, besides reprises, 20*s.* being about 3½*d.* per acre; whereas the payment of 5*l.* 3*s.* 4*d.* set up by the appellant as a modus for the small tithes alone, would amount to 8½*d.* per acre.

The respondent further proposed to give in evidence, -first, The rate paper before mentioned, to shew that the non-render of tithe in kind, in respect of Bagber Farm, and the uniform payment of a sum of money in lieu of the vicarial tithes, during the period spoken to by the witnesses, were not peculiar to that farm, but that during that period, no tithes in kind had been rendered for any part of the parish, and that

* The taxation of Pope Nicholas:—an inquisition on a writ of *ad quod damnum*;—and the Ecclesiastical Survey of 2d Hen. VIII.—V. l. Appendix.

payments, similar to the one in question, had been, for the whole of that time, annually made by every occupier of lands within the parish; and that they had always been made on St. Thomas's Day, in pursuance of the general notice given in the church, and collected under the same paper, and by the same denomination, viz. as a tithe rate.

Secondly, (having proved a search in the respective registries of the dioceses of Bristol and Salisbury, (the proper repositories,) for the original endowment of this vicarage, and that none could be found, (although it appeared that no search had been made in the augmentation office,)) the respondent's counsel proposed to read from a book, said to be an old ledger or chartulary of the abbey of Glastonbury*, [404] brought from the muniment room of the Marquis of Bath, (who is the owner of other estates formerly belonging to the abbey, concerning which memoranda were likewise contained in this book.) certain entries, in a character of hand-writing belonging (as was proved) to the latter end of the 13th or the beginning of the 14th century, or during the respective reigns of Edw. I., II., and III., relating to the appropriation of the rectory, and the endowment of the vicarage; by which it appeared, that at that time the small tithes, separately and distinctly specified, and having separate and distinct values annexed to them, were assigned to the vicar,—and no money-payment, or modus, in respect of any one farm in the parish, was mentioned or alluded to.

The same book or chartulary, in the early part thereof, contained an index or summary of the contents, entitled, “*Kalendar Sequentis operis*,” wherein, at the commencement of the enumeration of those instruments which referred to Newton, the following entry appeared, “*Deficit ordinacio vicarii Nywton*.”

To prove the custody of that book, the respondent called as a witness, the steward of the Marquis of Bath; who proved, that the Marquis was possessed of the estate of Longbridge Deverell, in the county of Wilts, and the manor of Walton, (formerly of the possessions of the abbey), but his Lordship had no property of any description in Sturminster Newton:—that on the witness succeeding his father in the office of steward, he found [405] the said book in the strong closet of his office;—that all the old rolls relating to Longbridge Deverell and Walton, were kept in a particular room called the evidence room:—and that the modern papers relating to Longbridge Deverell and Walton, were kept in the closet of the same office.

From that book, so produced from such custody, the respondent proposed to read certain entries without date, beginning “*Portiones Ecclesie de Sturmyenstr*,” &c. when the counsel for the appellant objected to the admissibility in evidence of the said book, and of the said entries therein contained; but the Judge was of opinion, that the book and the entries therein, so proposed and offered to be given in evidence, were inadmissible: and the same were accordingly rejected as evidence on the part of the respondent.

And, thirdly, They proposed to read certain accounts of the reeves of the abbey for the manor of Newton (also found in the custody of the Marquis of Bath,) for the purpose of shewing that the reeves obtained allowances and acquittances, in their accounts with the abbey, for various articles of small tithes arising from the demesne lands of the manor, as having been rendered in kind at various periods subsequent to the time of legal memory.

These, also, were objected to and rejected; and a verdict was found in favour of the modus.

[406] In the following Michaelmas Term an application was made for a new trial, on the ground (amongst other things) that evidence which had been tendered on behalf of the defendant at law upon the said trial, had been unduly rejected. A rule to shew cause was granted; and the Court, after a full and elaborate argument of several days at the bar, directed a new trial.

On that occasion the judgment of the Court (after time taken to consider the arguments) was delivered as follows by—

23d February 1814—GIBBS, Chief Baron. These two cases of *Bullen* against *Michel*, and *Williams* against *The Same*, came before the Court upon a motion for a new trial. The trial was had on an issue directed by this Court, to try “Whether, from time immemorial, the occupiers or occupier of the farm and lands called Bagber Farm, have or hath paid, and have or hath been accustomed to pay, to the vicar of Sturminster Newton, on Saint Thomas's Day in each and every year, a certain modus or

ancient customary yearly payment of 5l. 3s. 4d. for and in lieu and full satisfaction and discharge of the tithe of hay and grass seeds, and of all other matters and things, except corn and grain, yearly arising, growing, and renewing upon and throughout the same farm and lands called Bagber Farm :” and in the cause of *Williams* against *Michel*, a similar issue was applied to the farm which *Williams* occupied.

[407] The case has been so fully and recently argued, that it is not necessary for me to go through the detail of all the facts that came out upon the evidence. We have received great assistance from the industry and ability of the counsel who have argued it, and from the candour with which they have laid before the Court what were the real questions arising in the cause. It is a cause of infinite importance, and embraces matters of considerable extent ; it has given rise to points of great nicety and difficulty, and it is not to be wondered at therefore, if, on the first trial, all the facts were not attended to with that care and diligence with which, upon further consideration, it may appear that they ought to have been applied and directed. The verdict was found for the *modus*.

The application for a new trial rests upon two grounds ; first, that on the evidence which was produced, the verdict ought to have been found against, and not in favour of the *modus*, as the weight of evidence strongly preponderated that way ; and next, that evidence was offered and rejected which ought to have been received. Upon the first point, without entering at all into the consideration of what effect that evidence would have on our minds, we are of opinion that if the case rested entirely on the Judge’s report *, and if nothing was to be added to that which was received in evidence, there would be no ground for the Court to [408] interfere and disturb the verdict which the jury have found. It was a question for their consideration : they have drawn their conclusion from the facts before them : and supposing those facts to be confined to the evidence that was produced before them, we should see no sufficient reason for disturbing the verdict which they have returned.

The next objection, that evidence was offered and rejected which ought to have been received, divides itself into three parts ; first, the vicar says, he offered in evidence the tithe-rate by which all the payments in lieu of tithe were made, and that that ought to have been received in evidence, but was rejected. Next, he says that he offered in evidence a chartulary, which he insists had belonged to the abbey of Glastonbury, which ought to have been received, and that that also was rejected. And next, that he offered in evidence the reeve’s accounts, which ought to have been received, but were also rejected.

These objections rest upon grounds wholly distinct from each other. With respect to the first, the question is involved in some obscurity from the manner in which the report is worded ; but from the very fair and candid admission of the counsel, and by what appears from the questions put to the witnesses, it is evident that the real question was, Whether that tithe-rate which contained an account of all the payments, by all who were called on to make those payments, on the same day, was or was [409] not admissible evidence. Now just to render that intelligible, I will state that the parishioner, the plaintiff at law, proved clearly that a certain payment had been made by him and his predecessors for fifty or sixty years : and that was considered as *prima facie* evidence of a *modus*. It appeared on the cross-examination of one of the witnesses, that the father of the witness who had received this payment, received it, together with several others, under a tithe book. We are therefore of opinion, that that tithe-book ought to have been received in evidence, as it contains a history of that collection of which the payments relied upon by the parishioner, as proof of his *modus*, constituted a part. But here we desire to guard from any conclusion as to the weight which it ought to have with the jury, or the extent to which it ought to influence their verdict : we studiously abstain from giving any opinion upon that point, and it will be for the jury, when they consider this, together with all the other evidence that will be produced in the cause, to say what weight is due to it, and whether, notwithstanding the evidence of the other payments at the same time, these payments which were made by this parishioner and his predecessor, still stand as satisfactory proof of a *modus* : or whether they were voluntary and conventional

That report stated in substance, that the facts which have been before given as the foundation of this case, were in evidence on the trial.

payments agreed on between the vicar and the whole parish, of modern date. That will be exclusively for the consideration of the Jury.

The next objection is, that a chartulary, found in the possession of Lord Bath, was offered in [410] evidence, and rejected. This chartulary is found to contain an account of the license of appropriation of the parish, and likewise to contain an account of what the several matters were of which the vicar was endowed. The first objection to this evidence was, that it was not sufficiently proved that this book had ever belonged to the abbey of Glastonbury, which it was necessary to prove in order to let in the evidence. I take it to have been proved, (indeed it was admitted,) that search had been made in every place in which the endowment itself might be expected to be found, and that none was found; therefore a copy of it would be evidence. Then the question was, whether this book appeared, from the facts attending it, to have belonged to the abbey of Glastonbury. We should recollect that such a book as this purports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dissolved, those estates went to the Crown, and the Crown afterwards granted them to different persons; the book, when the abbey was dissolved, would go to the officers of the Crown, and when the Crown portioned out and made over the possessions of the abbey to other persons, the book could go to only one of those grantees; and the only possible way of connecting it with the abbey is, by shewing a connection between the possessor and the Crown, and by raising a probability that the Crown may have handed over the book to the present possessor.

The only mode of proof that occurs to me of that [411] fact is, to shew that the present possessor of the book is now the possessor of certain lands which formerly belonged to the abbey, which, when the abbey was dissolved, passed to the Crown, and out of the Crown to this person: because, from what I have before stated of the history of these books, and the manner in which they would pass, if you can trace the estate from the abbey to the Crown, and from the Crown to the person in possession of it, it is probable the person in possession would have the book as connected with the estate. Now it does appear, that there are one or two descriptions of land, Walton and Cluer I think, of which mention is made in this book, which were the property of the abbey of Glastonbury, and must have gone to the Crown at the dissolution of the abbey, and it appears that Lord Bath is now the proprietor of those lands: there does, therefore, exist that sort of connection. There is a chain, composed of those links, which I have stated before were sufficient to connect the two together, and shew a probability that the book reached the hands of Lord Bath, having passed through the abbey: for these estates of Walton and Cluer were part of the possessions of the abbey, and they must have passed to the Crown; they are now in the hands of Lord Bath, they must have passed from the Crown to him, and the probability is, that the book attended them in their passage. On this ground, therefore, we think the custody is so accounted for as to render that book admissible in this case.

It has been also objected (the objection of [412] custody being removed,) that still its contents do not bear on the facts in issue in the cause. What effect it would have upon those facts, we guard against intimating any opinion upon: and we do not mean, by sending it to a new trial, to send to the jury any opinion as to what their verdict should be, but merely as to what ought to be received in evidence. This book I must now take to be found in the custody of the abbot. It contains an account of the license of appropriation, and it contains likewise what I will only call, (to avoid giving it any peculiar name,) an account of the particular matters of endowment; and the endowment not being found in the places where search has been made for it as its natural places of deposit, that list of articles found in the custody of the rector is admissible evidence. In what respect it ought to influence the verdict, or what effect it ought to have upon it, we wish it to be understood we give no opinion upon.

There is however one other effect I wish particularly to guard against. If it be held that this endowment, as it is called, should be proved to bear date within the time of memory, the parishioner is not to be turned round upon the form of the issue by that circumstance*. The point which it lies upon the plaintiff to prove is, in the terms of the issue, that this payment has immemorially been made to the vicar; whereas, if the endowment was within time of memory, that is impossible: but the

* Vide *Prevost v. Benett*, vol. i. p. 236.

Judge may [413] endorse that special matter on the postea, because the point to be tried is, whether there has existed from time immemorial a modus which exempted the occupier of this farm from rendering tithe in kind, and entitled him to pay that modus; and whether that originated in the time of the rector, before the vicarage was endowed, or whether it was endowed beyond time of memory, is perfectly immaterial to the merits of the case: the fact to be tried is, whether the modus has subsisted. I hope it will be remembered, that that objection is not to be taken.

The only remaining question turns upon the reeve's accounts. Those reeve's accounts purport to be accounts of the reeve of the abbey, allowed by the bailiff of the abbey: the reeve receives certain profits of land for the abbey, and he discharges himself by certain sums which he seeks to have allowed in his account, and which the bailiff, on behalf of the abbey, does allow. So that one side of the account, (according to the doctrine applicable to such instruments) the charging side, will be evidence, because the reeve charges himself; and the discharging side will be evidence, not only because it is part of the same account, but because the bailiff admits the propriety of it: in one case, it is against the reeve to charge himself, and in the other case, it is against the bailiff to allow his discharge. Now the articles of discharge contain certain payments, which the reeve insists that he made for the tithes of those lands, out of which the profit with which he [414] charges himself arose, and those are tithes of lands within the parish of Newton Sturminster. As far as those accounts go to shew that those tithes to which the accounts immediately relate, were at that time rendered, we think they are admissible. I use the word admissible studiously; we do not say that they determine the point, nor do we say (whether they determine the point or not,) what effect that ought to have upon the verdict of the jury on the general question; but we think that they are admissible evidence to prove the fact which they purport to announce, namely, that those tithes mentioned in the accounts were paid. What effect it would have, or whether it would turn out to be relevant to the point in issue, will depend on the view which is taken of the effect of that evidence by the Judge who tries the cause: but we are of opinion, upon the points I have stated, that this evidence is admissible: and on that account, as well as on account of the magnitude of the case, and the satisfaction that is due to the parties who bring forward a case of so much importance, we think it ought to go to another jury.

I should mention, that upon the case of *Williams v. Michel* we say nothing, because that the Court will deal with hereafter. We cannot grant a new trial in that, because the plaintiff being dead, such trial could not take place. If the parson chooses to proceed for those tithes, it will be necessary to revive the suit.

[415] In the case of *Michel v. Lord Rivers*, in which the bill was demurred to, and the demurrer overruled, I cannot give judgment, as I did not hear the argument; but I am desired by my learned brothers to say, they are of opinion that the vicar has had all the discovery he is reasonably entitled to.

The Rule was therefore made absolute.

At the following Lent Assizes at Dorchester, in 1814, the same issue was again tried before Mr. Justice Bayley and a special jury, when (the same evidence having been adduced as on the former trial, with the addition of the documentary evidence which had been then rejected) a verdict was found for the respondent.

The learned Judge (amongst other things) in his comments on the rejected evidence now produced by the respondent, observed to the jury who tried the cause, that the entries in the book called the Chartulary, commencing *Portiones Ecclesie de Sturminster*, &c. were not only evidence proper for their consideration, but most important in their effect, as tending to shew, as well for what things tithes were payable within the parish of Sturminster Newton at the particular period of those entries, as the precise value of those tithes at that time: in which latter point of view, those entries would be found to bear very strongly on the case, and to militate against the claim of the appellant. And the jury, upon the evidence so adduced and sub [416] mitted to their consideration by the judge, found a verdict for the respondent.

In Easter Term following, an application was made on the part of the appellant to the Court, for a new trial; which was moved for by—

Friday, 20th May 1814—Lens, Serjeant *, on the ground that, although [417] the

* On a former day it had been proposed to tender a bill of exceptions, as the most usual and regular course of proceeding in such a case; but the Court seemed to think

chartulary which was produced on the second trial, had been pronounced by the Court to be [418] admissible in evidence, (loose as it was,) it was expressly restricted by the Court as to the appli-[419]-cation of its contents, and the effect which it ought to have on the minds of the jury, and could only be read for the purpose of shewing the existence of an endowment of the vicarage, if that had been disputed; but that it was still objectionable, when applied to any other purpose.—That as, on the second trial, it had been used to prove the value of the various titheable articles of which the vicar had been originally endowed, which was offered as evidence to contradict the modus set up, by shewing that the tithes were then received in kind, and not by money-payments; and that according to the amount of the then value, as recorded by the paper, the sum of 5l. 3s. 4d. the modus for Bagber Farm alone, was nearly equal to the value of the tithes of the whole parish, of which that farm formed only a small part: it was therefore contended, that the document, although admitted by the Court as evidence for some purposes, was not so for others; and that it was particularly objectionable when put in to prove a fact (*dehors* the instrument) which was to affect a third person, not a party to that instrument, or in any way cognizant of [420] it;—an instrument made by parties, not only not in the same, but a contrary interest from the person sought to be affected by it: for however different the interests of a rector and vicar might be between themselves, yet with respect to the land-owner, they could have but one common interest.—That the rights of the church could not be thus regulated and established among themselves, by the fabrication of documents declaratory of those rights which were in future times to be used against third persons, who might not have had the means of knowing even that such documents were in

that that would be harassing the defendant, by affording the plaintiff two distinct modes of proceeding, which might be successively adopted, because if he should fail on the bill of exceptions, he might then afterwards move for a new trial. The majority also held, that the trial of an issue was not to be considered on a footing with common trials at Law, inasmuch as they were entirely under the control of the Court by which they were sent down, having for their only object to inform the conscience of the Court; and that therefore, unless the result should prove satisfactory, they might be sent down repeatedly, until that object were attained.

On that occasion, the three junior Barons (the Lord Chief Baron having already strongly expressed himself to be of the same opinion with Barons (Graham and Richards,)) delivered their sentiments as follows:

GRAHAM, Baron. I have known a great number of issues directed for the purpose of informing the conscience of the Court, and I do not recollect any one which was treated as a record of an independent action. Perhaps the way most consonant with general practice, would be to bring forward the question now proposed to be discussed in the shape of an application for a new trial, on the ground of a mis-direction of the judge: and if we should mistake the point of law, it might go to a higher authority upon any erroneous judgment to which we might come upon the motion. That would be more consonant with the common and ordinary course in Courts of Equity.

I have known many cases where issues have been directed, and on applications for new trials having been made in the Court to which the cause had been sent, the parties have been obliged to bring back the record from that Court to the Court which directed the issue.

It would be quite anomalous, according to my recollection, and the experience I have had in the profession, to treat an action of this sort as an independent action, unconnected with the equity cause, of which it is merely a branch.

WOOD, Baron. I must own I think a feigned issue differs not at all from another action; and that when once it gets into a Court of Law, it is subject to all the rights and remedies that all other actions are.

Bills of exceptions are not common in any case, but I should think that there is no objection to a bill of exceptions in this case any more than in any other. If we send a question into a Court of Law, they must decide it according to the legal rules of evidence; and if there is any objection to the evidence, that is a matter for the consideration of a Court of Law, not only of this Court, but of any other to which it may be removed by writ of error. There is no rule of evidence established in this Court different from the rules which prevail in other Courts; and whether the learned judge who tries a feigned issue, properly receives or rejects evidence, may always be liable

existence : and that therefore, when the general admissibility of the paper had been established by the Court, guarded as it was by an anxious disclaimer of any opinion being given as to the particular effect and operation, or relevancy of its contents, its use should have been at least more circumscribed by the learned judge who tried the cause, if not wholly confined to the proof of the former existence of an endowment ; although in that case it would have been useless, because that was admitted by the defendant, and therefore formed no part of the issue.

The learned Judge, in his report of the evidence, said, that as the character of the hand-writing gave reason to believe that it was contemporaneous with the endowment, he thought it evidence of what the endowment had been, and of what it consisted, as the monks must have known what the state of the parish was at the time of the endowment, and the value of each article of tithe, and could not have been ignorant of the fact, if there had been so large a [421] money-payment at that time, for the farm in question : and that he thought it evidence that the money-payment insisted upon did not then exist, and with that view admitted it to be put in and read.

Pell, Serjeant, Taunton, W. P. and Gifford, now shewed cause. They objected, that the present motion was in effect nothing more than an attempt to bring under the re-consideration of the Court their former decision on the previous occasion ; for although the objection of the custody of the paper was then the principal subject of discussion, the doctrine of *res inter alios acta* was also very much pressed and ultimately disposed of, as well as every other objection now attempted to be set up.

The case was most ably and learnedly argued, and at very great length ; but all the arguments which were used on either side are repeated or fully noticed in the

to be made a question for further consideration ; and the proper way of putting it is by a bill of exceptions.

RICHARDS, Baron. Perhaps it may not be improper for me to state my impression upon this subject.

I have never known an instance of the trial of an issue directed out of the Court of Chancery, being treated throughout as a common action at Law. I have always understood that an issue directed by a Court of Equity, is directed solely for the information of that Court, and that it is in the hands of that Court. It may be modelled in any shape. And the Court may compel the parties to admit evidence which is not strictly legal evidence, and it has other distinguishing incidents. I remember one instance in particular, which seems to me to shew very manifestly the distinction between a feigned issue and an action at Law, which occurred in a case that came before the present Chancellor. That is the case of *The Minor Canons of St. Paul's v. Morris* *. There had been an issue directed by the Court of Chancery, which was tried at bar in this Court : an application was made to the Court of Chancery for a new trial, on account of the rejection of what was considered to be material evidence ; and the Lord Chancellor was of opinion, upon a full discussion of the matter, (although he thought that the evidence which had been offered and rejected ought to have been received) that there ought not to be a new trial. His Lordship, in that case, says, "New trials, after trials at bar, have been granted here, when the Courts of common Law would not grant them ; and upon this consideration, whether the cause was tried in such a way as to be satisfactory : and if the Jury have given such a result, the question which I think the Court ought to ask itself is, whether the Jury would miscarry in making a different conclusion upon the rejected evidence." He also said, "If that evidence had been admitted, and the Jury had brought in a different verdict, I would have sent it again to new trial after new trial, till the right conclusion had been drawn. I am master of all the facts from the learned Judge's report ; and I see that if that evidence had been admitted, and the evidence had weighed with the Jury, it would have operated injustice, which I should not have endured." From that case, it appears to me, that there is a very great distinction between an issue directed out of a Court of Equity, and an action at Law, and that they are governed by different rules. The rule in Courts of Equity is, that the evidence must be applied in such a manner as best to afford that information which the Court seeks by the trial, to direct what is technically termed its own conscience.

* 9 Ves. 155. —Vide also, *Pemberton v. Pemberton*, 11 ib. 53

judgment, which the Court this day delivered seriatim (there being a difference of opinion) on the whole case.

25th January 1815. — RICHARDS, Baron, having detailed the circumstances which led to the motion for a new trial on the finding of the Jury in the first instance, and expressed his approbation of, and concurrence with the judgment of the Court, as delivered by the late Lord Chief Baron on that motion, (his Lordship not being then on the bench,) proceeded thus :

The cause went down to be tried again, the paper which had been previously rejected having [422] been considered admissible evidence, and it was not confined to any particular points of proof.

The issue on that occasion was as before, the immemorial annual payment of a modus. There could have been no doubt of the vicar's right, for that must have been admitted on the record in such an issue. Then the question arose, whether the paper ought to be applied to the proof of any fact beyond the existence of an endowment. Now I cannot but think that, there being no question then as to the existence of a vicarage or endowment, the use of the document must necessarily have been extended to that part of it which did not purport to be evidence of an endowment. And I also think, that when this paper was once produced, it became, in the absence of better evidence, after search made, the best evidence of an endowment, and must have been considered as of commensurate authority, as far as it went, with the endowment itself : and consequently, whatever objections were taken to the use of this document, would have been equally applicable to the very endowment.

It is a general principle, that whatever evidence is once received, it must be read throughout : and here particularly the Court could not have permitted this paper to be read, but for the express purpose of its other contents, the endowment having been admitted.

Now if an endowment had been produced, which had contained a description of the state of the parish as to the titheable articles which it afforded, although [423] that might also have been objected to, as being *res inter alios acta*, it would have been evidence of the contents of that instrument : and I consider this paper also as furnishing evidence of its contents, though subject, certainly, to circumstantial observation. I therefore cannot but be of opinion that it was proper for the consideration of the Jury, and that we must allow it to have whatever weight they thought it was entitled to.

The Court having once pronounced that the paper was admissible in evidence, it would be extraordinary if it should now say that there should be a new trial, because the Judge had acquiesced in the solemn decision of the Court : and I think that even if this Court had not so decided, the Judge ought to have received this document, and to have treated it as he has done.

I might rest the case here, but I will proceed further : and for the sake of argument, I will suppose that the evidence objected to was of a more doubtful nature than it really is. I would still say, that it ought to have been received. In such cases the rules of Courts of Equity differ materially from those of Courts of Law. It is of the essence and constitution of Equity, to decide at once on facts, as Juries do, except in one or two instances, as that of an heir at law disputing the validity of a will, and a rector suing for tithes. I do not recollect any other case. In all cases besides, a Court of Equity may decide definitively without a trial at Law.

If in this case the evidence which directed the [424] Jury in their verdict, was sufficient to satisfy the Court, the Court will not say to-day what influence it ought to have had. The jury are merely, in cases of issues, the means by which a Court of Equity gets at facts through the medium of a *viva voce* examination, and cross-examination of witnesses. But the Court, after all, exercises its discretion ; thus, in the present case, the Court sent it to a Jury for its own satisfaction : they were dissatisfied with the inquiry below, and therefore they sent the cause down again for further investigation.

In this case, I think the evidence given in support of the payment, as it appears on the report, is very unsatisfactory : some of that evidence even goes to negative the modus, and in those receipts which are given for money paid for the tithes, no mention is made of modus. There are several of the receipts not given for a money-payment in lieu of tithes, but for one year's rate, and some generally for the farm, and so on. The sums paid, therefore, have been by no means regularly dealt with as

moduses, and are never expressed to be so paid; and therefore, I confess, if the Jury had returned the same verdict without the evidence of this paper, I should have been satisfied, and would by no means disturb it. It would then have been a case of greater obscurity, perhaps; but I should have prevailed on myself to have been satisfied that the Jury had had sufficient evidence laid before them to warrant their conclusion; and if I should even then have thought them right, when I find that they have had the additional and corroborative evidence of this paper before them, I must [425] necessarily incline much more strongly in favour of their verdict, without at all intimating what weight I think the paper ought to have had in their decision.

I am, however, fully convinced that the weight to be attached to the effect of that paper, whatever it might have been entitled to, was purely a question for the Jury; and I must consider myself bound by their judgment.

WOOD, Baron, stated the case; and observed, that when the cause went down for a new trial, the objection to the modus in point of form*, arising from its being probable that the endowment would be proved to have been made within legal memory, although the modus was alleged to have been paid to the vicar from time immemorial, was particularly guarded against.—The issue (his lordship continued) was therefore on the fact of the immemorial payment of the sum alleged to be a modus, and so it must now be taken.

On the trial, the plaintiff established a *prima facie* case, by proving the payment of this sum of money as far back as living memory could go. Then the defendant produced a manuscript book, endorsed "Chartulary of Glaston Abbey," found in the possession of the Marquis of Bath, containing two documents, one purporting to be a copy, or in the form of a copy of an appropriation, dated 1269, made by the Bishop of Salisbury to the Abbey of Glastonbury, of the fruits and profits of the rectory of [426] Sturminster Newton, then being in the patronage of the abbey, reserving to the bishop a power of ordaining a vicarage in the same church, which should be worth, to be let, ten marks, or 6*l.* 13*s.* 4*d.* at the least; and the abbey were to take possession of these fruits and profits on the cessation or decease of the then present rector.

The other document on which the present question arises, I know not what to call. It is without date, and entitled "*Porciones ecclesiar de Sturminster assignate vicarie ordinande in eadem perpetuis temporibus duratura.*" Then follows an enumeration of house, garden, lands, and tithes, with the value of each article, amounting in the whole to 23*l.* 16*s.* 6*d.*; and there are various burthens imposed on it to the amount of 3*l.* 19*s.*, leaving a clear income of 19*l.* 17*s.* 6*d.* The appropriation professes to be made to the monks of Glaston, and the reason assigned is, because they had been afflicted with misfortunes, and had been and were borne down with the weight of their debts. If any such endowment ever took place, the amount must have been 19*l.* 17*s.* 6*d.*; and that is highly improbable, because the only power which was reserved of endowing the vicarage, limited the amount to 6*l.* 13*s.* 4*d.* and there is no reason given why the monks of Glaston should have exceeded it.

On the first trial of this cause, the Judge thought the document was not sufficiently authenticated as to the propriety of its custody, to be admissible as evidence, and therefore rejected it: neither the [427] rectory of Sturminster Newton, nor any estates in the parish, having been proved to belong to the Marquis of Bath. On the motion for a new trial, it was granted, on the ground of the Marquis of Bath having been connected with the abbey, because he had become the owner of part of other possessions of the abbey, through the Crown. And on that ground, of custody alone, I thought the new trial had been granted. It seems the Lord Chief Baron, and my brother Graham, thought otherwise, and that the question of its being found in the proper custody, was not the only ground, but that it was also agitated, whether it was not generally admissible in evidence; and that it was held that it was. But, if the late Lord Chief Baron thought so, I protest against assenting to that opinion, either then or now.

I have frequently knownoucher books, and other documents coming from the custody of persons connected with the dissolved abbies, offered in evidence; and the first question always arises on the authenticity of their custody: the next is, whether they are admissible evidence from the nature of their contents. When the question in the present case is confined to this,—does the book come from the proper custody?

* Vide the judgment, ante, page 412.

I agree that it does. As to the other point, of whether it is evidence, I thought that that was for the decision of the Judge who tried the cause; and I do not find by my notes, that that question was argued on the motion; but it was of course mentioned, to shew that the contents were applicable to the subject-matter in dispute.

[428] The first point on which the new trial was moved for was, whether there ought to be a new trial on the merits of the case, according to the preponderance of the evidence on both sides. The second was as to the rejection of the tithe rates, and of other documentary evidence which ought to have been received, among which were the bailiff's accounts and this book; and as to the admissibility of these two documents, which form part of the book, nothing was pressed in argument, but that the book which contained them did not come out of the proper custody; but no argument was made as to the reception in evidence of their general contents, and I certainly only meant to give my opinion on the first point, of the custody in which the book was found. I say thus much in order to free myself from any imputation of inconsistency in my opinion.

I now come to the point immediately before us. The Judge received the documents in evidence, supposing this Court to have decided that they were admissible, to prove that the money-payments did not then exist. The plaintiff's counsel objected that they were not admissible for that purpose, and that therefore they could not be admitted at all in this case; because, from the form of the issue, the question of endowment or no endowment did not arise, for the plea of *modus* admits the vicar's title, if the *modus* should not be established. It is because the endowment was not the question, therefore, that the document was, as evidence on that issue, totally irrelevant. Inasmuch as it purported to be a copy of [429] or extract from an endowment, it might in that view have been material; but where the title was not the question, it could not bear upon the issue.

My objection to the second document which was offered as evidence of the endowment, is that it is impossible to ascertain what it is. Is it a copy of an endowment? Certainly not. Is it any extract from any endowment? It cannot be called any such thing. When this document or entry was first made, there was no endowment in existence, whatever there might have been in contemplation. This paper purports to be a prospectus of some future endowment to be made by the bishop, but it is no proof of a subsequent endowment having been made, or of its contents.—(His Lordship here commented much on the effect of the word *ordinande* as applying to some act yet to be done.)—It is altogether a species of evidence unknown to me, even as evidence to prove an endowment; for its reception amounts to admitting, that proof that something was to have been done, is evidence of its having been done. From the nature of the document itself, therefore, it is inadmissible. But supposing it were evidence of an endowment having at any time actually existed, is an endowment, not followed by perception, to be set up? In the case of a vicar, who has received tithes, filing his bill for the recovery of them when withheld, it perhaps might be some evidence of his original title: but here the plaintiff admits the endowment: how then can it be used on this precise issue, of the sum in question having been immemorially paid, to prove that no *modus* existed at the time [430] when the vicarage was endowed? Is it not, in such a case, purely, *res inter alios acta*? And I consider, that there is no one sacred maxim in law more founded in good sense and justice, than that *res inter alios acta alteri nocere non debet*. As between a rector and vicar, an endowment is evidence, because both are parties to the act: but the landholder is a third person, and ought not to be affected by it, for he is neither party nor privy to the act. If the act of the rector could not at the time have affected the landholder, by extinguishing a *modus* thenceforth payable to the rector, by means of an endowment of a vicar: what is there that can now give this paper that power and effect? When did it begin to be so effective, or what has made it so subsequently? Does its having remained dormant for five hundred years in the library of the Marquis of Bath, without ever having been acted on, give it such efficacy? Certainly not. *Quod non valet ab initio in tractu temporis non convalescet*. Suppose an improper rector and vicar had signed a declaration twenty or thirty years ago, that the alleged *modus* was only a temporary composition, would that have been evidence against the landholder? And what difference is there in principle, between a similar declaration having been formerly made by a landholder on his own behalf, and an endowment. The landholder says, and proves, I have always paid a sum of money in lieu of tithes,

for my farm, to the rector and vicar successively. In answer to that the vicar produces a paper, with which the landholder is wholly unconnected, from the contents of which it is made to appear, that such a payment could not always have [431] existed: can that be evidence against one who is not a party to it, and who has never heard of it, or had any opportunity of contradicting it or setting it right? Certainly not. Suppose that, in support of a prescription for a right of way over another's land, an old conveyance from a former proprietor, reciting that there was no such right, was produced: would that be evidence to prove that such a right never did exist? I think it certainly would not.

What was said by Lord Hardwicke in *For v. Ayde* (2 P. Wms. 529), is extremely applicable to the present point. One of the questions in that case was, whether the making the tithe grass into hay, for the benefit of the rector, could be a legal consideration as to the vicar, who claimed the small tithes of herbage by bill; and they set up that defence, which they contended discharged them from payment of tithes to the vicar. Lord Hardwicke says, "The vicarage was derived out of the parsonage, and the parson, by consent of the patron and ordinary, endowed the vicar with these small tithes: this shall not prejudice the parishioners, nor deprive them of the benefit of enjoying their modus, which they before were entitled to." His opinion therefore is, that the endowment could not affect the modus: and I draw this inference from it, that if endowment can not of itself destroy a modus, it cannot be received in evidence to prove any fact that tends to the destruction of a modus; [432] for it would be absurd if that were not the consequence.

Then by what rule of evidence is it that judgments, decrees, or depositions are not admissible in evidence to affect strangers, but are only received as against parties and privies, or persons claiming under them. It is perfectly clear that the general rule is, that a verdict can not be evidence in an action against one who was not a party, but a stranger to the former proceeding, and who had therefore no opportunity of examining witnesses in his defence, or to appeal against the judgment. The same rule applies to depositions as well as to verdicts. In the case of *Rushforth v. The Countess of Pembroke and Currier* (Hardres, 472), a bill was preferred in the Exchequer Chamber for suit of a mill, and a trial at law being directed, the Countess offered in evidence depositions taken in a former suit, brought by Currier against the same plaintiff and others, tenants of the Countess, upon the same subject: but as the Countess was not a party in the former suit, the depositions were rejected. On a motion for a new trial being made, the Court were of opinion, that the former depositions ought not to be made use of at the trial as against the Countess, because she was not a party to the suit; and as they could not be read against her, no more could they be read for her, because she was not bound by them; for not having been a party to the suit, she was not in a capacity to [433] examine any witness, or prefer any interrogatories in it; for that reason also, she could not make use of the depositions of any one who had been a witness in it. That case shews how strictly the rule is observed as to verdicts and depositions.

Now let us suppose that there had been an ancient verdict or decree against the rector, in a suit between the vicar and the rector, and that the vicar had thereby recovered the tithe in kind of this very farm; would that decree have been admitted as evidence against the landholder, to prove that there was no modus? Most clearly it would not. In the case of *Benson v. Oliver* (Bunb. 284.—Gw. 701), on a bill filed in this Court for tithe hay, by a former impropiator, against Semain, wherein the plaintiff's title was affirmed, the Court would not permit the decree to be read, because the then plaintiff could not shew that the defendant claimed either the same lands, or under the same title as Semain. And if a verdict or decree cannot be received in evidence against a third person, how a document of a less solemn nature, between other parties, can be admitted to affect third persons, I cannot understand.

The learned judge has reported as the ground on which he received this document in evidence, that as the monks were conversant with the state of the parish, and the value of titheable articles, if so large a sum of money had been paid they could not have been ignorant of it.

[434] Now with deference to that learned judge, and others who may be of his opinion, I beg leave to say, that ignorance or knowledge of a fact is not the principle upon which the rule of *res inter alios acta* has been established not to be evidence against third persons. In the case of verdicts or decrees, or depositions, or written

documents *inter alios*, you reject them, without inquiring or considering whether the parties to them had the means of knowledge or not. In most of those cases wherein verdicts and depositions have been rejected on that principle, the parties to them had the means of knowledge: still the evidence has been constantly rejected, (whatever means of knowledge they might have had,) because the party to be affected by them had no participation in the transaction, nor any opportunity of examining into the facts, or contradicting any false statement, or correcting any mistake or error which might have been made as to his rights: and upon that principle alone the evidence has been rejected, and the means of knowledge of the parties has had nothing at all to do with it.

It has been urged, that the rule of *res inter alios acta* admits of many exceptions, as in the case of Pope Nicholas's Taxation, the Ecclesiastical Survey in Henry VIII.'s time, and deceased rectors or vicars books: but the admission of such evidence first originated in this Court, and has not met with perfect approbation from the other Courts in Westminster Hall. And I take the liberty of saying, that if they were *res integra*, I should hold that they ought not to be received in evidence.

[435] With respect to Pope Nicholas's Taxation, we have in this very cause a striking proof that it never ought to have been received in any case as evidence of value. This vicarage, according to the document admitted in evidence, is supposed to be endowed in 1269, or some time between that period and 1291, with specific articles, each separately valued, and amounting in the whole to 23*l.* 16*s.* 6*d.*; and in Pope Nicholas's Taxation in 1291, (twenty-two years afterwards,) the rectory and vicarage together are valued at no more than 23*l.* 6*s.* 8*d.*: viz. the rectory twenty marks, which is 13*l.* 6*s.* 8*d.* and the vicarage fifteen marks, which is 10*l.*: so that both rectory and vicarage are not valued at so much as the vicarage alone is supposed to be endowed with only twenty-two years before, or less. Now does not this prove, either that no such endowment ever took place, or that the taxation is a fraud and a fallacy?

Upon the last trial Pope Nicholas's Taxation was not produced, and with good reason; for after the defendant's counsel had succeeded in getting the supposed endowment received in evidence, if he had produced Pope Nicholas's Taxation, it must have cut it up by the roots. It is from the admission of such evidence that this country is deluged with tithe suits.

But admitting that the Taxation and Survey are evidence, still they are very distinguishable from the document in question. They are public acts of state, made under authority, and known to all [436] men at the time: whereas the present document is a thing made between private parties, without any privity or knowledge of other persons.

As to deceased rectors and vicars books, that species of anomalous evidence has been established on a very slender foundation indeed. The first case I find on that point is *Legross v. Lovemoore* (2 Gw. 529), in the year 1679, in the Exchequer. There entries in a vicar's book were rejected by the judge on the trial, and the plaintiff was nonsuited: but a new trial was indeed afterwards ordered, on payment of costs, and then it was only by the defendant's consent the book was ordered to be read in evidence. The next case is *Lord Arundel's case* (ib. 620), in 1718, in the Exchequer; and the whole of the case, which is only a short note from Viner, amounts to no more than that books of accounts, memorandums, &c. of a preceding vicar may be made use of as evidence for his successor, to support his demands in case of tithe, &c. by Bury, Chief Baron, and Baron Price. Whether this important point was ever argued or not, does not appear: and upon this determination of two Barons, the rule it seems is now to be established, although so many judges have expressed dissatisfaction with it.

Another class of cases have been cited, where entries by deceased persons have been received in evidence: such as bailiffs accounts, stewards accounts, entries by a man-midwife of the time of delivering [437] a woman of a child, &c. I will not go through and comment upon every one of them, but I will take the principle of all those decisions from what Lord Ellenborough says in the case of *Doe (on the demise of Reeve) v. Robson* (15 East, 32); where it became material to shew the due execution of a power, to prove that the lease was actually executed on a day subsequent to its date, and where entries in a deceased attorney's books were admitted to be read, to fix the actual time of execution. His Lordship there says, the ground upon which the

evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time, a competency in them to know it. In the present case, indeed, the rector and vicar, when the endowment was made, might have had a competent knowledge of the tithes and emoluments mentioned in the endowment; but there was not a total absence of interest in them to pervert the fact, because they had an interest, or at least might have had an interest to destroy the modus, and establish a right to tithes in kind. Therefore, the second part of the rule so laid down by Lord Ellenborough, with these exceptions, does not apply to or support the present evidence. I am not for going on making exception after exception, till at last we have entirely frittered away all our rules of evidence, and have no standard left on which we can rely, and every thing will become admissible that can afford a probable guess or vague conjecture as to the existence of a fact.

[438] Upon the whole, therefore, I am of opinion, that the second document ought not to have been received in evidence:

First, because as no endowment was necessary to be proved by the defendant on this issue of *modus* or *no modus*, it was therefore irrelevant.

Secondly, because the document, from its imperfect and incomplete nature, (neither purporting to be a copy or extract from any endowment that ever did exist, but a mere plan or prospectus of an intended endowment, which is not shewn by further proof to have ever been carried into execution,) is therefore also inadmissible as evidence in any case.

Thirdly, because if it were proof of an endowment, yet as that endowment itself (if it could be produced) would not have been admissible evidence for the purposes for which this paper was received, as against the landholder; for being an act done by third persons, without his assent, privity, or knowledge, the accuracy or correctness of which those persons, whom it is afterwards attempted to affect by it, could have had no opportunity of assenting to or dissenting from; it was therefore, as to them, *res inter alios acta*. And on these grounds I think that there ought to be a new trial.

GRAHAM, Baron. The question is, whether the Judge did right in suffering that part of this instrument which estimates the amount in value of the [439] small tithes belonging to this vicarage to be read, for the purpose of being taken into consideration by the jury. It was not, to my recollection, argued, nor could it be argued, after the judgment of the Court on the first motion for a new trial, that the instrument itself was not to be read in evidence; but it has been boldly contended, that, (whatever be its proper denomination, and even if it were a formal endowment, as between the vicar and the land-holders resisting his right to tithes in kind, it ought not to go to the Jury, in proof of the non existence of the money-payment to affect the *modus* pleaded. It is necessary to refer to what was the decision of the Court upon the motion for this new trial, and the arguments that were then offered. For my own part, I was in the dark from the beginning to the end as to what passed upon that occasion, if the determination of the Court, which was most ably delivered by the late Lord Chief Baron, was not, that the book, coming from the proper custody, was to be received in evidence; and I have no conception of such a construction of that decision of the Court, as that the only import of it was, that from its having been found in the proper custody, it might be carried down to *Nisi Prius*, but that the Judge looking into its contents should tell the Jury, that this or any part of it was not the subject of their consideration. And I am clear my brother Lens, who argued the case, did conceive that those contents, so far as they established some particular matters, might be competent evidence, but he confined his objection to that part of them which purported to state the value of the tithes at that particular period, [440] or that the tithes were then paid in kind, for that they were, as to those points, *res inter alios acta*; because the bishop, the appropriator, and the vicar, as we are to understand, had all a fellow feeling and common interest to enlarge the patrimony of the church, and to destroy and defeat the rights of the laity.

In arguing this point, the counsel for the plaintiff have very properly, according to my judgment, laid aside the string of cases from *Warren v. Gurnee* (2 Str. 1129. 2 Bur. 1072), and *Barry v. Bobbington* (1 T. R. 511), to that of *Doe on the demise of Reece v. Robson* (15 East, 32), as exceptions out of the rule of *res inter alios acta*, upon the principle that the act done or recognised is against the interest of the party doing or adopting it. But if Lord Ellenborough, in the later case, is correctly reported to have stated the principle on which these cases stood, I am not clear that this case

does not fall within that principle. He says, "the ground on which this evidence has been received is, a total absence of interest in the persons making the entries to pervert the fact, and a competency to know it." Now it becomes extremely material to see what really is the nature of this instrument, and I hope my construction of it will appear to have some foundation. It is clear that it is not an endowment. It is not a copy of an endowment. It is not an extract from an endowment. I take it to be clear that at this period, there was no formal endowment under the seal of the [441] ordinary. The entry in the book, "*ordinatio deficit*," might mean that it was lost; but the title to the entry satisfies me that "*deficit*" meant,—was defective, or was not then ratified by the ordinary. Its title imports this,—"*Portiones Ecclesie de Sturmyuster, Assignate Vicarie ordinande in eadem perpetuis temporibus durature*." It is not material whether you refer "*ordinande*" to "*Portiones*," or to the last antecedent, "*Vicarie*." If the former, it reads thus, portions of the Ecclesia assigned to the vicarage, and to be ordained and settled by the ordinary in perpetuum; if the latter, it means portions assigned to the vicarage, which vicarage is to be ordained and endowed in perpetuum. Both constructions are substantially the same, and express that the ordinary's seal or fiat was to be affixed or obtained. Then, I think, this entry purports to be a memorial or authorized document of what the abbey itself had assigned as the portions of the vicar, or person by them appointed to perform the spiritual functions of the church. It is a memorandum of the project, or particular of the provision which the abbey itself had made for their vicar, subject to the ordinary's approbation, and which had not yet received the sanction of his seal.

Before the statutes of Richard II. and Hen. IV. it is a well known historical fact, that the bishops claimed and exercised the right of compelling a provision for the curates or vicars appointed by the regular clergy in their appropriate churches; many of the abbeys resisted, and threw themselves upon [442] the authority of the pope, or made assignments (which was the appropriate form) of themselves, without consulting either. There is a very learned argument of Mr. Baron Comyn, while he was at the bar, and which is reported by him in page 508 of his Reports, where he quotes one of the constitutions of Ottobon. Ottobon was the pope's legate in this country in the time of Henry III.: and his constitutions and ordinances were observed by the clergy, and form the ground work of many ecclesiastical regulations to this day. I take the passage from the Report in Comyn, who, referring to it, gives it the date of 21st April, 52d Henry III.; and it is to this effect, "*Universi Religiosi qui ecclesias in proprios usus habent si vicarii non sunt positi in eisdem infra sex mensium spatium vicarios diocesan presentare non omittant quibus sufficienter*,"—(which shews that this ordinance was perhaps the basis of the statute of Richard II.)—"Quibus sufficienter pro facultate ecclesiarum assignent portionem," (that is, the monasteries themselves shall do it; and if that be not done by them,) "*Alioquin diocesan id facere studeant*." So that it is perfectly clear, that long antecedent to the statute of Richard II., the ordinaries did provide for the proper provisions of the curates or officiating clergy, and regulated the portion that should be assigned to them; and I need not say, that the constitutions of Ottobon were long observed by, and governed the conduct of the regular and secular clergy.

Selden, in his History of Tithes, in the third [443] volume, page 1262, (which is also referred to by Comyn,) says, "Nor was there any perpetual certainty of the profits of their presentees, (that is, the person, the appropriate person presented to any vicarage,)" meaning they had no regular establishment, "till the monks, by composition with the ordinary, or by their own ordinance," (which I take it was the act of the abbey of Glastonbury at this time,) "which prescription after confirmed, appointed some yearly salary in tithes, or glebe, or rent, for the perpetual maintenance of the cure: which salaries became afterwards the endowments of perpetual vicarages." So that these assignations or assignments of portions of tithes had, in after ages, the validity of established vicarages.

If this be the true construction of this instrument or memorial, (and I really think, upon attentive perusal of it, it is impossible to give it any other construction,) that it was an assignment by the abbey itself, not yet ripened into a complete and formal endowment, but waiting the sanction and approbation of the bishop; and, appearing so to have stood at that time, it would at this day have acquired all the validity of a vicarage established by a regular endowment—if this be the true character of this instrument, it was extremely important, and even essential, to state

the fact of the value of the portion assigned to the vicar, in order to satisfy the ordinary that the vicar was completely provided for; and that is still more strongly evident, from the condition imposed upon the original appropriation to [444] this abbey, that they should establish and provide for a curate up to a given sum at least. The sum mentioned, I think, in the ordination, is only ten marks; but as it did require an establishment to a given value, when the convent and the society itself had assigned portions, it was an essential part of that instrument, that it should specify what the value of that provision was, in order to shew that it did come up to the measure appointed, or that, in point of fact, they had been more generous than was required of them: and therefore, the value is of the very essence of the instrument, and the main object of its design.

Now it is with this view, in explanation of this instrument, that I stated originally, with reference to the exception to the cases of *res inter alios acta*, that this might be received, on the ground of its being against the interest of those who framed it, to set the value low. It was unquestionably for the interest of the monastery, to set the value of the assigned portion at the highest, that the bishop might be perfectly satisfied. They would therefore rather over-value, than under-value the tithes set out. With this view the instrument sets an annual value upon the manse, upon the glebe, upon the housebote, upon the haybote, and upon the firebote, in the lord's wood: so that that is perfectly consistent with the nature and import of the evidence. I wish much that this matter may be understood, and that the effect of such documents as these, when offered in evidence, should be clearly and distinctly ascer-[445]-tained; for if they have any thing of truth or weight in them, a thorough knowledge of them may be the means of avoiding further litigation.

The interpretation which I put on this, appears to be confirmed by subsequent entries in this very book which has been produced, by which it appears, that these portions were entered there with the express view of satisfying the bishop that they did form a competent or sufficient provision for the vicar. They were presented to the official of Salisbury, by an inquisition upon oath, in 1280, probably by three or four rectors of neighbouring parishes, and others, taken, as appears, from these instruments, in consequence of some mandate which he had issued to the Lord of Charlestock, to inquire of the portions and their value, in order to settle the disputes between the abbey and the vicar, as to the value and the nature of the provision; concerning which the instrument recites, "there is a difference of opinion between the abbot and convent, and the vicar. To remove the matter of the present and future contention, that we may be able to tax and ordain, or endow the vicarage, *certis finibus*." I happen to have a copy handed up to me in which "*certis finibus*" is translated, —certain rates: but it appears clearly, that it means that the vicar should be endowed with distinct tithes from those belonging to the appropriator, and that the respective portions belonging to each should be thereafter distinctly ascertained.

Then, in confirmation that this really was the [446] effect of this prospectus,—and when I call it a prospectus, I do not mean to speak of it as an imperfect instrument, but as an assignment (for that is the appropriate term,) by the abbey, which, whether the bishop approved of it or not, would in time have all the validity of a regular endowment: for, from the constitution of Otobon, which I have referred to, it is quite clear that they could make such provisions, (not merely temporary) but to stand to all future times: and therefore, a vicarage established upon the footing of that assignment, even though it never had been followed up by a regular endowment, would have, in subsequent times, all the effect of a regular endowment.—In confirmation, I say, of the construction which I have put on the document, there follows another title, "*Taxatio Vicar. de Styrminster*," which, with the note, "*Ordinacio Vicarii deficit*," are, together, quite conclusive: for it is obvious, that they were waiting the result of the commission which had been issued by the official of Salisbury: but that not having been made, from whence we are fairly to conclude that the bishop was satisfied with the provision made for the vicar, they go on to say, "*Ordinacio Vicarii deficit*," as a memorandum that they have not yet obtained it. And that appears to be the true history of the transaction.

I am sorry that I am occupying so much of the valuable time of this Court: but it is extremely material when points of evidence, which to many of us, to me at least, have appeared perfectly settled, are thrown into doubt by any one, that they should

be [447] fairly and fully discussed; and I hope I shall have the concurrence of my brothers in saying, that that time is not ill spent which is employed in sifting matters of this sort.

I do not, however, think it proper to rest wholly upon the principle of those cases to which I have alluded alone, and to consider this document as admissible evidence, only on the ground of its being an exception to the rule of *res inter alios acta*. I rather ground my opinion upon this simple rule, that an instrument of this sort, coming from a custody which gives it authenticity as a genuine document and relating to the subject of inquiry, or points in issue, must be read throughout to the jury, as well as to the judge: that both must hear its contents, and the whole contents, if they are connected together: with this main qualification,—that they bear upon the question in issue, and more particularly if such parts of the instrument as are offered in evidence coincide with the nature and the design of the instrument itself, as I say this statement of values does.

I agree perfectly in the guarded terms in which the opinion of the Court was given by the late Chief Baron: I have not under my eye the very words in which it was delivered, but I know I shall be corrected by the superior accuracy of my Lord Chief Baron who follows me, if I am wrong: but I give the impression of it on my own mind, as being that the book, or rather the entries contained in it, were evidence, and that all their contents were evidence. But the Court declared that they were to be considered as saying nothing, as to the effect of the application of [448] those contents on the points in issue, or as to the weight which they ought to have with the jury. That, according to my apprehension and recollection, was the judgment of the Court.

A written instrument, relating to private contracts or other transactions between individuals, may often contain facts which are evidence against parties and privies, but not against those who have no concern in those contracts or transactions, and whose interests are sought to be affected by it. Instruments of every kind may state, and truly state, facts which have no relation to the point in issue, and are therefore not evidence, or if they have relation to the point in issue, may be excluded by rule of law. Thus, the confession of a prisoner is no evidence against his confederate. In all such cases, it is the province of the judge to tell the jury they must not hear the instrument speak: but the distinction, according to my apprehension, is obvious between instruments or documents of a private and those of a public nature, when offered to regulate private rights under established and accredited authorities, and to defeat or recognise those rights: and I know no distinction in these cases, between original documents and subsidiary evidence of them: the latter, on proper introductory evidence, are placed on the same footing as the former. Of this kind are those ancient documents, and the memorials of public authorized acts, which ascertain and fix the rights of the Church.

An endowment, or what in ancient times held place of an endowment, is, I have always under-[449]stood till within these last few years, indeed, perhaps I may say until the day of this discussion, to be an instrument of this public nature. Of the many endowments or substitutes for them, which I have heard read, and of which I have read as having been received in evidence, I never heard any objection taken to receiving any part of their contents, or any such distinction taken, as that which is now insisted on.

I will not compare the credit of an endowment, or this assignment of the abbey, which I call an endowment, with Pope Nicholas's taxation, which was made with a view to foreign profits: nor with the ecclesiastical or parliamentary surveys, made with a less exceptionable object: nor with the ministers' accounts, conventional leases, or leases of corn of rectories, and tithes, the revenues of dissolved monasteries: nor with inquisitions post mortem, nor instruments of that nature, which we have often received to be read without objection. In all those cases the land-owner, and in some the vicar, might very properly say, how am I to be affected by what the agent of the pope, or the minister of the Crown, may chuse to settle as the value of the tithes, or the portions in which they are to be paid? I admit that endowments do not state the value of the vicars portions in general, but that is because that is previously ascertained upon oath: but all the endowments state that an inquiry has been made to that effect, and they state that as the ground-work of the endowment. And I protest, for one, that if an endowment, of which I do not affect to have seen any instance, instead of stating that the bishop had [450] been satisfied by the oaths of twelve men as to the

values, had stated the report of those twelve men, that the fleece consisted of so much, and so on, I do not see how it would be possible to reject the evidence of value as there mentioned; but if the instrument be of the nature of a proposed plan, or particular of an endowment, the values become not only pertinent, but the most material part of the instrument.

The argument would be conclusive of the admissibility of this evidence, but for a possible mistake which I may have made in the construction I have put upon the instrument before us. A great many endowments might very properly contain values; and supposing the instrument to be such as we found in the case of *Kennicott v. Watson*, which came before us lately*, where a pension was payable by the vicar as long as his benefice produced a given sum: and if it should fall short of that given sum, then the pension was to be suspended. Now if the payment of that pension was to depend upon the value of the vicarage, that value would be a necessary part of the endowment: and can any person say, that the value so expressed in an endowment of that nature, would not be perfectly competent evidence to shew what the value of the vicarage was at that time of day. Not only is the distinction new to me, but in all cases whatsoever the vicar looks to the endowment as the foundation of his rights. Perception and long enjoyment is the [451] vicar's common law proof; and when his endowment is established by proof of such perception which bespeaks an origin by endowment, I have always considered that, in favour of the vicar or of the rector, it was that which regulated the rights of all parties, and that it was tantamount to the highest authority: and I have never to this moment heard it said, that an endowment was evidence only as between the patron and the vicar, in matters of doubt on a question of endowment. It does not bind the rector and the vicar alone, but it also binds the land-owners. Can any man say, that if there had been an endowment of glebe, or of an interest in a wood, the lord could dispute the endowment because he was not a party. Third persons are perpetually concluded by endowments: as when a man claims an interest in a portion of tithes, would not the endowment, endowing the vicar of that portion of tithe, be evidence against him? It is very often for the interest of a man to say, I pay a lay-penny, and I pay it for agistment as well as for hay: the vicar produces an endowment, by which he appears to have been endowed of agistment: would not the endowment of agistment, *eo nomine*, conclude him? I presume that that could not be very much a question, but I put it by way of illustration. Then it may be said, that if this is the case, why did not the Court reserve the effect, and the application of the contents of this instrument, to be considered by the Judge who tried the cause. The reason was this: the facts which the endowment proved, or its contents, might by possibility have no relevance or application to the question at issue. A [452] fact may be provable by undoubted evidence; but in order to make it evidence to the point in question, it must be through a proper medium of proof. Suppose that this payment of 5l. 3s. 4d. had stood alone, and was not made common cause with all the other moduses in the parish, the fact that all the other farms in the parish paid tithes in kind, would have been no evidence, probably, that Bagher Farm paid tithes in kind also at that time: because though other farms paid tithe, *non sequitur*, that Bagher Farm did. The meaning of the decision I take to be this: the entries in the book, coming from a place where it would be naturally preserved, may be read, their contents must be taken to be authentic, and there is no giving validity to one part of the contents more than another: but whether they bear upon the question, whether the facts which they prove from a medium of just reasoning, from which a conclusion can be drawn to affect the point in question, must be left to the Judge. Circumstanced as this case is, it might have been a very nice question, whether the fact of payment of tithe in kind in the other parts of the parish, would have been competent evidence. That question, however, has been very properly avoided upon the present occasion: but the fact that the estimated value of the vicar's endowment did not exceed 8l. or 9l. exclusive of the manse and glebe, &c. for I do not make them amount to more; the fact that the estimated value of the endowment, estimated as I say, for the essential purpose of the instrument did not exceed 8l. or 9l. is so material a fact, that the counsel for the plaintiff in this cause felt that it must be excluded, [453] or that it would be well nigh fatal to their case. It is all but

* See that document, ante, p. 252.

conclusive. If rejected, it must be rejected not because it is irrelevant, but because it is most directly to the point, and goes in a great measure to decide the question in the cause. No man can say that these entries do not prove that the abbot had assigned to the vicar his manse, and glebe, and botes, out of the lord's land. It can hardly be said that this is not evidence for him against the proprietors of this wood, and the occupiers of this glebe: and why not then of the value, without the statement of which, the instrument loses half its import. How can the Court exclude the estimated values, which are part of the very purpose of the instrument, and of every sentence which assign the vicar his tithes? The argument concedes that it is evidence that he has those particular tithes. It has "*Decimam pullorum et porcellorum.*" I do not find that objected to; but it is contended, that you must strike out the other part of the same sentence, "*que valent, 20d.*" So you may read, "*Decima lactis Casei,*" because that proves only his right to that particular tithe: but you must not complete the sense, and read "*per annum valet, 20d.*" That appears to me to be a sort of reasoning, with respect to the exclusion of this or that part of the contents of an instrument of this sort, that I cannot understand.

Something has been said as to the manner in which this was left to the jury by the Judge, as if the Judge had at one time expressed his opinion that it was no evidence, and had concluded with [454] saying that the evidence was extremely strong. In that respect, I think something may very well be allowed for the situation of a Judge, in trying a long cause of this sort, and exhausted; something might have struck the ear of those who put down what he said, not perfectly perhaps expressive of that sentiment and that opinion which he really entertained. But if we are to take it that the Judge said at one time that this was no evidence, (if that be a real representation of what came from the Judge,) and at another time, that it was strong evidence, we may consider the Judge as saying, that it could not be treated as conclusive evidence: for though it bears upon the point, and bears to a great degree, it might be, that in estimating those values, the subsisting moduses at that time of day had been overlooked; though it is very strange, if it was the design of the abbey to propound to the bishop a reasonable sum, that they should state the whole tithe as only 9l. if one farm produced at that time between 5l. and 6l. However, it is sufficient to say in this instance, that the learned Judge appears to me to have done very right in declaring, that though not perhaps entirely conclusive, this evidence did go a great way to decide the cause in favour of the vicar; therefore I think that the Judge has done no more than his duty in directing the jury, as to this part of the evidence, as he has done; and upon the whole, I am clearly of opinion that there ought not to be a new trial.

THOMSON, Chief Baron (stated the question and the circumstances under which the former new [455] trial had been granted).—On the former motion for a new trial, the Court thought that the rate-rolls which had been rejected ought to have been received, and that alone would have been sufficient for a new trial; but they also thought that the book, which had been declared inadmissible because it had not been produced from the proper custody, should be received, because the Marquis of Bath was shewn to have been sufficiently connected with the abbey, to have made his custody the legitimate possession. The Chief Justice not only so thought, but that the contents were admissible, and bore upon the question at issue, for that formed a considerable part of the objection which had been taken to it, and therefore must have been overruled. Yet that opinion of the Court, as to the relevancy of its contents, was expressed with great caution by his Lordship, guarding in a particular manner against their being understood to have decided any thing as to what effect that evidence ought to have on the verdict of the jury.

The cause then went down again, and the defendant on that occasion prevailed on the strength of the evidence of the rejected documents; and now a further investigation is sought to be obtained by the plaintiff, on the ground, that this document ought not to have been received to the extent, and for the purposes, to which it had been then applied. On the former occasion, (at least as I and my brother Graham thought, although it seems my brother Wood is of opinion that it was not so,) it was held by the Court, that the value of the titheable articles [456] enumerated in the paper ought to have been read to the jury as evidence; leaving, however, the degree of credit which it ought to receive when produced, entirely to them. They have decided how far it was entitled to their consideration by their verdict.

It is now contended, that no weight ought to have been given to that part of this document which sets out the value of the tithes payable to the vicar.

Now let us consider in what situation this paper stands as between the parties. It is found in the custody of the rector, that is, of the monastery, who are entitled to every thing which is not granted to the vicar. This, then, is an entry made by the abbey themselves, in which they acknowledge what the vicar is entitled to: and as far as that goes, it is an entry against their own interest. It contains the particulars, and very minutely, as has been observed, of all the articles which the vicar was to possess, as well in land as in tithes: and there is annexed to both, that is, both to the land and to the tithes, a value in the same sentence. It appears to me impossible to make a distinction between the evidence of their giving him the thing, and the value of the thing, which is specified in the same breath which gives the very thing itself. It was material, as has been observed by my brother Graham, that the value should be specified: for the license of the bishop for the appropriation, which I have not mentioned before, but which is found in this chartulary, had directed that a vicar should be constituted, and that he should be endowed with not less than ten [457] marks. Then it was material for the monastery, in compliance with that direction of the bishop, when they did assign any particular subject of which he should be endowed, to enter the value of those subjects: in doing which, they certainly need not have made an entry of more than was requisite to satisfy the bishop that they had complied with that part of his direction, in having endowed the vicar to that amount.

In all the articles that are mentioned, they are mentioned specifically, as though the tithes were paid in kind through the parish: and there is no mention of any money-payment, and especially of so large a payment as this of 5*l.* 3*s.* 4*d.* existing before that time, in this parish: but this instrument states the value of the tithes then existing, without taking notice of any such *modus*. Indeed, if any such payment then existed, and they were aware of it, they might have very easily satisfied the injunction of the bishop as to the quantum of the endowment, by assigning to the vicar in one article, this which would have been above half of it, and thus have saved themselves the trouble of specifying so many articles. But so it stands upon the evidence now laid before the jury upon the new trial, and from which the jury have drawn their conclusion, that in fact, at that time of day, the *modus* did not exist.

I will not take up any more time, for it seems to me, that we ought now to be satisfied with what the jury have done, and to allow the credit that [458] they have paid to this book, which has been admitted in evidence. But the case has been greatly strengthened upon the second trial, by the admission of the tithe-rates, as they are called, which were before rejected. The evidence in support of the *modus* before, went further than the proof of constant payment of this sum by the owner of that farm, but when the tithe-rates were examined, and the evidence relating to them given, it appears that all the parish at the same time were paying sums of money for the same number of years, —that they were included in the same book of rates, and collected with the same notice in the church at a given day. That certainly very much strengthened the evidence which resulted from the chartulary, negating the existence of any such payment.

Upon the whole of this case, therefore, without going more into detail, it appears to me that the evidence was properly received. Indeed the Court have before decided it was admissible: and I think that on the whole case, the jury cannot be said to have drawn a wrong conclusion in saying that the *modus* did not exist. Therefore, I am of opinion with my brother Graham, and my brother Richards, that this order for a new trial should be discharged.

Rule discharged.

In February then next, the appellant presented a petition of appeal against the above order of the Court of Exchequer, so refusing a new trial, praying [459] that that order might be reversed, and that a new trial might be ordered of the said sixth issue, for the following, amongst other reasons: subscribed by Lens (Serjeant), Dauncey, Gazelee, Casberd, and Heald.

First, Because the said book called the Chartulary was not sufficiently authenticated by being traced to the proper custody, so as to render the same legal evidence.

Secondly, Because, supposing the said book to have been sufficiently authenticated, the entries therein are not of such a nature as to be legally receivable in

evidence. They do not purport to be an original instrument, nor a copy of an original instrument, nor a substitute capable of being received in the absence of an original instrument; nor do they profess to be an extract of any description, or an original declaration proceeding from any particular party. They are entries evidently referring to some prospective act, yet so indefinite and uncertain in their nature, as to be incapable of any specific title or denomination; and if it were possible to contend that they might be construed as an original endowment, which it is submitted is impossible, it is obvious that the instrument would not be derived from the proper custody.

Thirdly, Because, supposing the said book to have been duly authenticated, and the entries therein, from their nature, to be legally admissible in evidence, such entries are not appropriate evidence [460] with reference to the issue on the record; for the endowment of the vicarage, so far from being a subject of dispute, or constituting a necessary part of the respondent's proofs, is admitted by the very nature of the appellant's own case; and as to that which is the only point in issue, namely, the mode in which tithes are payable annually for Bagber Farm, those entries cannot be received in evidence, although as to another point, if it were a matter in controversy, they might be considered as legal proof.

Lastly, Because those entries are not legal evidence as between the parties upon the present record; for they cannot be considered in the light of a public act, in which the world at large may be supposed to have borne a part, nor of an act to which the appellant or any former owner of Bagber Farm can be construed to have been a party. They seem to have been the unauthorized act of certain individuals, as against whom it may be conceded such entries would be evidence, but as against the appellant, or in other words, the owner or occupier of Bagber Farm, who had no participation or concern in their formation, nor any knowledge whatsoever of their existence, those entries, on the ground of their being *res inter alios acta*, are inadmissible in evidence.

On the part of the respondent, were submitted the following reasons for affirming the decree: subscribed by Pell (Serjeant,) Taunton, W. P. and Gifford.

[461] First, Because the original endowment of this vicarage, if it could have been produced, would have been admissible in evidence, not only for the purpose of establishing the rights of the vicar to particular species of tithes claimed by him, but also for the purpose of raising an inference from its contents, that a money-payment similar to that now contended for, did not exist at the date of the endowment; and under the circumstances of this case, the entries in question were good secondary evidence of the endowment, and receivable therefore in evidence, in the same manner as the endowment itself would have been.

Secondly, Because the book came out of the custody of the rector of this parish (*viz.* the abbey of Glastonbury,) and since the rector is entitled to every thing not granted to the vicar, an entry made by the rector, acknowledging what the vicar is entitled to, is an entry against his own interest; and therefore, upon the principle of numerous decisions, admissible in evidence against third persons.

Thirdly, Because the entries being, as it is submitted, admissible in evidence upon the grounds before stated, the respondent was entitled to have them read throughout.

Fourthly, But independently of the question upon the admissibility in evidence of the entries from the chartulary, there is another ground upon which (as was observed by Mr. Baron Richards, in delivering his judgment) the respondent might, if [462] necessary, insist that the verdict ought not to be disturbed. An issue of this kind, directed by a Court of Equity, is merely for the purpose of informing and satisfying the conscience of the Court, which is ultimately to form its own decision upon the facts, as well as the law of the case. When, therefore, the finding of a jury upon such an issue is brought under the consideration of the Court, upon the ground that evidence was improperly received at the trial, if it appears, upon a review of the whole case, that the other evidence in the cause was sufficient to have led the jury to the conclusion they have formed, the Court will not send the case to another trial, the result of which ought to be the same: but, being satisfied that the conclusion the jury have already drawn is right, will act upon it.

In this view of the subject, it would be material to consider the nature of the evidence on the one side and on the other, in the present case, independent of the chartulary.

To establish the existence of an unvarying unalterable payment in lieu of tithes

from the year 1194 (the time of legal memory,) the evidence on the part of the appellant consisted merely in proof of the non-render of tithes in kind, in respect of this farm, during the recollection of any living person, and the receipt by the vicars of this parish, since the year 1754, of the sum of 5*l.* 3*s.* 4*d.* annually on St. Thomas's Day, in lieu of his tithes.

[463] From this evidence, unsupported by any reputation in favour of its being a customary and ancient payment, or by any mention of it as a modus or fixed payment in any of the title deeds or muniments of his estate, he seeks to raise the presumption that it had existed for six hundred years.

To repel this inference, proof (now no longer objected to) was given on the part of the respondent, that the payment in question (which was for the small tithes alone) exceeded by much the probable value of the land itself, at various periods about and subsequent to the time of legal memory.—That although the farm in question constituted a small part (not more than a six-and-twentieth) of the whole parish, yet that this payment amounted to more than half of the whole estimated value of the tithes of the vicarage, at different periods within the time of legal memory :—that the non-render of tithes in kind during living memory, and the payment of a regular annual sum in lieu of such tithes, since the year 1754, (from which alone the presumption of its immemoriality was attempted to be raised,) were not circumstances peculiar to Bagber Farm : but that on the contrary, all the other farms in the parish, during the whole of the period referred to by the appellant's witnesses, stood precisely in the same situation ; uniform payments in respect of all of them having been annually made, in consequence of a general notice to the whole parish :—That they were all collected on the same day, under the same paper, and under the same denomination. In short, that there was no distinction whatever between the payment in question and all the other [464] payments (one hundred and nine in number) throughout the parish. If, therefore, the payment in question were an immemorial and unalterable one, it followed from the same evidence, that all the others were so likewise ; and consequently, that the vicar, in the year 1194, received 6*l.* 17*s.* 6*d.* for his small tithes : when, in the year 1291, the whole vicarage (including the glebe and the other profits) was valued only at 10*l.* a year, and in 1535, the vicarial tithes were valued at 8*l.* 16*s.* 3*d.* only : a thing wholly incredible. This evidence, therefore, completely destroyed the slight and weak presumption raised on the part of the appellant ; and as it irresistibly proved, that the payments throughout the parish could not have been immemorial, and as the payment in respect of the appellant's farm, was not distinguishable from the others, the jury could not have hesitated to draw from thence (without the assistance of the chartulary) the conclusion that the appellant's payment was not a modus or immemorial payment : and consequently, no further satisfaction could be obtained by sending the case to a new investigation, which must, or at least ought to, produce the same result.

Sir Samuel Romilly, and Dauncey, having argued at the bar for the appellant : and Pell, Serjeant, and Gifford, for the respondent.

12th June, 1816. —Lord Eldon, Chancellor, now delivered judgment. —It seems to me, that this is a case in which it is extremely fit that whatever judgment may [465] be given on it, the reasons upon which the House proceeds should, in some measure at least, be stated ; the degree or extent to which reasons are stated are measured, as your Lordships know, by the discretion of the House itself, whether it affirms or not. I shall say nothing at this moment as to any proposition, either for affirmance or disaffirmance of the judgment which I shall propose to your Lordships : for, considering the case as one which (however we may dispose of it) calls upon your Lordships to state the grounds upon which we act, because it is certainly a case of very considerable importance with respect to other cases that may arise in the courts, I find it impossible within that space of time which must elapse between the present time and one o'clock, when the Judges are to attend on important business, to address your Lordships so fully as I should wish to do to-day.

My Lords, if the entries in this book have been properly received in evidence, and if the effect of them has been stated to the jury with sufficient accuracy, there is an end of all other questions in this cause ; because, I think I may venture to state to your Lordships, that at least I have found no noble Lord in this House who would have any inclination of opinion that this verdict was wrong, if that evidence was properly received. If that book was improperly received, or its effect was not stated

with sufficient accuracy to the jury, then other very important points have been submitted at the bar, which deserve to be well considered.

I understand an issue had been granted by the [466] Court of Exchequer, in my Lord Chief Baron Macdonald's time. And upon the rehearing of the cause, the Court continued of opinion that that issue should be tried; and I consider what has passed in that Court since, first upon the motion for a new trial, which the Court granted, and the second time, upon the motion for a new trial, which has been refused, as stating the opinion, in the first instance, of all the then Judges, and in the last instance, of all the present Judges except Mr. Baron Richards, that in this case an issue ought originally to have been directed. Where there has been an appeal against the opinion of the Court, as to granting such an issue, it would be extremely improper, and I think very difficult, in this case, to say that that issue was not granted with propriety originally; and I should certainly feel a great anxiety to abstain from saying any thing on that subject, without looking through the record in the Court of Exchequer, and all the evidence which was given in the cause. But I have no difficulty in saying, and if it be important at this period to say it, I desire it may be understood, that after now about forty years experience in the profession, I take it to be quite clear that a Court of Equity, in cases of this sort, as well as with respect to all cases where matters of fact are in question, has a right itself to determine upon the fact, without the intervention of a jury. I very readily admit that the exercise of its judicial discretion will, in many cases, make it its duty to call for the assistance of the verdict of a jury; but I can never admit that if the evidence which is before a Court of Equity, is satisfactory upon the fact, a Court of Equity is bound to send [467] any such case to a jury; and that is a doctrine which I conceive to be as clear in matters of title as it is with respect to any other matter of fact. And I do not hesitate to say, that in the view I have taken of this case, if it had come here originally by appeal, as it regarded the direction of issues, it appears to me that the weight of the evidence, independent of this chartulary, is so much on one side, that at least I should have found myself, for one, under great difficulty in persuading myself to grant an issue; but issues have been granted, and, we must now take it, properly granted.

There is another point of great consequence which has been stated at the bar, and that is this:—It is said, that because an issue has been granted, if evidence has been improperly received, there ought to be a new trial. Now that is a point on which I wish, at least, to reserve myself, provided we do not dispose of this on the first point.

The case of *The Minor Canons of St. Paul's* was a case that not only received the judgment of the humble individual who now addresses you; but it was afterwards brought there by appeal, and this House, very well assisted at that time, concurred in this doctrine at least, that where evidence had been improperly rejected upon the trial of an issue, yet, that if,—upon looking at the evidence which was recorded in the Court that directed that issue, and looking at the evidence that had been actually given on the trial,—if the Court of Equity itself was satisfied that, if that evidence which was rejected had been received, and the verdict had been the [468] other way, it could not have permitted the verdict to stand:—the refusal of a new trial, in such circumstances, was a refusal according with the proper course of judicial proceeding. In that case of *The Minor Canons of St. Paul's*, I stated, both in the Court below and in this House, that I thought that no issue ought to have been granted. An issue, however, was granted; and therefore, I thought we ought to consider the issue as properly granted, as there was no appeal against it. It was some evidence that my opinion was not very wrong, that when the issue first came on to be tried, I think before Lord Kenyon, or perhaps at the bar of the Court of King's Bench, Lord Kenyon disposed of it very speedily, certainly; for he said there was nothing to try. However, another trial was granted, which, one of the learned counsel now at the bar must recollect, was tried at the bar of the Court of Exchequer; and upon that trial, some material evidence was offered, which three of the Judges were of opinion should not be received; Mr. Baron Graham was of opinion it ought to be received. The evidence was rejected by the prevalence of opinion; and then a motion was made before me, sitting in the Court of Chancery, for a new trial, because that evidence had been rejected. I declared it then to be my opinion that Mr. Baron Graham was right, and that, if I had tried that issue, I should have admitted that evidence; but I also stated, that considering what are the peculiar duties of a Court of Equity, considering

what is the particular purpose, and the particular view with which it calls for the assistance of a jury, it appeared to me, that it would be quite a monstrous doctrine to say that, the object being to [469] satisfy the conscience of a Court of Equity, in order to satisfy its conscience, a Court of Equity should direct a new trial, when it saw, upon the effect of all the evidence taken together, that if the verdict was given the other way, its conscience would not only not be satisfied, but would be dissatisfied, and the Court would be unable to confirm it. It seems to follow, then, that if evidence is rejected which ought to be received,—and you will not grant a new trial, because that evidence is rejected,—that you will not grant a new trial, because some particular evidence is received, if, putting that out of the case, you come to the same conclusion, with respect to the satisfaction of the mind of a Court of Equity upon the other evidence which was received, regard being had to all the other evidence in the cause in the Court below. I say simply thus much to-day, because I wish upon these two points to have it at least understood, if my opinion is worth regarding, that it is most indisputably clear, that a Court of Equity may decide tithe causes as well as others, without directing issues. It will, of course, use an anxious and a careful exercise of discretion, in refusing or not refusing issues; but if there prevails anywhere, a notion that it is incumbent upon a Court of Equity trying tithe causes, whenever there is a question of fact, to send the case to the Jury, I must declare that that is a doctrine contradicted by my experience, and the whole administration of the law for a long series of years.

I am anxious also, if we should happen to determine this particular case upon the first point, (that is, if we should happen to be of opinion that the [470] book was admissible in evidence, and that its effect has been stated to the jury with sufficient accuracy,) to protect that decision against any inference being attached to it, as if we had decided what a Court of Equity would or would not do if that evidence ought to have been rejected.

Adjourned till the next day, three o'clock.

13th June.—Lord Redesdale.—(Having very fully stated the case, going minutely through the evidence, both parol and documentary, beginning with the ledger-book or chartulary of Glastonbury Abbey, and noticing the various points which had arisen in the course of the proceedings below.) The objections that were made to the admissibility of this book, were of three descriptions: first, that it did not come out of the proper custody: (that however seemed not to have been pressed upon the last trial;) secondly, that the entries in these books were not evidence of the matters, in proof of which they were proposed to be produced; and thirdly, (if they were evidence of those matters,) that as they were founded on what is commonly called *res inter alios acta*, (that is, that they related to a thing with which the owner of Bagber Farm had nothing to do,) they could not be offered in evidence against him.

With respect to the book itself, many observations were made upon it, and particularly as to its containing matter not at all connected with the possessions of the abbey; and there seems to be no doubt that it is the fact, that it does contain matter [471] not at all connected with the possessions of the abbey: but it does, however, contain, from about what is now the sixteenth page to a very considerable extent in the book, copies of a variety of instruments with which in some way or other the abbey might have had concern, and such as are, generally speaking, to be found in all books of this description: for the Monks were in the habit of transcribing into books of this sort all the instruments with which they had any private connection, and also instruments of general public concern; and this I take to be the nature of this book. In all great families in the kingdom who have any thing of a muniment room, they have a book of that description, in which all the ancient writings belonging to the family are transcribed, for the purpose, as far as they may answer that purpose, of observation, and of more easy reference and ready access, than the original: and such, I take it, this book was. In order to make it evidence for a particular purpose, search was made at the Bishop's Register, with the object of ascertaining whether there existed there an endowment of the vicarage, and no such endowment was found.

The book produced, with a view to the case now before your Lordships, contains transcripts or entries of two instruments, if they may be so termed. The first is the ordinance of the bishop and chapter of Salisbury, upon the appropriation of the church of Sturminster Newton to the abbey of Glastonbury. Your Lordships will recollect, that subsequent to the date of this instrument of 1269, in the reign of [472]

Richard II., it was expressly required by the statute of the 15 Richard II., ch. 6, that upon every appropriation there should not only be a temporary vicar, but a proper endowment of the vicarage, ordained by the diocesan. Now that statute I apprehend to have been a statute in affirmance of that which was really the proper and regular practice long before; and in all the proceedings for the purpose of appropriations, it was always required, unless there was some special reason to the contrary, that there should be a vicar, and that that vicar should be properly endowed; and it was the duty of the ordinary to take care that that should be done. The instrument, of which the entry referred to purports to be a copy, is the ordination of the bishop and chapter of Sarum, upon this appropriation of the church to the abbey of Glastonbury; in which it provides, according to what I apprehend was conceived to be the duty of the ordinary, that there should be a vicarage, which should be of the value, every year, of ten marks, to let, "*quæ valeat annis singulis, ad firmam tradi pro decem marcis ad minus.*" That is a very important part of this instrument, supposing it to be an authentic copy of an authentic instrument: because the subsequent instrument is in conformity with it, and is also in the book from which this instrument is taken. That which immediately follows is entitled, "*Ordinacio Vicarie de Sturminster.*" It has been observed, that that title was probably not originally in the book, because it is written in a small compass; and that the copy originally terminated there, and then that the other immediately followed, and that these [473] words, "*Ordinacio Vicarie de Sturminstre,*" were afterwards added. But if your Lordships look through the book, you will see that all the titles, almost, are exactly in the same way; however, it does not seem very important whether it was added afterwards or not.

The entry of the second instrument commences with these words:—"*Porciones ecclesie de Sturmyenster assignate vicarie ordinande in eadem perpetuis temporibus duratur.*" then it expresses the several articles. Upon this it was observed, that this rather imported that it was an assignment of that which was to be given to the vicar, to be named and ordained; and that therefore it was previous to the actual endowment. Now I take it, that is in perfect conformity to the instrument which precedes it: that is, in order to complete that which was required by the former instrument, and to render the appropriation complete; for if the allowance of the appropriation by the bishop, contained a provision that the vicarage should be endowed to a certain extent, and that endowment was not made, the consequence was, that by law, as I take it, the appropriation was void. And therefore, although it has been held in later times that after a lapse of years, where there has been constant enjoyment it will be presumed that all which was to have been done, was rightly done, although, as far as appears, it was not rightly done; yet, I apprehend, that as the laws then stood, as they are to be collected from our law books, if the vicarage was not endowed according to the terms [474] of the bishop's ordinance upon the subject, the appropriation was, ipso facto, void. It therefore was of the highest importance to the abbey of Glastonbury, to preserve the memorial of the ordination, and the form of that which they did in pursuance of the appropriation, in making a provision for the vicar, to shew that it corresponded with the terms required by the permission given by the bishop for the appropriation. Now, supposing that these are copies of two authentic instruments, they are copies of two contemporaneous instruments; that is, so far contemporaneous, as that one immediately followed the other, in order to complete the substance of the former. It was essentially necessary that there should be set out the value of the different articles of which the vicarage was to be composed in the second instrument: and that accounts for the difference in this respect, between this which may be considered an endowment, and what is commonly the form of the endowment, because an endowment is usually made by the bishop himself, ordaining what it is that the vicar shall have, or in the instrument by which the bishop allowed of the appropriation. He did not usually require a specific sum to be appropriated to the purpose of the vicar, but simply required that an endowment should be made. That appears to have been the common form, especially after the 15th of Richard II., which requires that there shall be, in every license of mortmain for the purpose of such an appropriation, a provision that the vicar shall be competently endowed. Then this instrument, thus following the other, ordains that there shall belong to the vicar a certain [475] house and garden, and certain land and housebote, haybote and firebote, in the wood of the lord, and common of pasture, which the rectors had been used to have, and pasture for sheep and oxen, and the tithes of wool, of the value of 6s. 8d.:

the tithes of lambs, of the value of 12s. 6d.; the tithes of calves, of the value of 6s. 4d.; and he was to have also two calves of the flock of the lord, and one from another house; it does not appear what they were for; and he was also to have tithes of some other articles, the values of all which are set out in this instrument, and they amount in the whole to the sum of 5l. 15s. 8d. The other articles that composed the value of the vicarage are, 3l. 6s. 4d. for the glebe and common pasture: 4l. 9s. 11d. for the oblations, mortuaries, purifications, and so on; and then it appears, that fifty-one acres of arable land were set out for the glebe, which glebe is estimated, I think, at 3l. 6s. 4d. The whole of these things taken together, produce 13l. 11s. 11d.; the charges deducted are 3l. 19s. 5½d.; and the net value is 9l. 12s. 5¾d.

Now the first question is this: whether this instrument, so produced, or that this copy so produced, ought not to have been admitted in evidence. And then a previous consideration arises, whether, supposing the original had been forthcoming, the original itself would have been evidence. Now it should be observed, that this is not offered in evidence for the purpose of establishing a particular fact, but as evidence to rebut presumption, which the appellant called upon the jury to draw as an inference from [476] the evidence which he produced, of payments from the year 1754, that those payments were immemorial payments. In order to rebut that presumption, the vicar produces evidence to shew that these cannot have been immemorial payments, and that the jury ought rather to presume the other way; that is, they must presume from what appears to be, according to reputation, the valuation of the whole living at a certain time, the value of the whole of the vicarage at another time, the value of the whole of the vicarage at a third time, and the value of a particular parcel of land within the same district at another time, that 5l. 3s. 4d. was so infinitely beyond the actual value of the tithes of this particular farm (Bagber) in the reign of Richard the first, that it was impossible, whatever the jury might presume from the other evidence, that it could be an immemorial payment. That is the nature of the evidence, and according to that which was contended for on the part of the respondent, it seems that the object of it was to prove, adopting the language used constantly in the Court of Exchequer, that this was too rank: because you never can meet directly by instruments, the case of the party setting up a modus, for you never can prove directly what was the value of the several articles in the time of Richard the first: it can be done only, therefore, by that which shews what was reputed to be the value of those articles; and I apprehend, that in respect of that which is matter of reputation, its being *res inter alios acta*, does not form any objection to the admissibility of the evidence.

[477] Now this seems to have been completely admitted in this very case. in respect of other parts of the evidence, for no objection was taken, on the ground of its being *res inter alios acta*, to the taxation of Pope Nicholas, which is just as much *res inter alios acta*; it is a thing with which the occupiers of land in this parish had nothing at all to do. But that taxation is evidence of this,—of the rate and value at which the persons employed in that taxation thought fit, at that time, to estimate the living.

So as to the sum paid in the reign of Hen. VIII. it is proved by exactly the same thing, (the Survey) which is equally *res inter alios acta*, but that has constantly been admitted for the purpose of shewing what was the value of the whole of the rectory or vicarage at the time of that survey; not for the purpose of shewing precisely what was the value, but what was the sum which the person who made that estimate consented to adopt as the value, and therefore, as bearing a proportion to the real value, from which a jury might fairly draw an inference, what was the whole amount.

The same may be said of the inquisition on the writ of *ad quod damnum*, in the 37th Edward III. which relates to other lands, and lands with which the occupier of Bagber Farm had no concern, to which he was no party. It was *res inter alios acta*; but it was admitted as evidence, that at that time the reputation was, that the value of so many acres of land was so much, in that district; and from that evidence [478] the jury were called upon to draw their inference. And that applies to this proposition: Supposing the original instruments, of which copies are said to be contained in this book, could have been produced, I take it they would have stood exactly upon the same footing as the taxation of Pope Nicholas, as the inquisition on the writ of *ad quod damnum*, as the survey of Henry VIII. or a variety of other evidence.

If old leases could have been produced of lands in this parish, not of Bagber Farm only, but of other lands in the parish, from which the general value of land

could be fairly drawn as an inference by the jury, that would be evidence properly submitted to the jury upon that subject: because it is evidence of what is matter necessarily of reputation, upon which we can bring no precise proof, but which is to be left to the jury as matter of presumption, to rebut the presumption insisted upon by the other party for the purpose of inducing the jury to infer from the constant payment from 1754, of this same sum of money, that it was a payment by way of *modus*, which had existed before the time of memory.

This being the view which I take of the subject, the only question then is,—Is this book evidence of these two instruments, produced as it is? Certainly, if the originals could be produced, it would not be evidence, because it would not be the best evidence which could be had; but search having been made, the originals [479] have not been found; and as has been very justly observed by the greatest authority, if we are, because original instruments cannot be found, to shut our eyes to evidence of an inferior description, we shall do constant injustice. Where a record is lost from accidental injuries, from the destruction time produces, from embezzlement, from the carelessness or inattention of persons having had the possession of it, or from various other circumstances, so that it cannot be found, (and we know that in a variety of cases evidence of the titles of persons is incapable of being produced,) an inference is always drawn from the secondary evidence of other circumstances, from which a jury is called upon to presume that of which no direct evidence can be shewn.

The next question then is, whether this is that best evidence next to the production of the particular instrument. I take it to be clearly the next best evidence: perhaps evidence still less weighty or conclusive, if no better could have been produced would have been admitted, and might have been sufficient; but this is clearly the next best evidence to the production of the instrument itself, or the production of the entry of such instrument in the register of the bishop, where search has been made and no such thing can be found.

What is this evidence? These two instruments are copied by persons, probably some of the monks of the abbey of Glastonbury, amongst the ancient muniments and instruments concerning their abbey. [480] Why are they copied? they are copied because it is important to the abbey to preserve them. We ought to presume they are faithfully copied, for the same reason: there is nothing to induce an unfaithful transcript of them, and there is therefore every reason to presume them faithful transcripts; they are found in a situation in which such transcripts are likely to be kept, and where being found, they must be considered as of weight and authority. The second instrument is important, highly important, to the abbey itself. The first instrument is important to them, as it allowed of an appropriation, and contained the express provision that that appropriation should be followed by an endowment to a certain specified extent. It was important to them to preserve evidence that they had made an endowment to that extent; for it was by having made an endowment to that extent, that the impropriation was good, and not void. Then it was important to them that the statement, with respect to these values, should be correct, and particularly that they should state them high enough, because they were to make an endowment to the amount of ten marks at least; and being to make an endowment of that amount, is it to be credited that if one comparatively little farm, this farm of 150 acres in Bagber, paid nearly as much at that time when this endowment was made, as the sum at which they valued all those tithes, that that circumstance should not have been stated in this instrument, and that the tithes of the whole parish would be valued at the sum at which they are stated here, which is very little more than this one farm, and certainly not so [481] much as the receipts for Joyces's land amounted to, for they are 7l. odd, putting all the rest out of the question? It is therefore, in my mind, decisive that it is properly evidence, and that it is conclusive evidence upon the subject. There is another thing which results from this evidence, which is this, that if you take the first instrument, which is the bishop's license for the appropriation, it is clear from that that the appropriation is within the time of legal memory. The form of the issue is, that for time immemorial this had been paid to the vicar. Now certainly, in the manner in which questions of this kind are tried before a jury for the information of the conscience of a Court of Equity, that circumstance ought not to prejudice the appellant, and therefore it ought to have been indorsed upon the *postea*, supposing the jury had found for the appellant; that is, it ought to have been indorsed upon the *postea*, that although this was an issue to try whether this had been

immemorially paid to the vicar, the vicarage was founded within the time of memory, and therefore it could not have been immemorially paid to the vicar, yet that it was an immemorial payment; it might be to the rector, but not to the vicar. But in this instrument, by which the particulars of these tithes are allotted to the vicar, no notice whatsoever being taken of this payment, it is impossible to suppose that it could have been actually a payment made to the rector, that is, to the abbot and convent enjoying the rectory; it is a thing which they were not in the receipt of, because if they had been in the receipt of it, it must have been specified as a separate and distinct article, [482] in consequence of its considerable amount in reference to the whole of what they were supposed to have.

It strikes me that there can be no doubt that these two instruments, taken together, would of themselves have been important evidence, capable of being received for the purpose for which they were offered, if they had been originals; and that as the originals could not be found, this was the best evidence, under the circumstances of this case, that could be offered, and that therefore they were properly received in evidence upon this subject.

It was objected that there was an observation made by the Judge which might have the effect of misleading the jury, namely, that the second instrument was contemporaneous with the endowment. I really think that that (even supposing the ground upon which the objection was made had been more substantial,) was little more than cavilling about words, because what does a judge mean by contemporaneous? the jury would not necessarily understand him to mean exactly at the same moment, but that it was an instrument of about the same time: but I apprehend, that really if the expression was to be taken critically, contemporaneous would be a true description of it; for it is an instrument which, in its form, seems to import that it preceded the actual endowment of a vicar, as, in the terms of it, it purports to be a provision for a vicar to be ordained; and the observations made on the part of the appellant, on those words, make directly the other way, [483] and shew that a second instrument was made, and that, upon that second instrument, the vicar was endowed; and it is observable, that the nomination of the vicar was, by the terms of the appropriation, in the abbey and convent of Glastonbury.

Another consideration is, supposing there was any real objection to the admission of this particular evidence, what is to be done upon the application for a new trial of this issue. An issue of this description is directed for the purpose of informing the Court upon the subject; and that is clear because it is, in the terms of the order directing the issue, directed that any special matter should be indorsed upon the postea: the consequence of that is, that you are to consider it not simply as a verdict upon the record, upon which verdict judgment is to be pronounced,—for upon that record no judgment is pronounced,—but you are to consider it as the result of the finding of a jury, satisfying the Court, upon the view they have had of the subject, that they have had a right view of it, taking it in the whole. Now when I look at this case, and see what other evidence was before the jury, and the import of this particular evidence, it does appear to me to be abundantly sufficient to warrant the verdict of the jury; for the jury were called upon to establish this as a modus, upon the simple fact of payment, under the circumstances which I have stated, and which are the slightest that ever I remember in a case of this description, because there is no evidence whatsoever of a distinct payment as for a modus. The evidence which was brought out upon the cross [484] examination of the witness Moore, who proved the payments, demonstrates that exactly the same evidence might be offered for every farm in the parish, to the amount of about 70*l.* a year. That, therefore, was the slightest possible evidence upon which a jury could raise a presumption that these were immemorial payments.

Then, to rebut that presumption, besides the rate paper, there are the taxation of pope Nicholas, the writ of *ad quod damnum*, and the Survey, in 26th Hen. VIII.: all of which must have been founded upon the grossest error, if that which is contended for by the appellant in this case is really true, that this was an immemorial payment from before the close of the reign of Richard I. Then the jury must have drawn from this an inference, that the judgment they might otherwise have given from the fact of long continued payment, was a presumption which they could not conscientiously entertain. If so, the verdict of the jury, as it stands, supposing this to have been improperly admitted in evidence, still was perfectly warranted by the evidence before

them; and being so clearly warranted by the evidence before them, the result of that is, that the conscience of the Court of Equity is sufficiently informed upon the subject, and consequently, there is no reason for directing a new trial in this case; therefore, it does seem to me right to affirm the order of the Court of Exchequer, refusing the new trial.

I have gone thus at length into this case, be [485]-cause it is a case of very considerable importance, with reference to the trial of issues of the same nature. I am perfectly satisfied that the book called the Chartulary was properly received in evidence, under all the circumstances; and I am equally satisfied, that if the evidence was not properly received, the Court have done right in not granting a new trial.

LORD CHANCELLOR.—I hope I shall be able to bring within a very narrow compass what I have to offer to your Lordships attention. This suit was instituted about twelve years ago, and the question before us at this day is, whether a third trial should be granted of the issues directed by the Court of Exchequer, where there have been two former trials: one of which has terminated in a verdict for the appellant, establishing the existence of a modus in this parish, the verdict upon the second trial being found for the respondent, and thereby asserting that no such modus had existed. And although this cause has endured twelve years, yet if your Lordships are of opinion that it has not finally been satisfactorily decided in point of fact, or that there has been any material miscarriage in point of law, regard being had to the nature of this question as a question arising in the course of a cause in a Court of Equity, undoubtedly you must, whatever you may feel about it as to the parties, subject them to the consequences of a further investigation of the subject.

[486] This was a bill filed by a vicar making a claim of those tithes in kind which are called vicarial, which he asserted he was entitled to under some endowment, either produceable, or the contents of which must be now inferred. My Lords, the defendants in the cause in the Exchequer were twenty in number, and they had this very singular case to support:—for I believe no instance in the history of any parish in this country can be produced, in which the same thing was to be supported:—that all this parish with the exception only of what relates to the corn tithes was covered by moduses, those moduses amounting altogether to between 60*l.* and 70*l.* a year; and that therefore, the vicar of this parish must be considered as having been entitled to moduses for 68*l.* a year, represented as being contracts made for valuable consideration, so long time ago as the time of Richard I., and that too excluding corn and grain. So that you are to imagine that the value of the tithes of this parish in the reign of Richard I. were such, that tithes, which did not include either the tithable matter called corn, or the tithable matter called grain, appertained to the vicar, in the shape of pecuniary compensation, to the amount of 68*l.* a year. We know what the value of money was at that period, but we must also throw into the scale the probability that the rector was to have the tithe of corn and grain too. To be sure, if there was a vicarial tithe, in the sense in which I use the word, equal to the sum of 68*l.* in the time of Richard I., the tithes of corn and grain being also of such value as you may be pleased to attribute to them, in the time of Richard the first, I hardly know [487] any gentleman who would not have wished to be the subject of ordination to Sturminster Newton, I mean at this day, provided these moduses cannot stand; for what must the value of the tithes be now?

It was stated on the part of the appellants in the Court of Exchequer, that from time of which the memory of man is not to the contrary, they or their predecessors had paid these moduses, and that therefore the vicar had no claim to tithes in kind. My Lords, I take it from the judges report to have been proved, in the Court of Exchequer, that as far as memory goes, the vicarial tithes had not been paid *qua* tithes, but that there had been money-payments made throughout the whole of the parish, not forgetting the distinction between the Meads and the other parts of the parish; and the matter appears to rest, on the part of the defendant, with this evidence of non-payment of tithe in kind for that period. There was produced in the Court of Exchequer the paper, which Mr. Justice Chambre thought proper to reject when it was offered in evidence on the first trial, called a Rate Paper; and it has been stated to us from the bar, that the use made of that rate-paper, in the Court of Exchequer, was not such as has been made upon the second trial in the country, namely, not to deduce from the whole of the contents of this rate paper, what might be inferred legally as to any particular farm mentioned, with reference to the rate paid for that

farm : but that, reddendo singula singulis, they stated it to be a paper which had this peculiar species of application, that what was mentioned as to farm A., had a distinct application to farm A. ; [488] and what was mentioned as to farm B., had relation to farm B. only, and so on. Now though it appears to me to be a most important paper, and that it is evidence, yet I consider it so with quite a different application : For as the decision in the case of *The Minor Canons of Saint Paul's* was, that the rate-paper by which the collection was made, which in that case was a most material paper, was taken as evidence with this view, that it must be contended that the payments there mentioned were all customary payments, or that it might rationally be inferred that none of them were so, (for they must all be one or the other ;) so this paper appears to me not only to have been admissible evidence, but most extremely important evidence on this issue when applied in the same way.

Then, supposing that that evidence, with Pope Nicholas's taxation, the inquisition on the writ of ad quod damnum, and the Ecclesiastical Survey, was all that had been before the Court, I cannot help entertaining the difficulty which I expressed yesterday, (but which must have no influence upon your Lordships decision upon this matter, further than I can apply it upon another principle :) for I think it is matter of surprise that an issue should have been directed, because, independent of the evidence of the chartulary, there appears to have been demonstrative evidence that these payments could not be moduses ; and I take the liberty to repeat, (because I should be extremely sorry that there should be introduced into a Court of Equity, by any one, such a notion as that because they have [489] before them the trial of a fact which may be tried by a jury, therefore it shall be tried by a jury,) that that is not the principle upon which Courts of Equity have ever proceeded. These issues however were directed, and they went down to trial. On that occasion Mr. Justice Chambre was of opinion that this rate-paper, which I think so clearly admissible, and so highly important, was not receivable ; he was also of opinion, that the Reeves accounts, which I lay out of the question, were not receivable ; and he was also of opinion, that that which I call the Chartulary ought not to be received. A motion was made for a new trial, (the Court, it should be observed, has been repeatedly changed in its constituent members while the cause was pending,) and they were of opinion that the chartulary and the rate-paper were evidence. There appears to be some difference of conception at the bar as to what was the extent of their opinion, as whether the chartulary was admissible only as evidence, or whether, when admitted, it was to have any effect upon the cause. I can only say, that if I had been sitting in a Court of Equity, and thought the evidence competent, but that it would have no effect, I should not have thought of sending it to a new trial, for the book to be produced to the jury, and then for the judge to tell them to shut it up, and to place themselves in the same situation as to the inferences to be drawn from it, as if they had never seen it. I must therefore take it, that the majority of the Court were of opinion (with whom I also agree,) not only that it was competent evidence, but that it was to have some effect ; though they said, and with great [490] propriety, that they would not anticipate the effect of it upon the minds of the jury, for that must depend upon the nature and operation of all the evidence taken together.

Then they went down to trial again, and there is now a verdict establishing, as far as any verdict can establish it, that these payments are not moduses ; and let it be recollected, this was a suit instituted for the satisfaction of the conscience of a Court of Equity.

I have already said I may be wrong, but if I am, I shall be corrected by your Lordships : but I am at present clearly of opinion, that if the evidence had been before me without that book, I would have directed no issue whatever upon this case ; for I think the evidence completely satisfactory, that this could not be a money payment as old as the time of Richard I. It is not, however, necessary for me to discuss that, nor is it necessary for me to say much upon the last point, with which the noble and learned lord concluded. My Lords, if I were compelled by the principles on which, under the sanction of my oath, I act, to admit that where a verdict has been obtained on an issue directed by a Court of Equity, that it is, of course, that that Court of Equity is either to direct or to refuse a new trial, by reason of a miscarriage in the trial in the Court below, I should be very sorry for it ; but I must take the liberty of saying, in the presence of gentlemen now at the other side of the bar of this House, and I am sure they will allow me to say, I speak in [491] their hearing with

the highest respect for them, but I say it in consequence of having often seen it—that the object of these issues sent out of Equity is very frequently misunderstood, because the learned counsel sometimes proceed, (or at least they used to proceed,)—and that is a thing which ought to be corrected,—to get a verdict on these issues just as they would in an ordinary case at Nisi Prius; and they seem to think, that that mode of settling a matter at Nisi Prius is to satisfy the conscience of a Judge in Equity. We have therefore had some great miscarriages on the subject of appeals on issues lately; and it appears to be important to consider the principles on which they are tried. Thus, when in cases of wills, (a subject often of the highest importance,) we send an issue of *devisavit vel non*, (and a Court of Equity will not, generally, speaking, unless it is desired, direct all the witnesses to be examined,) the way in which it is tried is not for the plaintiff to call all the three subscribing witnesses, without whom the Court of Equity cannot establish a will, but to call some one witness to prove the signature and due attestation; then he leaves it to the defendant to make the other two the defendant's witnesses, and we know for what reason that is done at Nisi Prius; then, when it comes back to the Court of Equity, it is objected that that will not do, for that a verdict obtained on the testimony of one witness, will not be more conclusive than if we had in Equity established the will upon the evidence of one witness on paper; and therefore, it is contended, it must be tried over again. And that plainly shews the distinction between the [492] cases.—What I mean to deduce from this is, that where an issue is directed from a Court of Equity, it proceeds upon different principles and different reasons, and leads to different conclusions, from those which are the result of mere actions to be tried between man and man.

I just referred to the case of *The Minor Canons of St. Paul's*, to which I must advert again. That case was tried at the bar of the Court of Exchequer, having been tried in the Court of King's Bench before. There was material evidence offered on that trial, which three of the judges were of opinion ought not to be received; Mr. Baron Graham was of opinion that the evidence ought to have been received, and in consequence of his differing from the other judges, they moved the Court of Chancery, in which I at that time presided, for a new trial. My Lords, I thought myself at liberty to look at the whole case from the beginning to the end, and as the object was to satisfy the conscience of a Court of Equity, to see whether it ought, with reference to that object, to have made any difference if that evidence had been received, (for it would be an extraordinary thing to say, you shall take a verdict against what you consider evidence best calculated to satisfy your conscience,) I declared my opinion to be, that Mr. Baron Graham was right, and that the three judges were wrong; and I further said, that if that evidence had been received, and if the jury had come to any other conclusion, with that evidence before them, than that to which upon the exclusion of that evidence they did come, I should [493] have ordered a new trial; and inasmuch as that was my opinion, if such had been the case, it followed of necessity that I ought not to grant a new trial merely because that evidence had been rejected. Now to such a decision, taking it as my own, no man living can attribute less of authority and weight than I do; but I have the satisfaction of knowing that that was appealed from to this House, and that it was considered upon those principles, in this House, to have been correct. If your Lordships will turn to the printed cases, you will see that that was one of the reasons given for applying for a new trial, and this House determined, that as it was an issue out of the Court of Chancery, the opinion was not founded upon any error that would entitle the applicant to a new trial.

Then, putting the present judgment more distinctly upon another ground;—however difficult it might be found for your Lordships, where evidence is rejected which ought to have been received, nevertheless to refuse a new trial, which perhaps you hardly would in the case of individuals, where it was not merely to satisfy the conscience of the Court, it would be more difficult for you (when that is the sole object) where you are completely satisfied, upon all the evidence properly admitted by the judge and properly received by the jury, that the verdict ought to have been the same, although there is some evidence admitted by the judge and attended to by the jury which, strictly speaking, by law ought not to have been admitted by the judge, or attended to by the jury, to draw such a distinction as to say that [494] you ought to grant a new trial; and if therefore this case places me in circumstances in which it would become me to give an opinion upon it, I have no manner

of difficulty in saying it is my opinion, at least, that the rest of the evidence is so completely satisfactory that I should not advise your Lordships to grant a new trial.

The next question is, whether the evidence afforded by the entries has been properly received. It is first said that this paper, even if it was an endowment, ought not to have been received. Is, indeed, an endowment not to be received in such a case as this? My Lords, when the objection is, how can a particular payment, attending to the comparative magnitude of it, be an immemorial payment, a payment from the time of Richard I., by what evidence are you to negative such a presumption as that, but by this species of evidence? I beg leave to say, that it clearly proves that it is impossible there can have been taken from the time of Richard I. so much for the tithe of lands, when it is shewn that the lands themselves were not of the value which it is now said that the one-tenth then was. How are you to get at that, but by the general value of land in the neighbourhood: and on what principle is it that we every day admit inquisitions, and Pope Nicholas's taxation, and parliamentary surveys?—We admit them for the purpose of shewing, by the only evidence by which it is in our power to shew it, that the thing insisted upon by the man who sets up a modus, in its nature cannot be, because the nature of property in general was such, that it is quite impossible that that [495] should be paid as a composition for the tenth of the value in the time of Richard I., which is shewn, by a sort of general evidence, to have been at that time more than the amount in value of the whole put together. When, therefore, you come to look at what this paper proves with respect to the amount of the value of the tithes of the whole parish, and when you come to look at what these documents, taking them altogether, prove with respect to the value of what was supposed to belong to the vicar, it is quite impossible, in my opinion, to say that the legitimate inference from the whole is, that this could be a modus.

Then as to the custody of the book, I think that is unquestionable, and indeed that has not now been argued. It is such a custody as makes it admissible, because it is in the hands of a person who represents, at least to this purpose, the Abbey of Glastonbury. And I really do not trouble myself with the question which has been made as to whether it is contemporaneous, I mean in the strict sense of the word contemporaneous, that is, drawn up at the same time, or inserted in that book at the same time, or not: for no man can look at the book who knows any thing of such documents, without seeing that it is a transcript, in the regular order, into this chartulary, belonging to the Abbey of Glastonbury: and being so, it is within the scope of the principles deducible from all the authorities, and therefore it does appear to me not only to be admissible evidence, but to be evidence intimately connected with all the rest. When you come to compare the con-[496]tents of this paper with the other papers produced, you will find the result of the whole extremely cogent, and extremely important. Upon that ground alone, this new trial might have been refused, and I should not have said so much upon the other parts of the case, if it did not appear to me, from some views in which this case has been put in argument, that there might be considerable danger if we permitted, in this House, such erroneous notions to prevail with respect to the functions of a Court of Equity, and the grounds upon which new trials of issues are or are not to be granted, or withheld, in that Court: at least taking care that this decision shall not be supposed to be put upon the point of evidence only.

My Lords, upon these grounds I am clearly of opinion, that this new trial ought not to be granted.

Judgment affirmed.

[497] APPENDIX.

APPENDIX REFERRED TO IN P. 403.

Extracts from the General Ecclesiastical Survey, introductory of the Chartulary.

Anno R. R. Henrici viij^o xxvij^o. Et tempe Dñi Riçi Whityng nre Abbtis. ibm.

MONASTIU. GLASTON.

Declaraçō annui et integri valoris tam oim Terr et Teñtoz. ac at possessionu tempaliu q^m Exit' oim spuat eidm Monastiu spectaū viz. ut taxat' fuer et exaat' p Reuēdu in Xpo p^{re}m et Dñm Johem. Clerke Ep^m Bathōn et Wellen et Wiffm Sto'ton Militem cu al Comissiona^r Dñi Re^g ut sup' et put nfer' pleni^o liquet

WALTON valet in

Redd tam liboz. tenenē q^m cust' xxxiiij^o ij^o iiij^o ob. firm t^r dñic ix^o iiij^o ij^o ob. ult^a xxvj^o viij^o p feod Johis. Dragon Baffi ibm. Sic nre clare xlj.
Pquis. Cu^r & al casuat ibm. cū lxxv^o vj^o de vendic bosē iiij^o viij^o viij^o. Fin t^r ibm. C^a.

WILTS.—DEVERELL LANGBRIDGE valet in

Redd t^m liboz. tenenē q^m cust p a^m ult' iiij^o iiij^o ob. solut' Ep^o Saz. p Sinod xiiij^o iiij^o solut' eidm Ep^o ut al pençoe iiij^o iiij^o sol Decano et Capito Saz. ut [498] de alt xv. viij^o ob. solut' Archo. Saz. ut de pcoib^o xx^o p feod Johis. Bowser Af Señli ibm. et xiiij^o iiij^o p feod Wiffi Brice Baffi ibm. Sic clare lxiiij^o xvj^o q̄.
Pquis Cu^r et al casuat xxix^o v^o. Fin t^r ibm. l^o. lxxix^o v^o.

STURMYSTER PERSONAT' valet in

Decis p^odiat & at Exit' infra Rectoriam ibm. p anu x^o ij^o.

APPENDIX REFERRED TO IN P. 403.

Copy of the Entries of the Appropriation and Endowment contained in the Chartulary of the Abbey of Glastonbury, remaining in the Custody of the Marquis of Bath.

Ordinacio Dñi Epⁱ et capituli Sa^r super donacionē et appropriacionē
Ectæ de Nywtonē et Sturminster :

Walterus miseracione divina Sa^r Ep^s Reli^g viris Abbtⁱ. et Conventui Mon^o Glasi ordi^o sti Benedicti Bathōn et Wellen Dio^c salutem in Dño. Multo^r corda feliciter illustravit ideoq^{ue} celari n^{on} potuit grā que vobis divinitus est infusa dudum enim diversis adversitatibus afflicti ac per eas aeris alieni fuistis et estis onere pregravati succedenteq^{ue} temp^ore intemperie nec a tramite religionis aliquatenus declinastis nec hospitalitatis munificenciam in aliquo restrinxistis s^{ed} divina potius quam humana providencia passim omnib^{us}. ultra quam vestre suppeterent [499] facultates pretenditis opera caritatis volentes igitur sicut et velle tenemur ad hoc anelare ut ea de cetero facilius et felicius prosequi valeatis de consensu venerabilium viro^r dilecto^r in X^{to} filio^r dno^r decani et capituli n^{ost}ri Sarum fructus et proventus universos pertinentes ad Ecc^{li}am de Nywton Sturmyminster n^{ost}re dio^c in qua jus h^{ab}et patronatus et quam cū omnib^{us}. suis pertiⁿ ordinacioni et disposicioni n^{ost}re totaliter submisistis ordinamus disponimus et vobis ac per vos monasterio v^{ost}ro concedimus ad hospitalitatem et elemosinæ v^{ost}re sustentacionem in usus v^{ost}ros perpetuis temporib^{us} convertendos plenaria potestate reservata nobis et successoribus n^{ost}ris constituendi et ordinandi in eadem eccl^{ia} vicaria ijdonea que valeat annis singulis ad firmam tradi pro decem marcis ad minus ad q^u tū quoscūq^{ue} eam vacare contigit ad vos pertinebit ejusdem p^{re}sentacio. Vicarius autem qui pro tempore fuerit in eadem omnia onera ordinaria debi^t et consueta ad ipsam eccl^{iam} pertinenencia sustinebit in perpetuum extraordinariis inter Abbe^m et Conventu et ip^sum vicariū pro rata porcionum dividetis per hanc autem ordinacionem seu concessionem n^{ost}ram n^{on} ju^{ri} vobis intendimus attribuere per quod eccl^{iam} de Marnhulle

quam separato iur parochialem ee novimus assequi valeatis vel aliquatenus vindicare de predictorum vero decani et capituli nri consensu volumus ordinamus i concedimus quod ipsius ecclie de Nywton Sturmynstri Rectoꝝ qui nunc est cedente vel decedente fructuum et proventuum ipsoꝝ possessionem apprehendere valeatis nro vel successorum nrorum iterato consensu minime requisito. In cuius rei fidem et testimoniu[m] [500] nrm et predictoꝝ Decani et capituli sigilla presentibus sunt appensa. Salvis in omibꝫ in ecclia de Nywton Sturmynstri supradicta nra et successor nror et ecclie Sarum jurisdictione autoritate dignitate et consuetudine. Dat apud Remsbuꝛ 8º ids Maij duo gra Mº CCº LXIXº Pontifici nostri anno sexto.

Ordinacio Vicarie de Sturminstre.

Porciones ecclesie de Sturmynstre assignate vicarie ordinande in eadem perpetuis temporibus duratuꝛ mansum cum gardino et valet annuat di marꝫ tota arabt. pertinens ad dictam ecclia IX acꝛ except scilicet III acꝛ in crofta juxta mansum ecclie et IIIº infra clausu[m] quod vocatur lacombe jux. curia Dni. & II acꝛ juxta boscū ecclie et valet dicta terra assignata vicarie per annū XII sol. Item VI acꝛ pti et valent per annum IX sol. cu redd et terra de Colber et baggeber et valet per annu XII s. VIIIº husbote heybote et furbote in bosco dni et valet per annu XX sol pastuꝛ de hamede et Estacꝛ vat per annū IIIº churchesch. bli & vat per annū XVIIIº IIIº churchesceth Galliū vat per annū IIº Xº. Decima lane vat per annū VI VIIIº Decima agnoꝛ vat per annū XII VIº. Decima vituloꝝ VI IIIº. Et pta habit. II vitulos per annū de curia dni et unu de alia domo et vat III deciam pullo. et porcello. que val XXº deciam ovoꝛ vat Xº. Deciam aucuꝛ IIIº oblacionū III festo principalu XXXIIIº IIIº. Deciam feni except decia de dnico abbis XLIIIº. Decia lact et cas per annū vat XXº decia lini val per annu XVI. Mortuaꝛ et oblaciones rone descend Xº. Oblacio [501] cere et requeste VIIº IIIº. Oblacoꝛes cum pane budto. VII VIIº. Purificacoꝛes II. Oblaciones et decie mercato. IIIº VIº. Decima gardino. et colūba III. Decia molend scilicet Robti. Molendinaꝛ VI. cu piscatuꝛ. Decia molend dti mauri II. Johis. frond XII. Item cois pastuꝛ quam rectores dictie ecclie consueverunt hꝛe. ita tamen quod non communicet in dnois et separat pastuꝛ boscoꝛ pꝛatoꝛ et pasturarum dictorum abbis. et convent qꝫ non aestiatur pastura ad lx bident XIIº. Pastura ad III boves cum bobꝫ dni II. Item in campo boreali XXVI acꝛ di terre arabil una perticata in campo orientali XXV acꝛ teri arabit pt acꝛ VIº et debet precii singule acꝛe dimidia et sic valebit terra singulis annis vicario XIIIº. IIº qº. Ona incumbent sunt ista procuꝛo archi VII. IIIº. ob. qº. Redd na Pasche et Pent II. Sinodochiu XX. IIº. ob. Cathedratuꝛ XVIIIº. Servitui unius Capellani LXXI. VIIIº. —Altellagiū id est provenciones ad altaꝛ valet per annū X.

Copy Taxation or Valor of the Year 1291, commonly called Pope Nicholas's Taxation : remaining in the King's Remembrancer's Office in the Court of Exchequer.

Anno Dni. 1291.

Rotulus taxacois Bono. Temporal reddit et provent Religioso. persona. Archidiacon diversis Com in Regnū Angliæ fact Aº Dni. 1291.

[502] Sa. Taxatio Bono. Spiritualiu et Temporalu in Archidiaconatibus Dorſ et Sa.

Archid Dorſ.

Decanatus Schefton.

	TEMPORAL.	SPIRITUAL.
Ecclesia de Stureminstre Nyweton	XX m ^{ts}	II m ^{ts}
Porco Prioris de Craneborn in eadem	VII	VIII d. ob.
Vicari in eadem	XX m ^{ts}	XX.

*Extract of the General Ecclesiastical Survey, 26th Henry VIII. A. D. 1535.
Remaining in the First Fruits Office.*

Dorset.

Dioç Sarum.

Decanañ de Shastoñ.

Stourmyster Newton psonat^o.

Psonat. appropriat Monastio de Glastoñ in Coñ Som^s—nⁱ hic on^at q^u } Nⁱ.
in on^e Abbis. dei Monast^oij }

Stourmyst Newton Vicař.

Will^o Poxwell modo Vicař ibm. cū Capella de Bagbere
eidm. Vicař annex.

In Terr ^e Gleba p annu	iiij.ℓ.
In omiod Decimis	viiij.ℓ xvj ^s iiij ^d ob.
In oblaç i alijs pñç	iiij.ℓ vij ^s vj ^d .
[503] In quadm porçone eidm Vicař p tempe existen p) Abbem. Monastij de Glastoñ in Coñ Som ^s solut . . .)	iiij ^s iiij ^d .

£ s. d.

xvij. vij. j. ob.

Inde solut Archidiaç Dorç p Sinod t^e peu^r an^{ti} x^s vij^d.

£ s. d.

Et reman ^o	xvj. xvj. vj. ob.
Inde p x ^{ma}	xxxiiij ^s . viij ^d .

Copy Survey of Newton, in Domesday. A. D. 1086.

Dorsete.

Terra Sçæ. Marie Glastingberiensis.

VIJI. ~~Eccle S-Mario Glastingber~~ ten^t Newentone T. R. E. geldb. pro

XXII. hid. T'ra. ē. XXXV. cař. pter hanc ē t'ra. XIIIJ. cař in dno ibi.
q̄ nunq. geldau'. Ibi s̄t XXI. uilt & XVIIJ. bord & X. cotař & XIII.
colibti.

& XV. serui. Ibi. III. molini redd. XL. sot. & LXVI. ač pti. Silua
II. leū & dim' lǵ. & una leū lāt. Valuit. XXX. lib. modo. XXV. lib.
De t'ra ista hui^o a ten' Waleran^o. VI. hid. Rogeri^o I. hid Chetel. I. hid.

Hæ. VIII. hidæ poſs arari^{xⁱ car.}. Valent. VII. lib.
cocus

De ead t'ra ten' Goscelm^o de rege. VIII. hid. Ibi ht. II. cař. & II. seruos.
& V.

[504] uiltos & VI. bord. cū IIII. cař. & molin. redd. III. sol. & IX. den. &
XVI. ačs pti.

Silua dimid leū lǵ. & una q̄ lař. Valuit & uat IIII. lib.

*Then follow the Writ Ad quod damnum, 37th Edward III. A. D. 1363; and Inquisi-
tion thereupon:*

The Tithe Rates:

And Receipts for the Money-payment, from the year 1766 down to 1792.

[505] MEMORANDA.

Hilary Term, 56 Geo. III.

During the last Michaelmas vacation, Sir Alan Chambre, Knight, resigned his office of one of His Majesty's Justices of the Court of Common Pleas.

In the same vacation, James Allan Park, of Lincoln's-Inn, Esq. one of His Majesty's counsel, was called to the degree of Serjeant at Law, and appointed to succeed Mr. Justice Chambre in the Court of Common Pleas. He was soon after knighted. His rings bore the motto, "*Qui leges juraque servat.*"

Mr. Justice Heath died during the same vacation.

In the present Term, Charles Abbott, of the Inner Temple, Esq. having been called to the degree of Serjeant at Law, took his seat on the Bench as one of His Majesty's Justices of the Court of Common Pleas, vacant by the death of Mr. Justice Heath. The motto on his rings, was "*Labore.*"

In this Term also died Mr. Justice Dampier, one of His Majesty's Judges of the Court of King's Bench.

[506] Hilary Vacation.

George Sowley Holroyd, Esq. was called to the degree of Serjeant at Law, and gave rings, with the motto, "*Componere legibus orbem.*"

The following barristers were appointed of His Majesty's Counsel learned in the Law:—James Burrough, of the Inner Temple: Charles Warren, and Jonathan Raine, of Lincoln's Inn: James Scarlett, and George Harrison, of the Inner Temple: James Trower, William Cook, Samuel Yate Benyon, and William Agar, of Lincoln's-Inn; and John Bell, of Gray's-Inn, Esquires: and Charles Wetherell, of Lincoln's Inn, Esq. received a patent of precedence.

Died Sir Simon Le Blanc, Knight, one of His Majesty's Justices of the Court of King's Bench.

John Vaughan, Esquire, Serjeant at Law, Solicitor General to the Queen, was appointed one of His Majesty's Serjeants at Law, and promoted to the office of Attorney General to her Majesty, vacant by the death of George Hardinge, Esq. one of His Majesty's counsel, and chief justice of the Brecon circuit.

[507] Easter Term, 56 Geo. III.

Mr. Justice Abbott resigned his office of one of His Majesty's Justices of the Court of Common Pleas, having accepted the appointment of one of the Judges of the Court of King's Bench, vacated by the death of Sir Simon Le Blanc. He took his seat on the Bench this Term, and soon afterwards received the honour of Knighthood.

James Burrough, Esq. one of His Majesty's counsel, took the degree of the Coif. His rings bore the motto, "*Legibus emendes.*" He was afterwards appointed one of His Majesty's Justices of the Court of Common Pleas, in the room of Mr. Justice Abbott.

REPORTS of CASES ARGUED and DETERMINED
in the COURT of EXCHEQUER, at Law and in
Equity, and in the EXCHEQUER CHAMBER,
in Equity and in Error, from Trinity Term,
56 GEO. III. to the Sittings after Hilary Term,
57 GEO. III., both inclusive. Vol. III. By
GEORGE PRICE, Esq., of the Middle Temple,
Barrister-at-Law. London, 1818.

- [1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER. TRINITY TERM, 56 GEO. III. AND THE SITTINGS AFTER.

MEMORANDUM.

In this Term John Hullock, esquire, of Gray's Inn, was called to the degree of Serjeant at Law. His rings bore the motto, "*Auspicium melioris ævi.*"

- [2] DALZELL v. BAILEY AND ANOTHER, Executors, &c. Saturday, 15th June, 1816. —The Court will not order a cause set down for hearing, to be advanced in the paper, on the ground that the subject matter of the suit is an arbitration of matters of account: and that if the award should be set aside, the applicant would, on going into the account again, lose the advantage of a material and essential witness, who is old and bedridden, and not expected to live.

Raithby moved to advance this cause in the paper, on an affidavit, stating that the plaintiff had filed a bill against defendants in Easter Term, 40 Geo. III., praying that the award therein mentioned might be set aside: and for an account, and injunction to restrain proceedings at law in the mean time:—that the suit was afterwards revived, and defendants had put in their answers, and that the arbitrator having been examined on the part of the defendants, the cause had been set down, and was in the paper for hearing; and that if the Court should decree that the award should be set aside, and an account taken, as prayed, it would be necessary that the accounts between plaintiff and the testator should be again gone into;—that in support of such account of the estate of said testator, Robert Dalzell was a material witness on the part of the defendants: that he was in the 73d year of his age, and infirm and bedridden, and not expected to live, whereby defendants were likely to lose the benefit of his evidence in support of the estate of their testator, in case of such a decree as aforesaid, unless his evidence could be sooner obtained.

Thus, the application rested merely on the ground of the evidence of a material witness for the defendants being likely to be lost to them, unless the indulgence sought was granted by the Court.—It was very strongly pressed, as a motion founded [3] in justice to the applicant, whose merits depended almost entirely on the witness in question: and if the award should be set aside, and he should die in the mean time, they would have no chance of succeeding before another arbitrator. The learned

counsel acknowledged that the motion was quite novel: but submitted, that under the circumstances, there was reason to hope that the Court would assist the defendants, by granting a rule to shew cause why the order should not be made.

The motion was refused.

WARING v. HOLT. Tuesday, 18th June, 1816.—The defendant cannot, in this Court, change the venue, after having obtained an order for time to plead “on the usual terms” generally. It is considered to be one among what are commonly expressed in the order to be the usual terms imposed by it on giving time, that the defendant shall not afterwards move to change the venue.—When the order is intended to be without prejudice to a change of venue, it should be so expressed in the summons for attending the Judge.—Nor will the Court order a change of venue in such a case, although the defendant proposes to give judgment of the term.

Jones, D. F. opposed the present application made by J. Clarke, for changing the venue in this action (for goods sold and delivered) from Middlesex to Lancaster, on the usual affidavit.

The *quo minus* issued on the 2d May, returnable the 15th, and the declaration was delivered *de bene esse* the same day, to plead in eight days.

The defendant had taken out a summons for time to plead, which was endorsed by the plaintiff’s [4] attorney, and an order was drawn up on the 27th May, giving the defendant a week on all the usual terms*.

The motion was opposed on the ground that one of those terms was, that the defendant should not move to change the venue; and it was therefore submitted, that it was now too late to make this application, which, if it succeeded, would have the effect of deferring the plaintiff’s judgment, if he should recover in the action, till the next Michaelmas Term; and such a practice, if permitted, would often in Trinity Term enable a defendant to get over the long vacation. To shew that an undertaking not to move to change the venue, is always considered one of the usual terms imposed on a defendant obtaining time to plead, it was said to be customary, whenever it is intended that the common order shall not have such an effect, to introduce in the summons, that it shall be “without prejudice to the defendant’s moving to change the venue;” and summonses in the King’s Bench, having an express stipulation to that effect, were produced, for the satisfaction of the Court, as to that point.

[He cited *Prynt v. Berkeley* (Cowp. 511), *Hunter v. Gray* (Barnes, 493), and *Shipley v. Cooper* (7 T. Rep. 698), where the [5] Courts of King’s Bench and Common Pleas refused to change the venue after the defendant had obtained an order for time to plead.]

The criterion seems to be, whether or not a trial would be lost by the delay; and here it is obvious that that would be the effect of the change of venue now sought.

CLARKE, J. contra, contended that it was not one of the usual terms that the defendant should not be afterwards at liberty to move to change the venue. In the present instance, the order was general on the usual terms, that is, pleading issuably, rejoining gratis, and taking short notice of trial; but it is not added, for the first Sittings in London or Middlesex. In all the cases which have been cited, the order was drawn up on the express terms that the defendant should accept short notice of trial for the first Sittings in London or Middlesex.

He then cited the case of *Wrightman v. Thomson* (1 Wilson, 245), where the venue was ordered to be changed after a judge’s order for time to plead. In that case also, one of the terms expressed was, that the defendant should take short notice of trial for the Sittings within term in Middlesex; which may be the reason why that decision has not been always followed. In Tidd’s practice (p. 609 (5th ed.)), it is said that a defendant may move to change the venue at any time before plea pleaded, and that even after an [6] order for time to plead, though upon the terms of pleading issuably; and the cases cited there in support of that doctrine, are Say. Rep. 207; *Sadley v. Las.* M. 26 G. 3, K. B.; *Hudson v. Needham*, T. 27 G. 3, K. B. In this case, the terms are

* Pleading issuably; rejoining gratis; taking short notice of trial; and not, (as now decided,) afterwards moving to change the venue.

left general and undefined, and the question is, whether it be one of the usual terms that the venue shall not be changed.

Per Curiam. The defendant, by having obtained time to plead on the usual terms, has precluded himself from making this motion.

Order refused †.

THE KING (IN AID OF BRADDOCK) v. WATSON AND ANOTHER. (Demurrer.) Tuesday, 18th June 1816.—Replication to a plea (in bar to an Extent in aid), that defendant was trustee under a prior deed of assignment for the general benefit of all the insolvent's creditors;—that the prosecutor of the Extent was indebted to the Crown before and at the time of executing the deed;—that the insolvent then carried on trade, and was not then seised of lands, &c.;—that the insolvent was then indebted to the prosecutor:—and that the prosecutor had not executed the assignment, held bad on general demurrer.—Such an assignment is not fraudulent against such a creditor, unless there have been a commission of bankrupt sued out.—Nor can such a deed be avoided by the effect of an Extent, as a commission of bankrupt may.

The facts and pleadings on which this demurrer arose were as follows:—Braddock being found indebted to the Crown, by inquisition on an Extent, for duties of Excise on malt and beer, obtained an [7] Extent in aid against Joseph Wheeler, tested 21st August 1815, who was thereupon found, by inquisition, indebted to Braddock in the sum of 189l. 14s. for beer sold and delivered: which debt was returned by the sheriff of Suffolk as seized. He also returned that it was found by the jury, on the inquisition taken on the Extent against Wheeler, that Watson (the defendant) had received, and had then in his hands, the sum of 147l. 1s. received by him, as one of the trustees, under a deed of assignment, dated 28th February then last, and made between said Wheeler of the first part, said Watson and plaintiff Batterbee (creditors of Wheeler, of the second part, and several other persons, also creditors of Wheeler, of the third part) which was executed by said Wheeler, said Watson, Edward Drewe, and said Batterbee, but by no other creditors of said Wheeler, and particularly not by Braddock (the prosecutor) and Cornelius Elven:—that Wheeler, at the time of the said assignment, and then (on the taking the inquisition) was indebted to Braddock in the sum of 180l. and upwards: that Wheeler was a trader within the bankrupt laws,—and that he (the sheriff) had seized the said sum of 147l. 1s. into his Majesty's hands, as commanded by the writ.

The defendants came in and claimed the money due from Wheeler, and so seized, and having craved oyer of the Extent, pleaded (protesting the insufficiency of the said writs) the said assignment of all the insolvent's estate and effects to [8] them in trust for the benefit of all his creditors, setting out the date and the contents of the deed at length: in which there was a provision that, in consideration of such assignment, they should take the same, and the monies to arise therefrom, in full satisfaction and discharge of their several and respective debts then due and owing to them, and release the said Wheeler therefrom. The plea then averred the delivery of possession to defendants by Wheeler, under the deed and in execution thereof, before the issuing of the said writs of extent.—That the debts then and still due and owing from Wheeler to the defendants and Edward Drewe, amounted, in the whole, to the sum of 500l. being a larger sum of money than the said sum of 147l. 1s. received by Watson: and also exceeding the value of all the goods and chattels, debts, sums of money, and other things by the said indenture bargained and sold as aforesaid:—that Wheeler was not, at the time of the execution of said indenture, nor at the time of the sale and disposal of the said goods and chattels, nor of the receipt and recovery of the said debts and sums of money by Watson and Batterbee, or of any part thereof, a debtor or accountant of the Crown: and that the said indenture was bonâ fide and without fraud for the benefit of all such of the creditors of Wheeler as should chuse to take the benefit thereof, and without any intent to deceive or defraud the Crown, or Braddock. All which matters and things defendants were ready to verify: wherefore they prayed judgment, and that the King's hands might be removed, &c.

† It was then proposed to give judgment of the present Term: but the Court still refused.

[9] To that plea the Attorney General replied, that the King's hands ought not to be moved, for that (protesting the sufficiency of the plea,) the said Attorney General saith, that at the time of the taking of the said inquisition in the said writ of Extent against the said Joseph Wheeler first mentioned, and so as aforesaid, &c. the said Henry Braddock, in, &c. was indebted to our said Lord the King, in manner and form, &c. and from thence hitherto hath been and still is indebted, to wit, at, &c. and that before and at the time of the sealing and delivery of the said supposed indenture of assignment, in, &c. the said Joseph Wheeler carried on trade and commerce as a cordwainer, and sought his living by buying and selling, to wit, at, &c. ; and that the said Joseph Wheeler was not, at the time of the sealing and delivery of the supposed indenture as aforesaid, seised in his demesne as of fee, or in his demesne as of freehold, of any lands, tenements or hereditaments whatsoever ; nor was he at that time seised, possessed of, or entitled to any copyhold or customaryhold lands, tenements or hereditaments whatsoever : and that before and at the respective times of sealing, &c. and of the taking of the said inquisition on the said writ of Extent against the said Joseph Wheeler secondly mentioned, and so as aforesaid, taken on the said writ of Extent against the said Henry Braddock, therein also mentioned, the said Joseph Wheeler was justly and truly indebted to said Henry Braddock in the said sum of 189l. 14s. in manner and form, &c. and from thence, &c. to wit, &c. ; and that the said Henry Braddock hath not signed, [10] sealed, or delivered the said supposed indenture of assignment in the said plea of the said defendants mentioned, and so the said Attorney General saith, that the said supposed indenture is fraudulent and void, to wit, at, &c. paratus est verificare, praying judgment, and that the hands of his said Majesty might not be moved, &c.

To the replication there was a general demurrer, in which the Attorney General joined.

Platt now argued in support of the demurrer, premising that the present question, (raised by the inference of law, intended to be deduced from the facts detailed in the replication, that the deed was fraudulent, and therefore void against the person using the Crown process,) was, shortly, whether the assignment was, under all the circumstances, fraudulent in the eye of the law, and therefore a nullity : or, *bonâ fide*, and valid. It was submitted, that whatever advantages the prerogative process usually conferred on the person in whose aid it was employed, it did not give the Crown debtor new rights, nor could it discharge his debt of the equities, to which in other cases it would be subject. The writ is a more summary and expeditious mode of recovering a debt ; but when it has to conflict with equal claims, even in the case of the Crown itself, it must proceed *passibus equis*. Thus, if the Crown debtor were a mortgagor, a pawnor, or a lessor, the Crown could not, by its process against persons in either of those characters, suppress the incumbrances and acquire a greater interest than [11] that of the mortgagor, pawnor, or lessor, but must take the property subject to the mortgage, the pawn, or the lease. So neither can the Crown seize presently a debt due to its debtor *solvendum in futuro*.

If the assignment had been executed before Wheeler had become indebted to Braddock, it must be admitted that the Crown would have been bound by it, and could not seize for a debt which accrued due afterwards : whence it may be contended, that whatever can give validity to the deed as against Braddock, will also support it against the Crown, who cannot be put in a better situation than Braddock himself, (through whom, and by whose title it must claim,) would have been. In short, if this assignment was not antecedently void or avoided, as against Braddock, the proceedings under the Extent could not have the effect of avoiding it.

That an assignment of all his effects by a trader, for the general benefit of those of his creditors who chuse to come in, is not fraudulent as against the others, has been recently held in the case of *Pickstock v. Lyster* (3 Maule & Selwyn, 371), which was certainly a very strong case, for there the assignment of the insolvent's effects, which was not signed by any of the creditors, was not executed till after the plaintiff had obtained judgment by default. The words of Lord Ellenborough are strongly applicable to the [12] present case. His Lordship says (after expressing an apprehension that extensive mischief would ensue from countenancing the objection of fraud to such assignments, and citing cases where it had been held that an executor might give preference to some creditors pending a suit by another creditor) "the principle of those decisions would be destroyed, if we should hold an assignment fraudulent

because it may operate to the prejudice of a particular creditor:" then referring the assignment in that case to an act of duty rather than fraud, inasmuch as by it the fund was made available for the whole body of creditors, his Lordship adds,—“it is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceeding in his suit. I see no fraud; the deed was for the fair purpose of equal distribution.” So here, while Braddock is endeavouring to sweep away all the insolvent's property for his own exclusive benefit, Wheeler commendably defeats that purpose by this just and equal assignment, which the Court of King's Bench have held to be a moral duty, and the language of the rest of the Court is equally strong and pointed as to that effect of the deed. Had Braddock been excluded from, or had he not had notice of the deed, it might have varied the case; but that was not so.

There is certainly, however, a distinction in the case of *Pickstock and Lyster*, and the present, in one respect, which will probably be much relied on by the counsel for the prosecutor; that is, that in this case the debtor is by the demurrer admitted to [13] be a trader, whereas it does not, it must be acknowledged, appear by the report that Glover, the insolvent, in the case cited, was so. It does not, however, on the other hand, appear that he was not. But admitting for a moment that he was, the use to be made of that circumstance must be, that his property was subject to be affected by the bankrupt laws, and that therefore the deed was fraudulent and void. The answer to that is, that the circumstance of his being a trader would not of itself and alone place him in a situation to be liable to the statutes of bankruptcy. There must also be a subsisting petitioning creditor's debt, and an act of bankruptcy committed, neither of which appear by these pleadings to have existed: and if that were not so, no creditor of Wheeler's could have compelled a rateable dividend of his effects by those laws, nor even then, unless an actual valid commission had been sued out: on that ground, therefore, all objection of fraud is obviated. But that every deed of assignment executed by a trader is not ipso facto fraudulent and void, is quite clear; for it is not unfrequent that traders executing deeds of assignment, afterwards pay 20s. in the pound; in that case nobody would be defrauded; and therefore, if the proposition were received so generally, the absurdity might be incurred of pronouncing an act fraudulent, by which no one can be defrauded. This replication has not, therefore, by its several averments, surrounded the deed of assignment with any of those circumstances of fraud which would necessarily render it void, as against Braddock; and if it be good against him, it is also valid against the Crown, [14] who can only be entitled to his interest in the claim.

Walton, in support of the replication, admitted the sole question to be as stated, and submitted that this assignment was fraudulent under the statute of 13 Eliz. as against Braddock, and might therefore be avoided by him. (This was the more strongly pressed in the present instance, from the fact of there being inserted in the assignment a condition to be imposed on all who should entitle themselves to benefit under it by signing it, that they should release the debtor from the rest of their demands, in consideration of such dividend as they should receive.)—That he (Braddock) had not signed the deed, nor had any other creditor of Wheeler, except one besides the trustees: and that, therefore, if the deed was not ipso facto void, it was avoidable by him as delaying the recovery of his debt; and also operating to compel him to accede to a composition, which the bankrupt laws could not force him to submit to. A creditor may object to sign a bankrupt's certificate, whereby he keeps his future effects liable: a fortiori may he, an insolvent's assignment.—That the non-assent of some of the creditors to a deed of assignment, renders it fraudulent and void, was decided in *Eckhardt v. Wilson* (8 T. R. 148).

[Graham, Baron. In that case there was an actual commission of bankrupt taken out.]

[15] But the Court held it void under the statute of Elizabeth.

The case of *Pickstock v. Lyster*, was admitted to bear apparently against the replication, but it was contended that that case was distinguishable, as had been fairly observed: for it did not there appear that Glover was a trader, and the argument did not proceed on his liability to the bankrupt laws; whereas, in this case, the substratum of the argument is, that Wheeler was a trader, and therefore his creditors were not bound, and might have resorted to any remedy they pleased against the effects assigned.

There is also another argument arising in this case, on the question whether the Crown proceeding by Extent, not being bound or privileged by the bankrupt laws, and those who are armed with that prerogative process, have not, *pari ratione*, a superior right to avoid the deed, as it would have had in case a commission had issued. The assignment was clearly an act of bankruptcy, and a commission might have been taken out on it; and that there was a good petitioning creditor's debt, is confessed by the pleadings, and independent of the finding. It is therefore fraudulent under the bankrupt laws, and void against the creditors who did not execute it.

Per Curiam. There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all the creditors, Braddock as well as the rest. Nor is any such [16] inference to be drawn from the facts averred in the replication. It would have been a different thing, if there had been a commission of bankrupt sued out, and the property had been divested. This is a very common arrangement, which it would be very injurious to disturb, where there has been no commission.

Judgment for the Defendants.

Walton applied for leave to amend, which was refused; the Court saying that no amendment could assist him.

RICHARDS, Baron, observed, that as far as the facts in the case of *Pickstock v. Lyster*, were brought before the Court of King's Bench, the decision was right. But that he had no doubt on the trial, that the deed was executed under unfair circumstances, and with an intention to defraud the judgment creditor. One fraudulent part of the case, which was left to the jury, was that the deed was executed just as the execution was coming in; on the merits, therefore, that is a bad decision. But that case was decided by the Court of King's Bench, on the other ground of the assignment being for the equal benefit of all the insolvent's creditors. Such a deed certainly ought not to be avoidable by any particular creditor not attempted to be excluded from the benefit of it; and no such attempt has been made in the present instance.

[17] SEAL (Assignee of the Sheriff of Hereford) v. PHILLIPS AND OTHERS. Wednesday, 19th June 1816.—A defendant in replevin is not entitled to an assignment of the replevin bond on the plaintiff's neglecting to declare at the next county court, if he himself have not then appeared to the summons.—And if he obtain an assignment, and bring an action, the Court will stay the proceedings (on an affidavit being made, that a writ of recordari fac. loquelam has been sued out), without payment of costs by the defendant, which will be ordered to abide the event of the proceedings on the *re. fa. lo.*

The plaintiff, as assignee of a replevin bond, had brought an action against the defendant, and in the course of last Easter Term, Dauncey obtained a rule to shew cause why the proceedings in that action should not be stayed: the defendant having issued a writ of recordari facias loquelam, to remove the proceedings from the County Court into the Court of Common Pleas. The application was made on an affidavit of service of the notice of motion, and of the recordari fac. loq. having been issued, and delivered to the under sheriff.

It appeared by the defendant's affidavit, that on the 20th of April, the plaintiff had distrained for half a year's rent, amounting only to 6l. 10s. The goods being replevied on the 21st, the sheriff summoned the plaintiff to appear at the next County Court, (24th April):—that defendant did attend, but finding that no appearance was entered, he did not declare, under a notion that he was not bound to declare till the defendant (in the replevin) had appeared:—that he was ready to have declared, and that he had merits, the rent distrained for not being then due.

Owen now shewed cause. He submitted, that this application being for an indulgence to get rid of a regular proceeding, ought to have been moved [18] on payment of costs;—that this was not a case for the interference of the Court to stay proceedings, as the defendant had neglected his duty to the delay of the plaintiff, in not appearing and prosecuting his suit according to the condition of the bond;—that the party swearing he did not know that he ought to have declared, was no excuse: and as to having merits, the rent not being due when the distress was made, that cannot be tried on affidavits. It was peremptory on the plaintiff (below) to have declared at the next County Court, and if he does not, the defendant (below) is entitled to

proceed on the replevin bond, as the plaintiff has done, and on that point he cited *Dias v. Freeman* (5 T. R. 195), where it was held that the plaintiff was entitled to sue on a replevin bond if the defendant had not prosecuted his plaint with due diligence.

Dauncey, in support of the rule, submitted that as it was in consequence of the plaintiff's original neglect in not appearing to the summons, that the defendant had not declared he had no right to complain of the irregularity of defendant's not declaring, even if under such circumstances, he were bound to have done so: it is sworn, that but for that, the defendant would have declared.

[Wood, Baron. Inquiring if a plaint had been levied: it was said that the bond supposes that, without which, the defendant would not have been permitted to replevy.]

[19] A writ of recordari facias loquelam, returnable the 18th May, has been sent to the sheriff, but he has refused hitherto to return the writ, alleging that he has assigned the bail bond.

The Court made the rule absolute for staying the proceedings on the bond assigned, and ordered the costs to await the event of the cause, on the writ of rec. fac. loquelam.

Rule absolute.

MYTTON v. HARRIS. Thursday, 20th June 1816.—Old terriers, recording that tithe of hay is payable in kind, signed by the rector, churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut the presumption of a farm modus attempted to be established, by proof of a money payment having been uniformly rendered within living memory, and the absence of any evidence even of reputation that the tithe had ever been taken in kind: and that although such terriers are not proved to have been signed by any person interested in the farm. —Wood, B. dissentiente.—Nor will the Court grant an issue in such a case.—Modus of 10d. a score for agistment of sheep, bad.

The plaintiff, who was rector and vicar of the parish church of Llandyssell, (Montgomeryshire) filed this bill against the defendant for tithes of hay, clover, and clover-seed, gathered on a certain farm occupied by her in that parish, called Brynwyderwin, and for tithe of agistment.

The plaintiff had at first prayed an account of tithe of corn and grain; but the defendant having pleaded an annual composition in bar, the bill was amended by omitting that claim.

[20] To the present suit the defendant set up the following moduses—(having fully described the extent of her farm, both according to its ancient parcels, and those which had been recently substituted for some of them, under a modern inclosure act)—A farm modus of 19s. per annum, in lieu of tithe in kind, of all grass whatsoever cut or mown, and made into hay, in and upon the said ancient farm, or the titheable places thereof:

Three-pence per annum for and in lieu of the tithes of milk and calves of every cow having calf in the course of the year; and

One penny for every milch cow, being barren and not having a calf in the course of the year, which were fed and depastured on the said farm—all payable at Easter.

A further modus was set up of 10d. per score for and in lieu of the agistment tithe of all sheep agisted for hire throughout the parish belonging to persons not resident there.

The defendant, to prove these moduses, examined many witnesses, who deposed to the sum of 19s. having been paid for a long time back, as well as other various but fixed moduses for hay and grass throughout the parish; and that tithe in kind had never, within memory, been received or demanded for hay or grass made or cut in the parish. They also proved that there had ever been paid, within their memory, to the rector, 10d. a score for hogs [21] or yearling sheep depastured in the parish, belonging to persons not residing therein, and 2d. a-piece for lambs.

In opposition to this evidence, the plaintiff put in several terriers—the first was dated 5th March 1663, and was in these words: "Imprimis, there is due to the parson and vicar the tenth of all corne and graine, hey and herbege, pig and geese, wool and lam, hemp and flax, and other small commodities: and the tenth is parted between the parson and vicar: to the parson two parts, and the vicar the other." Signed by

the then vicar and eight of the inhabitants. Another, of the 13th of July 1675, in the same words, signed by the then minister and churchwardens, and five of the inhabitants. The third was dated in 1684, and recorded, that "The tithes of the parish aforesaid, both small and great, with Easter duties, wool, lamb and kid, hay and graine, lactualls, pig and geese, hemp and flax, and honey, are to be paid in kind, if required; and there is noe custom, usage, or prescription to the contrary." Signed by the rector, the churchwardens, the overseer, and eight other parishioners.

There was no other terrier found from that time till the year 1774, but in that year one was signed by the curate (Llewellyn Davies), to the following effect: "The rector is entitled to all tithes in kind (except a modus in lieu of tithe hay) from every farm in the parish." The next is dated 28th May 1777, and is also signed by the same curate [22] (who, in his deposition for the plaintiff, states, that he signed it at the particular request of the officers and parishioners, in order to establish the moduses,) and is thus entitled, "A terrier of the modus in the parish of Llandyssel and diocese of St. Asaph, in lieu of tithe hay delivered into Court the 28th May 1777." It then states various different sums paid by the several farms in the parish, and amongst the rest 19s. by the defendant for the farm then occupied by her. The next, in July 1791, was to the same effect, also signed by Davies.

Davies was the only witness examined by the plaintiff, and he deposed that he had heard an old inhabitant of the parish, who acted as vestry clerk, say that he had seen an ancient terrier which required tithe-hay to be taken in kind.

Dauncey, Benyon, and Hall, for the plaintiff.

Martin and Owen for the defendant.

THOMSON, Chief Baron, having stated the case, observed, that the only point of contest was, whether the several moduses had been sufficiently proved to enable the Court to establish them in the first instance: or, whether the evidence left them so doubtful as to render an issue necessary.

The modus of 10d. a score for hog sheep, and 2d. a head for lambs, his Lordship considered to be clearly untenable; and that there was no colour for setting it up. Then as to the farm [23] modus of 19s. there is certainly no evidence which goes to shew that that payment was a modus, notwithstanding the length of time during which that sum had been paid, which has been, without doubt, very considerable. But the rector, it appears, lived out of the parish during the whole of his incumbency, which may go far to account for it: and the payments said to be made in lieu of hay, are (taken as moduses) most extraordinary; for it seems that in some way or other, every inch of land in the parish is covered by various moduses. The three first terriers, on the other hand, are quite conclusive. There the tenths, which is a very strong term, and well relied on by Mr. Dauncey, are said to be payable in kind. But not a word is mentioned of moduses in either of those ancient documents: and the other modern terriers, as they are called, made above 100 years afterwards, and by the parishioners themselves, amount to the most feeble attempt to establish a modus that ever was made, and ought not to be countenanced.

GRAHAM, Baron, for the same reasons, was of the like opinion.

WOOD, Baron, was also of opinion that all the moduses, except the farm modus, were void, for uncertainty in point of law and fact.

As to the farm modus, however, his Lordship expressed himself to be of opinion that there had been sufficient evidence of the age offered in sup [24] port of it, although opposed by adverse documents, to call on the Court to send it to a jury.

In all cases (observed his Lordship) of usage, proved on one side and none on the other, I shall always hold that a jury ought to decide. As to the merits of this case, I am not at liberty, perhaps, to express my opinion: but with respect to the evidence of the terriers, I cannot consider them admissible evidence against the land owners, unless proved to have been signed by some of the persons from whom they derive title. We should certainly not admit them as against a rector or vicar, unless they were signed by them, or some of their predecessors. Other parishioners having signed the terriers, do not carry them any farther as against the owner of the farm. As to such terriers as concern the parish generally, I agree that it would be sufficient if they should be signed by any of the parishioners; but their signing a terrier cannot make it admissible to affect a farm modus.

His Lordship said, on the subject of awarding an issue in this case, that the jurisdiction of Courts of Equity was only ancillary and subsidiary to that of Court of

Common Law: and legal rights ought, if possible, to be established by legal means in the first instance;—that the nature of the examination of witnesses in Courts of Equity, through the medium of answers to interrogatories in writing, was a consideration which went to strengthen the necessity of the interference of a jury in doubtful [25] points: and as proof of it in this very case, the witness (Davies,) who appeared to have conducted himself in an extraordinary manner altogether, would cut an awkward figure in a witness-box, whatever he might have done on paper.

RICHARDS, Baron, was of opinion that Davies's evidence could not be put out of this question: and that, on the whole, the testimony was conclusive and satisfactory, as it appeared to him. His Lordship said, he would always oppose sending issues to a jury where it could possibly be avoided, unless it were in the well known excepted cases (of a rector and heir-at-law) *1.

Account decreed, with Costs.

[26] RIDLEY v. OBEE (BY ORIGINAL BILL). TAYLOR AND OTHERS v. OBEE (BY BILL OF REVIVER). OBEE v. TAYLOR AND OTHERS (BY CROSS BILL). Friday, 21st June 1816.—The Court will not make an order on motion, that a plaintiff in a cross cause (who has not examined witnesses on his part in the original cause, after having obtained an order to enlarge publication) shall be at liberty to read depositions taken on his behalf in the cross cause, after publication of the depositions taken on the behalf of the plaintiff, on the hearing of the original cause, on an application to put the cross cause into the short paper for that purpose, supported by affidavit of total ignorance on the part of all parties interested, and their attorneys, of the depositions published.—Nor will they depart from their general rule in that respect, however satisfactory in point of fact the affidavit in support of such a motion may be in the particular instance.

Dauncey and Pepys moved the Court *2, pursuant to notice, that the last-mentioned cause might [27] be ordered to be put into the short paper of causes, to be heard at the same time with the two first mentioned causes: and that the depositions taken on the part of the plaintiff, in the last-mentioned cause, might be read as evidence, on his behalf, in the two first-mentioned causes.

The motion was supported by an affidavit, made by the Attornies and Clerk in Court, of the plaintiff in the last cause, stating, in substance, that (all the causes being at issue) they were advised, by Counsel, to move for liberty to read the proofs obtained in the cross cause, on the hearing of the original cause:—that publication passed in the original cause in the latter part of the preceding, or the early part of the present

*1 The reasons given by those of their Lordships, who held that an issue ought not to go, the reporter has taken the liberty of omitting: for as that question seems to have been set at rest by the case of *Bullen v. Mitchell* (ante, vol. ii. p. 399), where all the arguments are fully given, it has been thought unnecessary to repeat what is there so recently and so fully discussed and settled.

It may not be superfluous to observe here, that before that decision, perhaps, the night of deciding without an issue, by the Equity side of this Court, in cases where either of their Lordships had entertained a difference of opinion, was not so completely established.

It is stated in all the cases, that the foundation of that right is, that the Court being satisfied with the evidence before it, does not therefore require the aid of a jury to assist its conscience. The distinction taken is, that in the leading [26] case of *The Minor Canons of St. Paul's v. Morris* (ante, vol. ii. p. 418), the Chancellor, as constituting himself the Court, expresses himself to have been satisfied with the evidence before him.—The Exchequer being composed of four Judges, a difference of opinion on the part of one of its members might have raised a question as to the Court being satisfied. That case, however, appears to have decided in effect, that the satisfaction of the majority is, in such cases, the satisfaction of the Court.

*2 This motion had been made before (on the first day of term); but the Court, on that occasion, refused to hear it, because there was no affidavit put in to satisfy the Court that the plaintiffs in the last cause had not in the mean time come to the knowledge of the evidence of the plaintiffs in the first causes: and, for what reason the witnesses had not been examined in the first causes.

year; but that in pursuance of the same advice, the plaintiff, in the cross cause, had not, on that commission, examined witnesses on his part;—that on the messenger of the examiner, who examined the witnesses in the original cause, inquiring whether the deponents (the Solicitors of the defendants in the original causes) would take an office copy of the depositions so taken, deponents instantly attended at the King's Remembrancer's Office, and informed the examiner's clerk that they were then preparing to examine witnesses in the last-mentioned cause, on the part of the plaintiff therein; and they therefore required that the depositions, which had been already taken in the first-mentioned causes, might not be permitted to be seen, and that the contents might not be disclosed to any person on the part of the said plaintiff in the last cause (Obec);—that none of depo-[28]-nents had seen or knew any thing of such depositions; and that, to the best of their knowledge, none of the witnesses examined in the last cause, on the part of the plaintiff therein, had seen or knew any thing of those depositions, excepting one, who had been also examined in the two former causes; and that there was no reason to believe that she had any knowledge of the depositions of either of the other witnesses:—and, finally, that they (the Solicitors for the plaintiff in the cross bill) had been served with a notice by the Solicitors for the defendant in the same cause; that they, as the Solicitors for the plaintiff in the original causes, intended to move the Court, "that the two first-mentioned causes might be ordered to be put into the short paper of causes, to be heard at the same time with the last-mentioned cause; and that the depositions, taken on the part of the plaintiff in the two first-mentioned causes, might be read as evidence, on their part as defendants, in the last-mentioned cause" *.

The motion was much pressed, on the ground that the causes were substantially one and the same, and that the question was precisely the same in both; that there had been no delay, nor had any other improper motive actuated the plaintiff in the cross cause, in not having examined the same witnesses in the original cause; on the contrary, he had acted under the advice of counsel, in so abstaining; that, on the one hand, the order sought could not [29] unduly affect the other party on the merits, while on the other, complete justice could not now be done to the applicant without it; that it was conformable to the constant practice of Courts of Equity, to read depositions taken in a cross suit, on the hearing of an original cause between the same parties, where the subject matter was substantially the same; and that that practice had been recognized by the other party themselves, who had also given a notice in effect precisely the same.

MARTIN and RICHARDS, *contra*, submitted, that if the party moving had any thing of which to complain, it was his own fault; and he had brought it on himself, by having neglected to examine his witnesses, if he had any at the proper period, in the course of the original cause. The dates of the proceedings shew it to be so. The original bill was filed in Michaelmas Term 1809, and was answered in January 1810. On the death of the then plaintiff, the suit was revived by her executors, as of Hilary 1810; that bill was answered in July following, to which the plaintiffs filed a replication. In Trinity Term 1810, the defendant filed a cross bill, which was answered in April 1811. The cause being afterwards at issue, and witnesses having been examined on the part of the plaintiff, publication would have passed by order, on the first day of Hilary Term 1813, but that the defendant had, from time to time, obtained orders to enlarge publication till the first day of last Easter Term, alleging continually that they had material witnesses to examine; so that they might [30] have examined their witnesses if they had had any, but did not. There is, notwithstanding, no attempt made to account for all the intermediate neglect and delay on their part; and, therefore, they ought not now to have the extraordinary indulgence of the Court, which they seek, in permitting depositions to be read after publication of the evidence taken on the part of the plaintiffs, contrary to the rules of the Court: for though it is sworn that none of the persons engaged in conducting the defendant's cause, have obtained any knowledge of those depositions so published on the part of the plaintiff, it does not appear that the witnesses examined by them in the last cause, did not know of them.

THOMSON, Chief Baron. The depositions now sought to be read, must of course have been published; and the present application requires of the Court to give validity

* That notice was afterwards withdrawn.

to an act already done; whereas the proper course would have been, (and it is the usual one in all cases of requiring indulgence) to apply for leave to do the act, with a view to the ultimate purposes of it. This might have been a more proper application, if it had been made with a general saving of all objections till the hearing, for that would have given the Court an opportunity of then saying, whether the depositions ought to be admitted to be read or not.

If we were to grant this application as now made, we should be departing from all our rules, and getting into a sea of confusion. We should be inducing all sorts of irregularities.

[31] GRAHAM, Baron, of the same opinion. The affidavit on which the Court might be induced to grant such an application, ought to be very strong; and certainly there have not been sufficient grounds laid before the Court on the present occasion.

RICHARDS, Baron. Rules which are made to guard against confusion and inconvenience, ought to be strictly observed. It might not, perhaps, be mischievous in one particular instance; but that would become a precedent for dispensing with the rule in many others, wherein it might be so.

Motion refused*.

BRABAND v. HOSKINS AND OTHERS. (Demurrer.) Friday, 21st June 1816.—Where the object of a bill *quia timet* is to prevent the assignees of a bankrupt, purchaser of an estate, from bringing an action to recover back that part of the consideration-money remaining due to the vendor which had been paid to him subsequent to the commission of the act of bankruptcy, on the ground of his having waved his equitable lien by taking a bond for the purchase-money, if the bill charge as a fact that the bond was given as a further additional or collateral security, the question of law cannot be raised on a general demurrer, because that fact must necessarily be admitted.

The plaintiff filed the present bill to restrain the defendants from proceeding at law against him; stating that he had entered into an agreement with Joseph Dicken, for the absolute sale of an estate, in the county of Derby, for the sum of 5250*l.*; by which it was agreed that Dicken should be allowed time for payment of the sum of 4000*l.* part of the [32] purchase-money, and should, for further securing the payment thereof, procure Richard Meek to join with him in a joint and several bond, in the penal sum of 8000*l.* That the contract was afterwards carried into execution. That in 1810, Dicken and Meek, who were both engaged in trade, became embarrassed in circumstances, when Dicken executed a conveyance of the estate to trustees, in trust, to sell for the benefit of his creditors, which was accordingly sold, and produced a much greater sum than the original purchase-money, which was received by the trustees; that (the sum of 800*l.* remaining due to the plaintiff, on the bond, and an arrear of interest, making, together, 913*l.*.) the trustees paid him that sum in the month of July 1814, when he delivered up the bond to be cancelled, and executed a general release: that Dicken becoming insolvent, he was declared a bankrupt, under a commission dated 15th November following, and the defendants were appointed assignees of his estate. The bill then charged that defendants, in December following, demanded of the plaintiff that he should repay the said sum of 913*l.*: and that they had threatened to commence an action, in case of his refusal to do so, on pretence that as previous to the payment to him of that money, Dicken had committed some act of bankruptcy, such payment was therefore void; whereas the plaintiff insisted that if that were so, he had a lien in equity on the estate, and the purchase-money produced by the re-sale for so much of the original purchase-money as remained due at that time; and that he had not waved or relinquished that lien by taking [33] the said bond, as that was taken by him as a farther additional or collateral security.

To this bill, the defendant demurred.

Whetherell and Wingfield, in support of the demurrer, submitted that the acceptance of the bond, more especially as it was the joint and several bond of the vendee, and a third person, had destroyed the plaintiff's original right of an equitable lien on the estate and purchase-money. The case of *Fawell v. Heelis* (Ambler, 726), establishes the

* The facts and merits of this case are detailed, in the cause entitled "*Taylor and Others v. Obee*," post, p. 83.

point, that if a vendor parts with his estate, and takes a security for the consideration-money, a court of equity will not assist him against the creditors of the purchaser. That case has never been over-ruled, whatever traditional doubts may be said to have been thrown on it by the dictum in the case of *Blackburn v. Gregson* (1 Br. Ch. C. 423). If the plaintiff had filed a bill against the assignees of the purchaser, he could not compel them to pay the money. The security which he has accepted, is a specialty of the highest nature, and binding land. The circumstance of his having taken the precaution to get the additional security of a surety, is a strong fact in proof of an abandonment of his equitable lien, and is quasi evidentiæ rei. Here, therefore, the vendor does not trust to the personal security of the vendee, and, as was said by the Master of the Rolls, in the case of *Nairn v. Prowse* (6 Ves. 760), without entering into the general [34] question, whether every security taken, necessarily amounts to a waiver of the lien of the vendor: in this case, the vendor has extinguished his equitable lien, by taking such a security as the present bond.

Roupell, in support of the bill, submitted that the previous question, arising in the present case, was whether, as this was a bill in fact quia timet, and the demurrer general, which therefore necessarily admitted all the facts, the plaintiff was not precluded, by the bill having charged that the security given was only taken as a further additional or collateral security; and if so, by the express agreement of the parties, the vendor's equitable lien was to remain, notwithstanding the security of the bond. That statement in the bill is positive, and the defendants cannot, on general demurrer, raise a question on it.

THOMSON, Chief Baron. If that be so, there is certainly an end of the demurrer; for that fact being admitted, the plaintiff has clearly no Equity which can entitle him to the interference of the Court in his favour.

It was then urged, that the statement in the bill of that fact, ought not to be taken as a positive allegation, but as matter of inference, from which the parties themselves were not at liberty to make any conclusive deduction.

Per Curiam. It is stated as a fact, and it is sufficient, therefore, to induce us to over-rule the [35] demurrer. If it be not the truth, it must be decided in a more solemn manner.

Demurrer over-ruled.

ATTORNEY GENERAL *v.* HUGHES. Saturday, 22d June 1816.—If the trial of an information has been once postponed at the instance of the Attorney-General pro defectu juratorum, the Court will also grant the defendant a rule to shew cause why the trial should not be further postponed, on his application, if in the mean time a material witness, deposed to have been ready on the former occasion, is not forthcoming.

Pell, Serjeant, moved to put off the trial of this information, after a peremptory undertaking.

He admitted that the Court would expect an urgent affidavit. That, on which the present application was founded, stated that a material witness for the defendant was absent; and that that circumstance was not known to the defendant when the undertaking was given.

It was also stated, that at the time when the cause was to have come on, the defendant was ready to go to trial with the witness, who was now deposed [36] to be absent; but that on that occasion, the trial was postponed pro defectu juratorum, at the instance of the Attorney General.

Under these circumstances, the Court granted the rule.

——— *v.* ———. Friday, 21st June 1816.—In an action against a sheriff, for not assigning a bail bond, the Court will not grant a motion to enter the recognizance of bail on the record as taken on the true day (it being always entered generally as of the term) to enable the plaintiff to proceed with his action. —Quære, if such an action be maintainable?

In this action, which had been brought against a sheriff for not assigning a bail bond, Owen moved, that the recognizance of bail might be entered on the record, as

having been taken on the 7th of May, agreeably with the fact, that the plaintiff might be enabled to maintain his action, which he could not otherwise do, the entry of bail relating generally to the term; but the Court of Common Pleas had permitted the record to be altered to accord with the fact, on a similar application in the case of *Austin and Others, Assignees of the Sheriff of Middlesex v. Fenton* (1 Taunt. 23).

The Court refused the rule, intimating, that the cause of action was at least very novel, if it could be maintained; and that the plaintiff should have proceeded against the sheriff by attachment in the usual and regular way.

[37] It was then stated, that bail had subsequently been put in and justified, but irregularly.

Per Curiam. You should have opposed the justification on that ground at the time. Rule refused.

SAME CAUSE. Saturday, 22d June 1816.—All motions to annul proceedings on the ground of irregularity must be made in the Term when the proceeding was had, or the Court will not receive the application.

Owen now moved that the justification of the bail, which had been admitted in this cause, might be set aside for irregularity.

But it appearing that the justification had been taken in Court last term, the Court said that that was an insuperable difficulty: for the rule was, that all motions to annul proceedings on the ground of irregularity, should be made the same term with the proceeding complained of, and that that rule could not be broken in upon in any case. They therefore refused to hear the merits of the motion.

[38] REX (IN AID OF HORN) *v.* RIPPON AND OTHERS (Assignees of Watt). Saturday, 22d June 1816.—After the defendant has obtained time to plead to an Extent, he cannot take any objection to the affidavit on which it is founded by motion.—The proper course is to craveoyer and demur.

The Solicitor General being present on the part of the Crown,

Dauncey and Walton now shewed cause against this rule, which had been obtained last term^{*1}, for setting aside this Extent (vide vol. ii. p. 398), on an objection to the sufficiency of the affidavit on which it was founded. They objected that the defendants having (on the expiration of the rule to plead, and being called on to plead peremptorily) obtained an order for six weeks time, were thereby precluded from any advantage which the alleged defect in the affidavit might otherwise have afforded them. Had not the present motion been pending, (the further time allowed for pleading having expired,) the defendants would have been in contempt for want of a plea.

Carr and West submitted that the present objection being that of a substantial and fatal error [39] in the affidavit, on which the whole proceedings were founded, they were not precluded in any stage of the cause from taking it. It is one which might be taken even after verdict, in arrest of judgment.

The Court inquired why the objection had not been raised by demurrer, onoyer.

It was said that, according to what was understood to be the practice on this side of the Court, it was not allowable to demur after time taken to plead^{*2}.

On the other side it was insisted, that there was no precedent in the practice of any Court of an attempt to set aside process, being permitted, after a defendant had submitted to require time to plead.

Per Curiam. It is certainly too late now to object, in this way, by motion, to the affidavit on which this Extent has proceeded. The proper course of bringing the question before the Court is by demurrer.

Rule discharged.

^{*1} On the first day of last Easter Term the defendants obtained a rule to set aside the venditioni exponas, which had been sued out in this Extent, in default of claim, within the time allowed by the rule, and being permitted to enter their claim, on shewing by affidavit that the claim had been omitted to be entered, by a mistake of their clerk in court, which was afterwards made absolute.

^{*2} The Court expressed doubts of there being any such practice.

[40] THE KING (IN AID OF SIMPSON AND OTHERS) v. HOPPER AND OTHERS, (Assignees of Mowbray). Saturday, 22d June 1816.—On an Extent in aid (or even on an immediate Extent) where goods and chattels of the debtor have been seized to an amount, according to the appraisement, beyond what is sufficient to satisfy the debt due to the Crown, the debtor's lands cannot be sold.—Under such circumstances the Court will, on motion, grant an amoveas manus (by an order to shew cause) on the defendants paying into the receipt of the Exchequer the debt without the costs.—Costs are not recoverable where goods and lands are seized, the goods alone being more than sufficient to pay the debt levied, not even in the case of an immediate Extent. The stat. 25 Geo. III. c. 35, held not to give the Crown a right to costs, in cases where it is not necessary to resort to a sale of the lands.—Quere, whether in the case of lands being actually sold under an Extent in aid, the prosecutor would be entitled to costs?

A rule was granted on the 15th instant, on the motion of West, calling on the prosecutors of this Extent, to shew cause why, upon payment into Court, or the receipt of the Exchequer to the account of the Receiver General of taxes for the North Riding of York, the sum of 4256l. 7s. 9d. the amount of the debt for which the Extent issued, an amoveas manus should not issue to remove the king's hands from the lands, tenements, effects, and property of the bankrupts, which had been seized by the sheriff of Durham, under the writ.

Simpson and his partners, who were bankers, were found indebted to the Crown in the sum of 10,000l. for money received by Simpson, for assessed taxes, as deputy to the Receiver General of the North Riding, and by him paid into the house of himself and partners; Mowbray & Co. were also found indebted to them in the sum of 4256l. 7s. 9d. for money lent.

The sheriff, according to the exigency of the writ, had seized certain freehold and leasehold [41] estates, the property of the several defendants, to a large amount, and also goods and chattels, which were appraised by the jury at the sum of 8000l.

Under these circumstances, West moved for the above rule, which was granted; and now

Dumcey and Nolan shewed cause. They objected, that it had not been made part of the order, that the money should be paid into Court with costs. They admitted, that in cases of goods and chattels seized, the Crown was not entitled to levy costs; but that, in point of fact, in the present instance, the defendant's lands had been seized under this Extent; and in cases where lands are seized, the Crown is entitled, by the 25th Geo. III. ch. 35, to have the costs which have been incurred in enforcing the payment of the debt. The words of the statute are,—"And all monies which shall become payable from such purchaser or purchasers as aforesaid, shall be paid, accounted for, and applied towards discharge of the debt due to the Crown, and of all costs and expenses which shall be incurred by the Crown, in enforcing the payment of such debt, in such manner as the said Court of Exchequer shall from time to time order and appoint." Then there is a provision for paying the surplus, if there should be any, "after payment of the whole debt to the Crown, and of all costs and expenses incurred in enforcing the payment thereof," to the persons who would be entitled in case there had been no sale, the statute obviously contemplating throughout the payment of [42] costs, in case of a seizure. The Act has certainly not provided expressly for the case of a redemption of the lands, by the debtor paying the money due to the Crown, under the authority of this Court; but from the object and policy of it, it may be assumed that in that case the expenses of the seizure must be paid. It can hardly be intended to be urged that the costs are only to be paid in the event of an actual sale; for that would be to oblige the Crown to resist any accommodation to the defendant, who, to save the expense of proceeding to extremity, should wish to recover his lands in an easier and earlier manner; or it would go to make the Crown a loser by its own lenity. The Court will not be disposed to sanction a proceeding which shall go to place the Crown in a worse situation, by receiving the money before a sale of the lands should be ordered, than it would be after judgment had been recovered, and the lands sold, when all the costs would be to be deducted out of the produce. If the lands are to be restored on payment of the debt, it will be tantamount to a sale of the lands for that purpose; and therefore the prosecutors of the Extent ought to have all the advantages which they would have been entitled to on such sale: it is by having

seized the lands that they have enforced the payment of the debt, for the goods and chattels which have been seized, may be liable to paramount claims.

It will, perhaps, be argued, that this being the case of an Extent in aid, the Crown cannot sell the lands. But the prosecutor of an Extent having [43] once employed the prerogative process, has a right to all its incidental privileges; one of which is, that under it the lands of the debtor may be seized and sold to pay the debt. It also appears by the inquisition, that although this is in form an Extent in aid, it has been issued for the recovery of the Crown's proper money. It is in aid of the Deputy Receiver General, for the amount of assessed taxes actually received by him, and lent to the defendants, and is therefore equivalent to an immediate Extent.

On the whole, this case resolves itself into two questions:

First, Whether the lands of a debtor to the Crown's debtor can be sold under this Extent in Aid:

Secondly, Whether, if they can be sold, the defendants may, before the order for sale, obtain an amoveas manus, by paying the Crown's debt into Court, without the Crown's costs of enforcing the payment.

West, in support of the order, submitted, that the prosecutors of this Extent would not have been entitled to costs, even after they should have obtained judgment; for, as this was merely the case of an Extent in aid, the statute of 35 Geo. III. did not empower them to sell the debtor's lands. That statute was merely remedial of the 13 Eliz. ch. 4, and was passed to facilitate the sale of the [44] lands of the debtor to the Crown, by a more expeditious and summary mode of proceeding, leaving the law as before; and did not, in any respect, extend the power to sell the debtor's lands to persons not having such power under that statute. The Crown, therefore, alone can sell the lands, and that only for the Crown's immediate debt. In this case, the debt of the person whose lands are seized, is not due to the Crown, nor has the Crown incurred any costs or expenses in enforcing the payment of it. There is no privity between the Crown, and the debtor whose lands are seized. If, therefore, these lands should be actually sold, the prosecutors of the Extent would not be entitled to their costs.

Another objection is, that in this case, as appears by the appraisement, the goods and chattels which have been seized, amount in value to more than sufficient to pay the Crown's debt, without having recourse to the debtor's lands. Therefore the Court will not, in conformity with the fundamental principle of the law, that goods are to be preferred in execution to lands, permit a sale of the lands, where the debt can be satisfied out of the goods. That general principle is recognized in the common case of execution by *elegit*, whereby the defendant's lands are never touched but where a sufficient levy cannot be made on his personal goods, to satisfy the plaintiff's debt and costs. In 2d Inst. p. 395, Lord Coke says,—“If the chattels be sufficient to pay the debt, and so may appear to the sheriff, whereby he may satisfy the debt, then he ought not to extend the lands for the residue; and [45] all this appeareth by the writ of *elegit*, framed upon this act.” That principle, until the stat. 33d H. VIII. extended to the Crown's execution, and was founded on *Magna Charta*, 2 Inst. p. 19; and there is no reason for an opinion, that since the 33d H. VIII. which gives the Crown the power to seize its debtor's lands, that the Court would order them to be sold, where the defendant's goods and chattels had also been seized to an amount more than sufficient to satisfy the debt. There is good reason why the Crown should not wish in such a case to take its debtor's land, where his goods were sufficient; for as it could only take the growing profits by *levari facias*, so dilatory a mode would obviously be postponed to the more summary proceeding of a *venditioni exponas* against the goods.

The statute of 25 Geo. III. does not give the Crown a right of election to proceed against either goods or lands, as it shall think fit; but, on the contrary, by the mode prescribed for proceeding against the lands at all, it has given this Court a discretionary controul in such cases, probably in contemplation of the very principle now contended for, of postponing lands to goods, in the execution of judgment. Were it, indeed, left in the discretion of the Crown, it would now, (since the statute has given costs in cases of levies, by sale of land,) on all occasions resort, as matter of course, to the lands in the first instance, for the sake of getting the costs and expenses, which it could not levy where goods alone are seized. But that would be [46] adverse to the policy of the established and ancient maxim of the law, that where the debtor has sufficient goods wherewith to satisfy the judgment, the lands shall not be levied on.

The act of parliament having given the Court a discretion, with respect to the

order for the sale of a debtor's lands, by requiring an application to be made to the Court, by the Attorney General, for that purpose; the question now is, Whether, in the exercise of that discretion, they will not, under those circumstances, make the present rule absolute?

THOMSON, Chief Baron. It appears by the inquisition^{*1}, certainly, that goods and chattels to a much greater amount than sufficient to pay the debt due to the Crown, and which is now proposed to be paid into Court, have been seized under this Extent. It is clear, therefore, that, in this case, the Crown itself would not have been entitled to resort to the lands under an immediate Extent. And on the return of the inquisition, we should [47] not have ordered a sale of the lands which have been seized, if an application had been made to us for such an order: for our first inquiry would have been, Whether the goods, which had been seized, were sufficient to satisfy the debt? and unless they proved insufficient, we should not order a sale which would not otherwise be necessary: so that the Crown would not be entitled to costs in the present case.

It becomes, therefore, unnecessary to give any opinion on the other questions which have been raised.

GRAHAM, Baron. I shall adopt the same proper reserve as my Lord Chief Baron in giving any opinion on the general rule, as to the right to costs on the sale of lands; for, in this case, that is put out of the question, by there having been goods and chattels levied to a sufficient amount to satisfy the debt: and no doubt the Court would observe the rule, that the goods seized must be shewn to be inadequate to the discharge of the debt, before they would grant an order for the sale of the debtor's lands, on a motion to that effect by the Attorney General.

WOOD and RICHARDS, Barons, of the same opinion.

Order made absolute.

[48] IN THE EXCHEQUER CHAMBER.

BEATSON AND OTHERS v. RUSHWORTH. (In Error.) Thursday, 27th June 1816.—

It is not ground of error that the plaintiff (in an action against a hundred, on the 41st Geo. III. c. 24, and 1st Geo. I. c. 5, for recovery of damages for injury done to him by the demolition of his mills by persons riotously assembled) do not allege in his declaration that such demolition was felonious, or that the persons riotously assembled acted feloniously.—It is sufficient to sanction a civil action, if it appear from the allegation of the acts done that a felony had been committed by them.

The question raised by the present writ of error from this Court was, Whether, in an action founded on the 41st Geo. III. ch. 24, for the recovery of damages sustained by the riotous demolition of mills, it was necessary to lay the injurious act as having been done "feloniously"?

The defendant had obtained a verdict at the York Lent Assizes 1815, against the plaintiffs, four of the inhabitants of the hundred of Agbrigg and Morley, in that county^{*2}. The three first counts of the declaration stated, That on the 24th of April 1812, at the parish of Halifax, in the hundred and county aforesaid, divers persons, to the number of twelve and more, being then and there unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, did, unlawfully, tumultuously, and with force, demolish, in part, a certain water mill of the plaintiff, being in the parish aforesaid, in the hundred of the county aforesaid, and the walls, doors, windows, window frames, locks and hasps affixed and belonging thereto; and part of the said water-mill of the said plaintiff, and certain [49] works: to wit, certain shears, frames, machines and straps belonging thereto, in contempt of our lord the King, to the damage of the plaintiff of 500l. and against the form of the statute, &c.:

^{*1} The finding of the Jury, on that part of the inquisition, was as follows:

"And the jurors aforesaid, upon their oaths aforesaid, further say, that the said Arthur Mowbray (and the rest of the bankrupts) were, on the said 22d of July last, possessed, as of their own proper goods and chattels, of and in the several goods and chattels mentioned and described in the schedule thereto annexed, marked B., which the said jurors did appraise and value at the sum of 8000l."

^{*2} Vide ante, vol. i. p. 343.

whereby, and by force of the statutes in such case made and provided, an action hath accrued to the plaintiff, being the person injured and damaged thereby, to recover against the defendant, being then and still inhabitants of the said hundred, the damage so by him sustained, by demolishing, in part, the said water-mill, and the works thereto belonging. There were several other counts, to all of which the defendant pleaded the general issue.

The error assigned was, that it was not alleged in either of the counts, that the persons mentioned to have been unlawfully, riotously, and tumultuously assembled, did feloniously demolish, in any part, the said premises: nor that they committed any felonious act or offence in respect thereof. The case now came on for argument before Lord Ellenborough, and Lord Chief Justice Gibbs.

Searlett, for the plaintiff in error, stated the sole point to be, Whether the omission of the word feloniously, in the several counts of the declaration, were fatal or not? He contended that it was: for by the rules of pleading, it is necessary that there should be allegations of whatever is required to be proved: as, therefore, it was decided in the case of *Rid v. Clark* (7 T. R. 496), that the hundred were not [50] liable in an action on stat. 1 Geo. 1, st. 2, ch. 5, (on which two of the counts in this declaration are founded) unless the riot amounted to felony within that statute: so it is necessary that it should be alleged, that the act for the consequences of which the person suing seeks compensation in damages was felonious. Lord Kenyon distinctly says, in giving judgment:—"I cannot agree that the hundred are answerable for damages done by persons who are not guilty of felony within the former part of the act." If the commission of a felony were necessary to support the action, the declaration is bad, if it omit the word feloniously: for a felony must be proved, and to be proved, it must be alleged.

Littledale was to have argued in support of the judgment: but their Lordships dispensed with hearing him, because they said,

They were clearly of opinion, that although it were certainly necessary to the support of the action which had been brought, that there should be such proof adduced as would be sufficient to establish a charge of felony on an indictment, it was, however, not necessary to aver, in the civil suit, that the persons assembled acted feloniously, or committed a felony: it was sufficient to state, that they committed the acts charged in the words of the statute, as had been done in this case.—In the case of *The King v. Judd* (2 Term Rep. 255), it was held not to be [51] necessary to state in a warrant of commitment, on a charge of felony, that the act was done feloniously: and that it would be sufficient if, on the facts stated, it appeared that a felony had been committed: that did not appear on the facts stated in that case, and therefore the Court held that they were bound to bail the defendant on that ground. In the present case, however, it appears clearly, from the acts stated in the declaration, that a felony had been committed, and that is quite sufficient to support the action against the defendant below.

Judgment affirmed.

Searlett afterwards admitted, that in the extract given of the declaration in the report of *Hyle v. Coan* (Doug. 699), (where the Court gave judgment for the plaintiff, on a special verdict found in that case, which was also an action against a hundred, for damages, by rioters in part demolishing a dwelling house, and destroying goods and furniture therein,) the act of demolishing was not laid to have been done feloniously.

[52] SEARLE, Assignee of the Sheriff of London, v. HALE AND OTHERS. Saturday, 29th June 1816.—The Court will stay proceedings on an assignment of a bail bond, the defendant having since perfected bail on motion, without tender of payment of costs, or any affidavit of merits, or that the application is made in ease of the sheriff or bail, where a trial has not been lost:—nor will they in such case order the bail bond to stand as a security: requiring only that the plaintiff shall be put in the same situation as if bail had been put in in time, and duly perfected.

A rule had been obtained by Richards, on the part of the defendant, for staying the proceedings on the bail bond assigned, in this cause; the defendant having put in and perfected bail; against which,

Owen now shewed cause, submitting that the rule obtained could not be supported : and taking two objections :—first, that there had been no affidavit of merits filed —or that the application was made in case of the sheriff, without collusion with, or indemnity from, the defendant, as had been held to be necessary by the Court of King's Bench, in the case of *The King v. The Sheriff of Middlesex* (3 M. & Sel. 299), (whereas in this case the motion is expressly made on behalf of the defendant :) and, secondly, that the motion was not originally made on terms of payment of costs, as it ought to have been, where the assignment and proceedings were regular, and the applicant sought an indulgence.—This (it was put) was a cause where a trial had been lost, the plaintiff having declared *de bene esse*—and therefore, if the rule should be made absolute, the bail-bond ought to be ordered to stand as a security *1.

[53] Dauncey, in support of the rule, contended, that as the plaintiff had not lost a trial, as would appear from the dates of the proceedings *2, the rule ought to be made absolute, on the common terms, without requiring the bond to stand as a security. The assignment of the bail-bond was taken on the 24th, and on the 25th the bail justified. —The case cited, was that of setting aside an attachment for not bringing in the body.—This is merely the case of an assignee of the sheriff suing on the bond given by the principal and bail below.

Per Curiam. The defendant must undertake to put the plaintiff in the same situation as he would have been in if the bail had justified in due time. On those terms we will make the

Rule absolute, on payment of costs.

[54] *GILBERT v. STANISLAUS*. Saturday, 29th June 1816.—In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, an averment that defendant represented the returns to amount to a sum certain is material, and must be precisely proved, notwithstanding it be laid under a *vide licet*. And a variance between the allegation and proof is a good ground of nonsuit after verdict. —In cases of doubt, there should be separate counts to let in proof of the precise fact.

The plaintiff having purchased the defendant's house, and business of a milliner and lace dealer, for the sum of 1680*l*. brought the present action of deceit for an alleged misrepresentation of the annual returns of the trade, and recovered a verdict on the trial, before Mr. Baron Richards, at Westminster, at the Sittings after Hilary Term.

Wednesday, 1st May.—Dauncey and Gaselee now obtained a rule to shew cause why that verdict should not be set aside, and a non-suit entered; for that the proof offered did not support the allegation in the counts.

The declaration stated that “upon the treaty for the purchase of the lease, trade, &c. and before the making the said agreement, and as inducement to the plaintiff to enter into and make such agreement, the defendant falsely, and deceitfully, represented and asserted to the plaintiff, that the annual returns of his aforesaid trades or businesses of a milliner, &c. amounted to a large sum; to wit, the sum of 6000*l*. —And thereby, and by no other means whatever, he, the plaintiff, was induced, and moved, to enter into, and make, and did accordingly enter into and make the agreement aforesaid;

*1 Tidd's Practice, p. 296; but see a distinction noticed there in the practice of the Common Pleas.

*2 The writ was returnable on the first return of this term (10th June). The defendant had four days inclusive, after the *quarto die post*, to put in bail, which would be till the 17th: on that day bail was put in. On the 18th the bail were excepted against. On the 19th, notice of justification was given for the 21st; but the bail did not attend. The defendant, however, (it was said) had still the whole of the 22d to justify; and if the bail had then justified, the plaintiff might have demanded a plea in the evening; but that day being Saturday, the defendant would have had the whole of Monday, the 24th, to plead, and therefore the plaintiff could not have delivered his issue till the morning of the 25th, when it would have been too late to have given the necessary notice (eight days) of trial for the sittings in Term, which are always in this Court the day before the last day of Term. —Another circumstance stated was, that the 24th (Monday) being a *dies non* as to Common Law proceedings in this Court, the defendant had all the 25th to plead in—*quere*.

whereas, in truth and in fact, the annual returns of said [55] trades and businesses, at the time of making said representation and assertion of the defendant, did not amount to, nor had they, during any year previous thereto, amounted to, nor had they in any year since that time, amounted to, the last-mentioned sum of money, nor to any other sum near to that amount; but, on the contrary thereof, to a much smaller sum of money, to wit, a sum not exceeding 3000l.; by means, &c."

The witnesses proved no more than that the defendant had represented that the returns of his trades amounted to between 5 and 6000l., or 6 and 7000l.

The defendant's counsel insisted that, to support the present case, which is in the nature of an action on a warranty, the plaintiff was strictly bound to prove that the defendant represented the amount of the returns to be precisely 6000l.

Tuesday, 18th June.—Scarlett and Denman now shewed cause. They contended that they were not bound by the sum stated in the declaration—that the substantial ground of the action was a false statement, on the part of the defendant, of the gross amount of the returns of the trade sold, whereby the plaintiff had been deceived, and induced to give a larger price for it than it was fairly worth—that the videlicet rendered the sum stated immaterial; and it was sufficient if the plaintiff proved that the defendant had represented the returns to amount to a large sum, [56] whereas, in fact, they were much less: and they submitted that, if it were necessary to prove a precise sum in actions of this nature, a plaintiff could never, or seldom, succeed in obtaining redress for a similar imposition; for the false representation would never be capable of proof in terms; and this was not the case of a variance from the terms of a written contract, which would certainly be fatal.—That the whole of the present case amounted to this: the defendant represented his business as more profitable than it really was: and if that was substantially proved (as from the verdict it appears that in this case it was,) that is enough.

In reply, it was insisted that the sum was material; because it was necessary to state a sum certain, as the representation of the profits, in order to shew the difference between the representation and the fact; and that being traversable, a difference in the allegation and the proof, was not aided by the videlicet; as a videlicet cannot make a material averment immaterial.—*Symons v. Knor* (3 Term Rep. 65), *Grimwood v. Barrit* (6 ib. 460). If the representation had been laid in the alternative, that might have helped it, *Penny v. Porter* (2 East, 2); but here there is no such count.

With respect to the case being substantially proved in all actions of this sort, the Court expects [57] some actual fraud to be proved, otherwise the mere false representation amounts to nothing. It was so held by the Court of Common Pleas, in the case of *Pickering v. Dawson* (4 Taunt. 779), where it was held to be necessary, besides the false representation, to shew that, by some fraud on the part of the seller, the buyer was prevented from discovering the true state of things. And in a case in Starkie's N. P. Reports (c), Lord Ellenborough expresses the same opinion.

Saturday, 29th June.—THOMSON, Chief Baron. In this case the averment in the declaration is certainly not proved. The allegation is, that the defendant represented the return of his trade as amounting, yearly, to the sum of 6000l.; whereas, in truth and in fact, they amounted to a much less sum, namely, under 3000l. Now that must be taken to be an averment, that the defendant represented the profits of the trade as amounting to the sum of 6000l. otherwise it would be nugatory, and there is no other sum mentioned. Then the last averment, that the profits, in point of fact, amounted to a much smaller sum (3000l.), makes the first very material, and therefore, although it is laid under a videlicet, it must be taken to be a positive averment, that the annual returns, in fact, amounted to the precise sum of 6000l.

[58] Now, as it turns out on the trial, the evidence was nothing like it. The witness proved that they were said to amount to between 5 or 6000l. or between 6 and 7000l.

There could have been no difficulty in laying it according to the fact, and in the terms in which it was made, and then it would have been capable of distinct proof. And if there were any doubt, there might have been separate counts in the declaration. As it stands, there is no evidence to prove the allegation, and therefore there must be a non-suit on that ground.

Rule absolute.

GRANT AND OTHERS v. AUSTEN AND OTHERS. Saturday, 29th June 1816. — A general remittance to bankers, to whom the remitter is indebted, accompanied by a letter requesting them to pay certain specific sums to particular persons (not expressly out of the sum remitted) does not so fix the bankers as to give the persons, to whom such sums were so directed to be paid, a right of action against them for money had and received, without an assent on their part to such an appropriation of the money remitted. — It is not necessary that the bankers should express a dissent from the required appropriation. — An order for delivering particulars of a plaintiff's demand will not be made, if the defendant refuse to swear that he does not know the precise amount of the plaintiff's claim. — See the note in page 60.

The plaintiffs, who were bankers at Portsmouth, brought the present action for money had and received, against the defendants, bankers, in London, to recover the sum of 59l. 15s. under the following circumstances:—

[59] On the 12th of November 1813, the plaintiffs received a check from Messrs. Baverstock and Son, brewers at Alton, on Mr. Gray, their banker there, for the sum in question, which they forwarded to him on the same day, with a request, in the usual course, to pay the amount to the house of Messrs. Ladbroke and Co. bankers, in London. Gray, on the 16th of November, made a large remittance, in cash, notes, and short bills, to the defendants, who were his agents in London; accompanied by a letter containing directions to pay certain sums of money on his account, which were, in the whole, very considerably short of the remittance sent, leaving a balance in reduction of Gray's general account. That part of Gray's letter which related to this sum, was in these words:—"I shall be obliged by your paying Messrs Glynn and Co. 55l. on account of Messrs. Wickham and Co. Winchester, and to Messrs. Ladbroke and Co. 59l. 15s. on account of Messrs. Grant and Binbey, Portsmouth."

Under the impression that the defendants had observed his directions, Gray credited them with that sum, as having been so paid on his account. The defendants made no communication to Gray, in answer to that letter, until the 25th November. On that day, Maunde and Tilson, two of the defendants, came to Alton, and then informed him, that unless he furnished them with 1700l. or 2000l. they could not pay his orders, but not particularly specifying them. On the 28th, Gray stopped payment, in consequence of the defendant's [60] refusal to pay his notes, and soon afterwards became bankrupt. In December, the plaintiffs wrote to defendants, stating the circumstances, and requesting payment of the money, which they answered by a refusal, giving as a reason, that they had not, at the time of the order alluded to, nor since, any money in their hands.

It appeared that Gray had considerably overdrawn on Austen and Co. and was, therefore, at that time, much indebted to them.

The plaintiffs then brought the present action, to which the defendants pleaded the general issue. The cause was tried at Winchester, before Mr. Baron Graham, at the Lent Assizes for Hants, 1816, when the plaintiffs obtained a verdict, the Judge giving the defendants liberty to move to enter a nonsuit.

Saturday, 4th May. — Gifford obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered: submitting, that under the circumstances of this case, (the facts of which had been agreed on at the trial, by counsel on both sides, to be as stated [61] above,) the defendants could not be considered liable at law, to the plaintiffs' demand, without some evidence to shew that they had assented to adopt Gray's order to pay the money to Ladbroke and Co.

In the case of *Williams v. Everett and Others* (14 East, 582), Lord Ellenborough (having nonsuited the plaintiffs on the trial of the cause at Nisi Prius), held that bills or money so remitted, "continued to be the property of the remitter, and to be held for his use (by the banker) until by some engagement entered into by themselves, with the person who is the object of the remittance, they have precluded themselves

* The defendants, during the proceedings, took out a summons for particulars of the plaintiff's demand: but the Judge refused to make the order, because the defendants would not swear that they did not know the precise claim.

They also obtained an order nisi for changing the venue to Westminster, which was discharged on the plaintiffs undertaking to give material evidence in Hampshire.

from so doing, and have appropriated the remittance to the use of such person." In this case, there was no such engagement, appropriating the remittance specifically to the use of the plaintiffs; and therefore there was not that privity between them and the defendants which gave them a right to proceed in the action which they had brought.

The language of the letter, inclosing the remittance, is inconsistent with the notion of that remittance being made for the express purpose of paying this specific sum out of any particular fund. It is merely a general letter, stating that the writer will be obliged, &c.

Saturday, 27th June.—Gaselee now shewed cause. He contended that the facts on which the case of *Williams v. Everett* [62] proceeded, sufficiently varied that case from the present, to render it inapplicable to the point before the Court. In that case, there had been an express dissent on the part of the defendants, to the application of the remittance to the purpose for which it was sent. They had actually refused to endorse the bill away, or to act upon the letter; and that refusal is emphatically noticed by Lord Ellenborough, in delivering the reasons on which his decision on that case proceeds, by which his Lordship says any implied consent on their part is negatived. In the present case, there was no dissent expressed by the defendants to the order sent by Gray; and their not having refused to do so, may be considered as tantamount to an implied consent, whereby the money became appropriated to the use of the plaintiffs; and the more so, as this was money actually paid to Gray by the plaintiffs, and through him to Austen and Co.

As to any difficulty arising from the question of the efficacy of an assignment of a chose in action, the cases of *Row v. Dawson* (1 Ves. 331), *Schellinger v. Blackerby* (ib. 347), *Ryall v. Rowles* (ib. 362, 363, 367), *Israel v. Douglas* (1 H. Bl. 239), *Mouldale v. Birchall* (2 Bl. 820), and *Fenner v. Meares* (ib. 1269), sufficiently obviate all objection on that ground; and the assignee may bring assumpsit on an assignment of a chose in action.

[63] The cases most in point with the present, are those of *Israel v. Douglas* (1 H. Bl. 239), and *De Burnales v. Fuller* (14 East, 590). In the first case, the action for money had and received, was held well brought against the defendant, who was the debtor, not of the plaintiff, but of a person by whom the debt had been transferred to the plaintiff. In the other, it was held, that for money paid by the acceptor of a bill lying due at Fuller's house, to take it up with, an action for money had and received, might be maintained by the holder against Fuller, although it was not received by Fuller, with a consent on his part, to apply it in discharge of the bill; and although he had, on the contrary, chosen to apply it in discharge of a debt due to himself by the acceptor.

The sole question is, Whether the sum sued for was received by the defendant, clogged with the trusts created by the purposes for which the money was remitted? There were other remittances accompanying the letter, to a considerable amount, far exceeding the several specific purposes for which they were made; and the defendants having received them, and neither sending them back, or expressing any dissent to the proposed objects of them, were bound so to apply them.

As to the language of the letter, that is mere matter of common parlance, and can have no legal effect in this case.

[64] Gifford, in support of the rule, admitted the point to be as put; but observed, that in *Israel v. Douglas*, there was an express contract between all the parties, that one debtor should be substituted for the other. In that case, a question arose on the old doctrine of non-assignment of a chose in action, which was obviated there by the consent of the debtor to the transfer; and it is clear that, without such consent, an action cannot be transferred, and on that all the cases of such assignments depend.

[Thomson, Chief Baron. That gives rise to another question here, of, whether there was, on the other hand, any dissent on the part of these defendants.]

In the case of *De Burnales v. Fuller*, there was an express and specific appropriation of the money paid in discharge of Fuller's acceptance; and that is the reason given by Lord Ellenborough, in delivering judgment in *Williams v. Everett*, for the decision in the case of *De Burnales v. Fuller*; and in that view, his Lordship says, that "they (Fuller and Co.) were, in effect, to be regarded in that case, as the plaintiff *De Burnales'* agents, through the intervention of Newnham's house, for the purpose of that receipt, and could therefore hold and apply it to no other." Here the strength

of the defendant's case is, that there was no specific remittance of the precise sum of 69l. 15s. for the express purpose of the letter. It was a general letter, on general business; and, at the time it was written, Gray was largely indebted to [65] the banking-house of Austen and Co. He does not even profess to appropriate any part of the remittance for the purpose, by an express order, but says generally, "I shall be obliged by your paying Ladbroke and Co." so much money to be carried, of course, to his general account.

THOMSON, Chief Baron. If we were to hold these defendants liable to the present demand of the plaintiffs, we should be carrying the doctrine farther than any case has hitherto gone.

There was certainly no such sum sent up, specifically, for the purpose of this payment, to Ladbroke and Co. A draft had been given by the plaintiffs to Gray, for that sum, but what became of that, does not appear. After receiving that check, Gray sends to the defendants a considerable remittance, and then comes this letter, which is supposed to be a precise direction, appropriating the sum in question.—[His Lordship read the letter.] Several particular sums are specified in it, and among the rest, this of 69l. 15s.; but they are not directed to be paid out of the money remitted. That letter came by the coach, after banking hours. No payment, however, was made by the persons in town, to Ladbroke and Co. on behalf of Grant and Co.—[His Lordship stated the subsequent circumstances and correspondence, which consisted merely of a request of payment by Grant and Co., and a refusal by Austen and Co.]—Now what is there, in this case, to signify any assent on the part of these defendants, to a specific appropriation of this parti-[66]-cular sum? If we were to say that this demand of Grant and Co. was well founded against Austen and Co., we should decide that every other person mentioned in the letter, had a specific lien in their favour, on the money remitted. There is no assent shewn, certainly, on the part of the defendants, to the requests contained in that letter; on the contrary, it appears that the whole account between the parties was soon after broken up.

In the cases cited, we can find no authority on which we can say that the circumstances of this case amount to any thing like a good and effectual appropriation, and therefore there must be a nonsuit entered.

GRAHAM, Baron. I am of the same opinion, and was so on the trial at the assizes.

A good draft was certainly sent to Gray and Co. by the plaintiffs, Gray and Co. therefore, were their proper debtors. They, however, send it to Austen and Co., their bankers, to whom they were, at the time, largely indebted, requesting them to pay this, their own debt, (and which they, Gray and Co. ought to pay) to Ladbroke and Co., for Grant and Co. Austen and Co., in fact, refuse, and think proper to pay themselves. Now there is nothing to fix them with any privity or participation in the transactions between Grant and Gray; and it is impossible to fix them by any subsequent act with the debt due from Gray to Grant and Co., without their express consent. This is, therefore, [67] an ineffectual attempt to substitute Austen and Co. for Gray and Co. as the plaintiffs' debtors.

WOOD, Baron. In order to constitute an appropriation of this sum, there must have been a consent. This is not the case of a specific sum sent for this particular purpose;—there is a general sum remitted, with directions to pay various particular sums, but not expressing that those payments should be made out of the sums sent. No notice was given to the persons to whom the money was so directed to be paid. All those persons might bring actions against Austen and Co. for the sums directed to be paid to them, if the remittances and the letter rendered them liable to the plaintiffs in the present action.

RICHARDS, Baron. I do not mean to say that consent is, in all cases, necessary; but, in the present case, which is particularly circumstanced, I think there should have been an express assent to fix the defendants.

Rule absolute.

[68] SQUIER v. HUNT AND OTHERS. Saturday, 29th June 1816.—It is not necessary, in an action for non-delivery of goods sold, to set out more of the contract than relates to the breach.—Proof that it was part of the contract, that plaintiff should pay for the goods by bill at two months on invoice or delivery, is not a

fatal variance from a statement in the count that they were to be paid for by a bill at two months.—Demand of delivery of the goods sold is sufficient proof of an averment that plaintiff was ready and willing to perform his part of the contract, although that demand was made by his servant when he was not himself present to have done so, if required on the spot.—Special assumpsit is the proper form of such an action.

This was an action of assumpsit (special *) brought for not delivering a quantity of cork sold to the plaintiff by the defendants. It was tried before Mr. Justice Park, at Exeter (Spring Assizes,) who non-suited the plaintiff, on the ground of his proofs varying from the allegations in the third count of the declaration.

That count stated, that plaintiff having bargained to buy a quantity of cork, then being on board the "Mary," at Penzance, at the rate of 20l. per ton, to be delivered to plaintiff, on request, in case he should give notice of such bargain and sale to the captain of the ship before he should have sold the said cork to any other person, and to be paid for by the said plaintiff to defendants, by a banker's bill, payable at two months, in consideration, &c. Defendants undertook, &c.—Averment, that after the making said promise, and undertaking, and before the captain had sold the said cork, said plaintiff gave him notice of the bargain and sale, and was then and there ready and willing to accept the [69] same, and to pay the defendants at the rate and in manner aforesaid; yet defendants refused to deliver, &c.

The plaintiff's foreman proved the contract for the sale of the cork, as contained in the defendant's letter, delivered by him to the captain, which was to the following effect:—Deliver the cork, if not sold, to Mr. Thomas Squier, the mode of payment to be by a banker's bill at two months on invoice; if cellared, to pay a proportional part of the cellarage for letting it remain till plaintiff sent for it.

Saturday, 4th May. Moore and Gifford now obtained a rule for setting aside the non-suit, and awarding a new trial; against which,

Saturday, 29th June.—Gaselee shewed cause, relying on the variances on which the non suit was founded: and that the contract was not proved, as stated in the count. He also submitted, that the plaintiff ought to have given some evidence, that he was ready and willing to pay for the cork in the mode agreed on, according to his averment, as was held by Lord Kenyon, in *Rawson v. Johnson* (1 East, Rep. 207), which he had not attempted to do; and that that was, in this case, the more necessary, as he did not attend himself to demand the cork, but sent his foreman for that purpose.

The contract, as proved, was that the plaintiff was to pay for the goods by a bill at two months, [70] on invoice: but, as laid, he states payment was to be made by a bill at two months, importing that the goods were to be so paid for immediately. It was proved also to be part of the contract that the plaintiff was to pay a proportional part of the cellarage, if the goods were allowed: whereas there is not a syllable about cellaring in the declaration.

Moore and Selwyn, in support of the rule, insisted that the payment of a proportional part of the cellarage, was not a material part of the contract, or necessary to be set out in the declaration.

[Wood, Baron. It is not necessary to state or prove every part of a special contract.]

In *Cottrell v. Cuff* (b), it was held sufficient if the plaintiff state as much of the contract as relates to the point of which he complains.

A bill to be given at two months on invoice, is still a bill at two months; the allegation is general, certainly, and the proof somewhat more particular; but that has never been held to be a variance, and it agrees with the course of trade that the bill should be given then.

The demand of the cork amounts to a conditional tender of the bill, and dispenses

* Vide *Anderson v. Scott*, 1 Campbell, 235 (note), where Lord Ellenborough ruled, that although there had been an incipient delivery, sufficient to take the case out of the statute of frauds, yet that delivery not being perfected, plaintiff had a right to an action in the present form, to recover damages for the non-completion of the contract.

(b) 4 Taunton, 287; and *Clarke v. Gray*, 6 East, Rep. 659.

with all necessity of proof of a readiness to give the bill, as stated in [71] the averment. So it was ruled in the case of *Wills v. Atkinson* (1 Marsh. 512).

THOMSON, Chief Baron. It appears that this cause was originally left to the Jury, but that during their deliberation, the Judge retracted that reference, being of opinion that, as the count was not proved as laid, the plaintiff ought to be nonsuited.

Now it does not strike me that there are any of those material variances which have been supposed. As to the paying a proportional part of the cellarage, that part of the contract was only conditional; that is, that he should pay it only in case the goods had been cellared; and it does not appear that they were; and therefore it was unnecessary to bring that into this declaration, or to introduce any thing not material to the ground of action.

Then, as to being paid for by a bill, that must necessarily mean by a bill to be given on delivery of the goods, or invoice. It was not in evidence that he was to pay in two months from the time of the purchase. There is no other material variance, and, therefore, I am of opinion, that there ought to be a new trial.

GRAHAM, Baron. I am of the same opinion. I thought, at first, that there was something in the objection of want of proof of the averment, on the authority of Lord Kenyon, in the case of *Rawson v. Johnson*; but the decision in *Wills v. Atkinson*, [72] is quite conclusive, that the demand of the article is proof of the averment of readiness to pay.

WOOD and RICHARDS, Barons, concurred.

Rule absolute.

THE ATTORNEY GENERAL v. STEVENS & PRALL. Friday, 2d July 1816.

Where the defendants in a joint information employ two different attorneys and clerks in court, if notice of trial be served on one of them only, and a verdict be obtained, the Court will set it aside, and award a new trial as to both, notwithstanding the offence charged be one which would affect them both as partners in trade: the costs of the trial already had, to abide the event of the second verdict.

Peake had obtained a rule, calling on the Attorney General to shew cause why the verdict given for the Crown, in this information, at the Sittings after Easter Term, should not be set aside, and a new trial granted, under these circumstances.

The affidavit of Prall stated, that the defendants were in partnership, in the trade of wine merchants, at Rochester; that Stephens was very old and infirm, and left the entire management of the business to Prall; and that a joint information was filed against them on a charge of mixing Cape with other wine, and for smuggling brandy. They were both served with subpoenas, to which they appeared and pleaded, each by a different solicitor and clerk in Court; that being conscious of not having committed any of the offences charged against him, he had instructed his attorney to prepare his defence: that the information had, to his great surprise, been tried, and that the Crown had recovered a verdict for 400*l.* in penalties for the said offences, [73] although neither the deponent nor his attorney had received notice of trial; that he was prepared for his defence, and that Stevens relying on him had taken no steps in the cause; that he had never heard from any one that notice of trial of the information had been given to Stevens, and that, for want of notice being given to the deponent, no steps were taken for his defence, or for that of Stevens.

The attorney, who acted for Prall, also swore, that after having procured a copy of the information he never had notice of any further proceedings being had in the cause till the day before the trial, when he heard from the agent of the attorney of Stevens, that the cause was to be tried the next day: that neither he nor his clerk in Court, had received notice of trial; and that he had never had any communication with Stevens on the subject of the information, or with his attorney or agent, till the day before the trial: and that if he had received due notice of trial, he should have been prepared for the defence of Prall, which would have been also the defence of Stevens, who he believed had a good defence.

The attorney for Stevens deposed, that he was employed to appear and plead for his client only, but that having understood that Prall's solicitor was preparing for his defence, which would also be that of the defendant Stevens, he therefore deemed it unnecessary to take any further steps on his behalf: and that when notice of trial was

received by his [74] agent as attorney of Stevens, he was not aware that the defendant Prall had had no notice.

The agent of Prall's attorney swore, that he had directed his clerk in Court, to appear for Prall, which had been done : and that a separate plea was afterwards put on the roll, on the part of Prall ; and that neither he, nor his clerk in Court, had received notice of trial, in the cause.

Damney and Clarke now shewed cause ; and they submitted that, inasmuch as the defendants were partners in trade, and the offence charged affected them both jointly, which was, in fact, a fraud practised on the revenue, in the course of the conduct of that trade ; notice to the Clerk in Court, of either, should be deemed good notice to both.

Peake, in support of the rule. The defendant Stevens, had a very reasonable object in defending himself apart from Prall, that he might have had a remedy over against him, if it had turned out that Prall had, by his misconduct, led him into the difficulty.

The Court decided, that under these circumstances, each defendant was entitled to a separate notice of trial : and Prall not having been served, they made the

Rule absolute, as to both defendants. The costs of the former trial, to abide the event of the verdict.

[75] REX, IN AID OF MAGNAY AND OTHERS, *v.* WILLIAMS. Wednesday, 3d July 1816.—Where a Crown debtor is entitled to an Extent in aid, by the practice of the Court, it is not necessary that he should have the sanction of the revenue solicitors, or of the officers of any of the revenue boards.—Before the late act (11 July 1817) a manufacturer, liable to duties of excise on the articles made by him growing due from day to day, was entitled to an Extent in aid, although he gave no bond to the Crown ; but it is not so now. Vide the 4th section of the act, page 80.—The Crown is entitled to an Extent against such persons, immediately on the articles being manufactured, although not charged with such duties.

The circumstances of this case were as follows : Messrs. Magnay and Co. were paper-makers at Bledlow, (Bucks) : and Williams, the defendant, a stationer, in Cornhill, was indebted to them for paper, to the amount of 1006l. 16s. 6d. and on bills of exchange drawn by them, and accepted by the defendant.

On the 27th May last, Williams was duly declared a bankrupt, and the usual provisional assignment executed by the Commissioners. On the same day, Magnay and Co. who were indebted to the Crown in 1010l. for duties of Excise on paper, made by them, lodged an Extent in the office of the sheriff, who took possession of the defendant's effects under it. Magnay and Co. had not given any bond to the Crown.

On the 30th of May, the defendant obtained an order nisi, for setting aside the Extent, and for an amoveas manus, on the ground that the prosecutor had not given any bond to the Crown, and was not such a simple contract debtor to his Majesty as was entitled to the Crown process ; and that the debt from Magnay and Co. to the Crown, had been since paid.

[76] Wednesday, 19th June.—The Solicitor General appeared on behalf of the Crown, and stated, that the Extent had not been issued by the Solicitors of any department of the revenue, and without consent of the Crown.

Martin and Gaselee, shewed cause,—submitting, that neither the consent of the Crown, nor the interference of the revenue solicitors, or officer of any board, was necessary to give a right to issue the process, a doctrine now established by the practice which has prevailed in this Court for a series of years. Nor can any disclaimer on the part of the Crown affect the proceeding in this stage ; that although no bond was given to the Crown by the prosecutors, they owed such a growing debt to the revenue as entitled them to the prerogative process, and the priority afforded by it. The finding by the inquisition, makes this a debt of record. The case of *The King v. Blatchford* (8 Ves. 241) goes the whole length of these propositions ; and the doctrine there recognized received the full approbation of the Lord Chancellor, as is recorded in the case of *Phillips v. Shaw* (Anstr. 162). Nor is the subsequent satisfaction of the Crown's debt, any ground for setting aside the Extent. *The King v. Blackett* (vol. i. page 96) fixes that point ; and, in fact, a Crown debtor having once

obtained the process to recover a debt due, may, by the ultimate effect of it, make use of the produce to repay himself.

[77] In support of the rule, Fonblanque, Selwyn, and Brougham, contended that the debt being put on record, by the inquisition, giving it the effect of a specialty, was a fallacy, as it was making the proceeding itself furnish its own foundation. Originally, the king's debtors alone were entitled to the process, (2 Maddox, 192,) and the practice of extending its beneficial effect to such debtors as the present, had crept into the Court only of late years. Such modern practice, therefore, ought not to be considered binding, unless sanctioned by the opinion of the Court, on their attention having been drawn to it by its being made the subject of litigation.

[Richards, Baron. It has been the practice of this Court, for upwards of fifty years, to issue Extents in such cases as the present.]

In the case of *The King v. Willon* (vol. ii. page 368), this Court had very recently set aside an Extent, which had issued on the usual authority of a Baron, on the ground that the debt due from the person in whose aid it was sued out, was not such a debtor to the Crown as entitled him to use the prerogative process: that, too, was the first instance of an Extent being set aside on that ground. It is certainly very difficult to distinguish the difference between a debt due to the Crown for duties on the paper made by a manufacturer, and those due from an innkeeper, in respect of post-horses, stage-[78] coaches, or any of the branches of his business, which make him, from time to time, a debtor to the Crown. The duties derived to the revenue from the exercise of the business of such a person, form a growing debt, as much as those accruing due in the present case, and are as much the object of the attention of the officers of the Crown. That case, too, is a direct authority for the summary interference of this Court, where it is considered due to the subject complaining of misapplication of the process. On the present occasion, no officer of any department of the revenue has interposed; and the Crown, by the mouth of the Solicitor General, disclaims all interference. This is, therefore, merely an Extent in aid, without the sanction of the Crown's concurrence.

The Solicitor General professed himself attending solely for the purpose of supporting the interest of the Crown, and therefore confined his arguments to the question of the subject's right to the prerogative process in aid, wherever he was borne out by the assent of any competent officer of the revenue acting on behalf of the Crown. He abstained from the merely private question, but admitted, that if the practice and the cases were not conclusive on the point, he should have doubted the right of an individual to acquire a title to the process by his own independent act, converting his simple contract debt into a debt of record.

Cur. adv. vult.

[79] Wednesday, 3d July.—THOMSON, Chief Baron, now delivered the judgment of the Court.

Having stated the circumstances and question of the case, his Lordship observed, that makers of paper, who were subject to certain duties of Excise, were in the daily habit of incurring debts to the Crown, on paper manufactured by them, and were, therefore, themselves, constantly liable to the process of Extent at the suit of the Crown.

When the Extent in the present case issued, the persons in whose aid it was employed, are stated by the affidavit to have been actually indebted to the Crown in upwards of 1000*l.* for duties. In such cases, the Excise may issue Extents, although the duties, not having been charged with the Excise, are not then payable. It is enough if they are due, which they are by the course of trade, as soon as the paper is manufactured.

We were referred to the case of *The King v. Willon*.—That was certainly a most extraordinary case. The person suing out that Extent in aid, was under the necessity of eking it out, by adding debts caused by his own neglect, in paying his income tax and assessed taxes; and there was no instance to be found, after search, of any Extent having ever before been granted under similar circumstances.

The present case, on the contrary, stands on a very different footing. Here there was a bona fide [80] debt owing to the Crown, for duties of Excise, accruing due from day to day. The Extent was therefore founded on the most usual and common grounds; and it is one of those cases wherein the Court have always held, that the prosecutor of the Extent is entitled to the advantage of this more speedy remedy.

Whatever regulations, therefore, it may be hereafter, on consideration, thought proper to make, with regard to the issuing Extents in aid, will be matter of future

deliberation. At present, we are of opinion that this Extent has been properly issued.

Rule discharged*.

End of Trinity Term.

[83] SITTINGS AFTER TRINITY TERM, 56 GEO. III. (GRAY'S INN HALL.

TAYLOR AND OTHERS v. OBEE. (By Bill of Revivor.) Wednesday, 17th July 1816.

—The Court will set aside a contract, where there appears to have been great inadequacy of consideration, at a distance of more than seven years from the date of the deed, on proof of the inadequacy, and that the purchaser had knowledge of the value of the subject-matter, and was in the confidence of the vendor, and ought therefore to have protected her by his advice from imposition, rather than have misled her for his own advantage.—Depositions in a cross cause, taken after publication of those in the principal cause, not admissible in evidence on the hearing of the latter. A defendant will not be permitted to take his answer off the file for the purpose of correcting a mistake: the course is, to file a supplemental answer.

This bill was originally filed in Michaelmas Term 1809, for relief from a contract

* The Act of Parliament which has recently passed, "to regulate the issuing of Extents in aid," (57 Geo. III. ch. 117, sec. 4), has now taken away from debtors of this description, the power of resorting to the prerogative process.

It is by that section enacted, "That from and after the passing of this Act it shall not be lawful for any person or persons, companies or societies of persons, corporate or not corporate, who shall or may be indebted to his Majesty by simple contract only: nor for any such person or persons, companies or societies, who shall or may be indebted to his Majesty by bond for answering, accounting for, and paying any particular duty or duties, or sum or sums of money, which shall arise or become due and payable to his Majesty from such person or [81] persons, companies or societies respectively, for and in respect and in the course of his or their particular trades, manufactories, professions, businesses, or callings; nor for any sub-distributor of stamps who shall have given bond to his Majesty; nor for any person who shall have given bond to his Majesty, either jointly or separately, as a surety only, for some other debtor to his Majesty, until such surety shall have made proof of a demand having been made upon him on behalf of his Majesty, in consequence of the non-performance of the conditions of the bond by the principal, and then only to the amount of the said demand: to sue out and prosecute any Extent or Extents in aid, by reason or on account of any such debt or debts to his Majesty respectively, for the recovery of any debt or debts due to such person or persons, companies or societies, or to such sub-distributor of stamps or surety aforesaid: and that all and every commission and commissions to find debts, Extent and Extents in aid, and other proceedings which shall be so issued or instituted at the instance of or for such simple contract or bond debtor or debtors respectively, and all proceedings thereupon, shall be null and void: Provided always, that nothing herein contained shall extend or be construed to extend to preclude or prevent any persons who shall or may become debtor or debtors to his Majesty by simple contract only, by the collection or receipt of any money arising from his Majesty's revenue for his Majesty's use, from applying for and suing out any commission [82] or commissions, Extent or Extents in aid, in case one or more of such persons shall be bound to his Majesty by bond or specialty of record in the said Court of Exchequer, for answering, securing, paying over, or accounting for to his Majesty, the particular duties or sums of money which shall constitute the debt that may be so then due from such person or persons to his Majesty; any thing herein-before contained to the contrary notwithstanding.

"V. Provided nevertheless, and be it further enacted, that no Extent in aid shall be issued on any bond given by any person or persons as a surety or sureties for the paying or accounting for any duties which may become due to his Majesty from any body or society, whether incorporated or otherwise, carrying on the business of insurance against any risques either of fire or of any other kind whatever."

for the sale of certain leasehold premises, entered into and executed in February 1803, on the alleged grounds of inadequacy of price,—advantage taken of the age and infirmities of the vendor, and confidence reposed by her in the purchaser,—and of interruption in the enjoyment of the consideration.

The bill charged, in effect, that the (original) plaintiff, who was a widow of an advanced age, having, on the death of her husband, become possessed of the premises in question, (a house in [84] Weymouth Street,) had been prevailed on by the defendant, who was an experienced builder, and then much in her confidence, as the friend of her late husband, to sell them to him, in consideration of his allowing her to retain for her own use two rooms on the first floor of the house, and a coal-cellar, and paying her an annuity of 50*l.* a year for her life. The ground rent (8*l.*), the property-tax (amounting to 4*l.* 8*s.* 4*d.*), and the interest accruing, due on a mortgage debt of 330*l.* on the premises, were to be paid by the plaintiff up to the time of her death: and on those terms she executed an assignment of the lease (prepared by the defendant's attorney) on the 26th March 1803, and gave him possession from that time. The bill then charged that the premises were in fact worth 950*l.*: and that the defendant had made great profits by letting the rooms to lodgers. It also charged the defendant's disturbing the plaintiff and her servant in the quiet enjoyment of the rooms occupied by her under the agreement;—prayed that the indenture of assignment might be delivered up to be cancelled;—and that defendant should be ordered to give up the possession of the house, and account for the intermediate rents and profits: and to pay to plaintiff what should be found to be due to her from him, after deducting the sums paid to her.

The answer alleged that, at the time the defendant agreed to purchase the house, the plaintiff had actually engaged to sell it to another person, for an annuity of 45*l.* a year, and had taken a guinea in earnest of the bargain;—that the plaintiff acted in the business by the advice of her own attorney, who inspected [85] the deed of assignment, and suggested an alteration to her advantage, which was afterwards introduced in the margin of the deed; that in case of her giving up the rooms, for the purpose of leaving town, the defendant was to allow her 10*l.* a year more, which was acceded to:—denied taking any unfair advantage, and disturbing the plaintiff in the occupation of the rooms.

The answer also stated, that since the execution of the assignment, the defendant had laid out 350*l.* on the premises in repairs; and had also furnished the several apartments of the house, which had increased their value to let; and insisted that the consideration paid to the plaintiff was the fair and full value.

[The defendant, in several places in his answer, relative to the value of the premises, (which he stated to be worth more, to be sold, than the sum of 450*l.*.) had omitted to alter the words "subject to the said mortgage," for the words "free of the said mortgage incumbrance."

Therefore, an application was made to the Court, for permission to take the answer off the file, that it might be amended in that respect, on an affidavit that it was merely an error in the engrossment.

But the Court refused to permit it; saying, that the only mode by which that could be done, consistent with the practice, was by filing a supplemental answer, for the purpose of correcting the mistake.]

[86] The mortgagee having given notice to the plaintiff to pay the mortgage money, the defendant paid 40*l.* to the mortgagee on account; but afterwards the plaintiff paid off the mortgage entirely, and took an assignment, and the mortgagee afterwards paid back the 40*l.* to the defendant. The legal estate becoming thereby vested in the plaintiff, she brought an ejectment against the defendant to recover the possession; and then the defendant filed a cross bill against the plaintiff, and obtained an injunction, on the merits confessed in the answer, to restrain the proceedings at law, on the terms of bringing the mortgage money into Court, and paying the interest to the defendant.

On the part of the plaintiff, three witnesses, two surveyors and a builder, deposed, that the premises were worth, to be let, 70*l.* a year, or to be sold, about 850*l.*

The defendant examined no witnesses.

Martin and Richards, for the plaintiff, rested their case on the ground of gross inadequacy of price paid for the purchase, under circumstances which gave the defendant a great advantage over the feeble state of mind of the widow;—from the confidence she necessarily reposed in him, so recently on the death of her husband,

whose intimate friend he was;—and the deed being prepared by the defendant's own solicitor, all which was sufficient evidence of fraud. The defendant had been consulted by her, and was bound to make a true repre-[87]sentation of the value of the property; and he has gone into no evidence to prove it true. The inadequacy of price, in this case, is evidence of an undue advantage having been taken, amounting to fraud. That is the doctrine of Lord Thurlow, as appears from the case of *Heathcote v. Paignton* (2 Bro. 175). It is recognized also in *Underhill v. Harwood* (10 Ves. 209), where it was held, that if from the inadequacy the Court was satisfied that there must have been imposition, it would interfere. In *Twisleton v. Griffith* (1 P. W. 311), also, a conveyance was set aside for inadequacy of consideration. In this case the inadequacy was enormous; and no security was given for the annuity, but on the premises sold.

Dauncey and Pepys for the defendant.

The depositions in the cross cause being * offered in evidence for the defendant, the plaintiff's counsel objected to their admission; an application having been made to the Court for the purpose of getting an order that they might be read on the hearing, which was refused; submitting that there was no ground for the indulgence; and that it was not sworn that the defendant had no opportunity of, or was by any means prevented from, examining the witnesses before. The attempt to introduce the evidence now, was resisted on nearly the same grounds as the motion which was made in term for the order (d).

[88] **THOMSON**, Chief Baron. It was the defendant's own fault that his witnesses were not examined. The points are certainly the same in both causes: but it was incumbent on the defendant (who had repeated opportunities, for the publication was frequently enlarged, which must have been on a representation that he had witnesses to examine) to have examined his witnesses in this cause. The general rule is of more importance than this particular case; otherwise, parties would continually lay by till the plaintiff had finished the examination of his witnesses; and it would be mischievous to permit depositions to be used at any distance of time. I regret that we should shut out any evidence; but the general rule cannot be relaxed.

GRAHAM, Baron. I was shaken by the argument of the Court, being driven to decide *ex parte*: but the rules of proceeding cannot be departed from. Publication of the depositions, taken on the part of the plaintiff in this cause, had passed; and therefore, though the cross cause certainly brings on the same point, the depositions taken in it cannot now be received. A motion was made in the term to be permitted to do this, which failed, and properly.

WOOD, Baron, of the same opinion.

RICHARDS, Baron. The nature of these examinations is the ground of the rule, the depositions in answer to the interrogatories being reduced to writing. It is not even argued, that if an application had been made to examine witnesses in this [89] cause, (in the present state of the proceedings,) it could have been granted; and yet to permit these depositions to be read, would be doing, *per obliquum*, the same thing in effect. It is enough to refuse the admission of these depositions: that those published in this cause might have been known at the time when those were taken; not that there can be any suspicion, in this instance, that they were, for the defendant's solicitors are very honourable men. We must, however, adhere to the general rule.

The depositions were rejected.

It was then contended that it has been long settled by all the cases on that point (f), to be a rule, that inadequacy of price is no ground for the interference of a Court of Equity, to set aside a contract; but in this case, the evidence of value was particularly inconclusive, and by no means such as to justify the interference of the Court. The date of the application for relief, by the bill, amounts to a period of seven years after the contract. There was an attorney actually employed on the part of the plaintiff, who took an active part on her behalf. No incompetency to manage her affairs has been proved by the plaintiff, or of undue advantage taken by the defendant in any respect.

Martin, in reply, adverted to the recency of the transaction after the death of the

* They had given previous notice of their intention to do so.

(d) Vide ante, page 26.

(f) *Heathcote v. Paignton*, 2 Bro. 175; *Peacock v. Erans*, 16 Ves. 512; *Gowland v. De Faria*, 17 Ves. 20; *Western v. Russell*, 3 Ves. & B. 187.

plaintiff's husband; [90] the defendant's habits of confidence with her; her age and ignorance, and his experience and skill in the subject matter;—every thing emanating from her to him, and no mutuality of advantage proceeding from him;—and that no bounty was even hinted at as being intended by her. With respect to the argument raised, from the lapse of time between the transaction and the filing of this bill, he cited *Pickett v. Loggon* (14 Ves. 215), where the suit for rescinding the contract was not instituted till twelve years afterwards.

THOMSON, Chief Baron. It appears to me, that the circumstances of this case authorize the Court to interfere. The defendant was a builder by trade, and therefore must have been particularly conversant in the value of the premises purchased by him of the plaintiff. He had been in habits of intimacy with her deceased husband; and, therefore, she was entitled to expect, that if she consulted him on the subject of a sale of her property, he would advise her for her advantage. The parties being in this situation, a bargain is concluded between them for the purchase of these premises, without the intervention of a third person; and the contract is made and executed on the 23d March, not more than a month after the decease of the plaintiff's husband. It is true, she had the deed of assignment laid before her attorney, Mr. Hall; but it does not appear that he was [91] consulted as to the propriety of the bargain; and it is therefore probable, that the deed was submitted to him merely for the purpose of ascertaining that it was rightly drawn, and technically proper. It is true, he introduces a provision for paying her 10l. a year more, in case of her giving up her apartments in the house; and she receives the annuity granted in consideration of the assignment, till her death, as Taylor does afterwards; but that annuity is not otherwise secured, than by way of mortgage on the premises sold, which it appears was let annually for much more than enough to pay it; and after her death, the whole interest in the lease, which was for seventy one years, was to become the defendant's property, which is sworn to be worth 750l. or 800l. Then out of the annuity, she was to pay the ground-rent, the interest on the mortgage debt, and the property tax, leaving her only about 20l. a year. Is not such a consideration enough to startle one? It is really giving nothing at all, and hardly deserves the name of a consideration. This is not such a contract as can be permitted to stand.

GRAHAM, Baron. I entirely agree. The situation of the parties imposed on the defendant an obligation to protect the plaintiff's interest; and he, on the contrary, takes an unfair advantage of that situation, and that in a very short period after her husband's death. Mr. Hall, indeed, appears to have been consulted as to the deed of assignment; but had he been called on to investigate the terms of the contract, he must have been startled. [92] The house sold was capable of producing a rent of 70l. a year, and the defendant's schedule shews that he received 86l. The rooms were furnished, it is true, but that could not have amounted to such a difference; and beside that, the plaintiff occupied part of the house himself. He appears to have had a clear profit of 56l. per annum. Can it be said that here was no inadequacy of price? The plaintiff, besides, was to pay all the incumbrances; and the consideration was secured on the premises themselves. She was induced, therefore, as it seems to me, to part with her property without any consideration at all.

WOOD, Baron, of the same opinion. I agree that mere inadequacy of price is not a sufficient ground for setting aside a contract. That the consideration, in this case, was greatly inadequate, there can be no doubt; but that is not alone the ground I proceed on in giving my opinion that the plaintiff is entitled to the relief prayed. My opinion is founded on the circumstances of the defendant's having been consulted by the plaintiff, —his being her confidential friend, —his knowing the true value of the premises, —and his having, under those circumstances, induced her to enter into a contract, which was at once advantageous to himself and injurious to her; and, therefore, I think that it should be set aside.

RICHARDS, Baron. The relative situation of these parties, appears to me to be sufficient ground for avoiding this contract made between them. The [93] plaintiff's confidence in the defendant, entitled her to his best counsel. It is true, that there is no evidence of her having actually consulted him as to the sale of these premises; but there is enough before the Court to enable us to say, that it must be so understood. Any one possessing the confidence of a party, must be regarded as in the situation of attorney of that party, and should not be allowed to take advantage of that situation. This defendant, it appears, has done so, and that immediately after

the death of her husband. If the plaintiff had died in a month after the bargain was concluded, the defendant would not have paid her a shilling consideration; though, had she lived much longer than she did, the consideration would have been totally inadequate. When we take into the account the charges to be satisfied by the plaintiff, out of the annuity proposed to be paid her, we must be struck with the unfairness of the transaction.

The acquiescence, for however long a time, I consider as nothing.

Decree.—The deed to be delivered up to be cancelled. Reference to Deputy Remembrancer, to take account of rents received, and money laid out in repairs.—Costs reserved.

[94] THE KING v. PLAW. 20th July 1816.—The *capias* clause of the writ of Extent is not usually enforced: and where there have been also effects seized sufficient to satisfy the debt, the Court seemed disposed to order the discharge of a defendant taken under it, on his giving security for his appearance at the return of the writ.

This was a motion for a rule to shew cause why the Extent in aid should not be set aside: and that the defendant, whose person had been taken, might be discharged out of custody; and for an *amoveas manus*.

The only point in this case worth notice, since the late statute (56 Geo. III. ch. 117), relates to the discharge of the defendant's person.

Dauncey stated that the object of the application was, that the defendant might be enlarged, for the purpose of going abroad to collect his debts: that application had been made to the prosecutor of the Extent for that purpose, in vain; and that sufficient property of the defendant's had been seized to satisfy the debt.

Roupell appeared for the prosecutor of the Extent.

THOMSON, Chief Baron. It is certainly a most unusual thing, in such a case as this, to take a defendant's person, even where the Extent is, in fact, at the suit of the Crown.

[95] GRAHAM, Baron. If there be reasonable ground to satisfy the Court, that enough of the defendant's property has been seized to cover the debt, I think that the person should be released. Originally, the *capias* clause was only inserted in the case of the Crown: and the Court has a discretion in awarding either *extendi facias*, or *capias corpus*, as it may see fit. I should be inclined to favour this motion, for it is certainly a hard case.

WOOD, Baron. I, for one, should certainly order that clause to be struck out. If the defendant give security for his appearance at the return of the writ, he ought to be enlarged: what more can any one require?

The Court ultimately recommended an arrangement between the parties.

The statute above alluded to has the following provision for the relief of persons in custody under Extents in aid:

By Sect. VI. it is enacted, "That it shall and may be lawful for any person or persons who may now or shall hereafter be imprisoned under or by virtue of any writ of *capias* in any Extent or Extents in aid, to apply to the Barons of his Majesty's Court of Exchequer in England or Scotland, or to any Baron of the same Court in vacation, for his, her, or their discharge, giving one month's previous notice in writing to the person or persons to whom he, she, or they owed the [96] debt or sum or sums of money for which he, she, or they is or are so imprisoned, at the time such debt was seized under such Extent in aid, of his, her, or their intention to make such application, and stating in such notice the ground of such application, and an enumeration and description of all and every the property, debts, and effects whatsoever of such person or persons in his, her, or their own possession or power, or in the possession or power of any other person or persons for his, her, or their use; and for the said Court, or any such Baron in vacation to whom such application shall be made, to order such person or persons to be brought before them or him to be examined upon oath touching and concerning his, her, or their property and effects, and if such person or persons respectively shall, upon such examination, make a full disclosure of all his, her, or their property and effects, to the satisfaction of the said Court or Baron,

or it shall otherwise appear reasonable and proper to such Court or Baron that such person or persons should be no longer imprisoned under such writ, for such Court or Baron to order a writ of supersedeas quoad corpus to be issued out of the said Court for the liberation of such person or persons from such imprisonment: provided always, that no such liberation as aforesaid shall be held or deemed to satisfy or supersede such Extent in aid or any proceedings thereon, except as to such imprisonment as aforesaid, or the debt or debts seized under and by virtue thereof, and for which such person or persons shall be so imprisoned." *

[97] THE ATTORNEY GENERAL *v.* NORSTEDT, (claiming the Ship "Triton"). Monday, 22d July 1716.—A judicial sale of a vessel found at sea and brought into port as derelict, under an order of the Instance Court of the Admiralty, on the part of the salvors and claimant (without fraud), is available against the Crown's right of seizure for a previous forfeiture, incurred by the ship having been guilty of a forfeitable offence against the revenue laws: although the Crown was not a party to the proceeding in the Admiralty Court, other than by the King's Procurator General claiming the vessel as an Admiralty droit; and although no decision of droit, or no droit, was awarded, and the sale took place pendente lite under an interlocutory order.—The Crown should have claimed before the Court, either as against the ship in the first instance, or subsequently against the proceeds of the sale, which were paid into the registry to answer claims under the order of sale, or have moved a prohibition.—The warrant for arresting a ship by the Admiralty, and the process of citation, is notice to all the world of the subsequent proceedings.—In pleading such sale, in defence to an information, the facts should be put specially on the record, so that the Attorney General might demur to, or traverse them.

[Not applied, *The Veritas*, [1901] P. 312.]

The great and important question which arose in this novel case was, whether, after the public sale, by commission, of a ship derelict, under a regular judicial sentence of the Instance Court of Admiralty, she still remained liable to be seized by the officers of the Customs, while in the possession of a bona fide purchaser under that sale, as having become forfeited to the Crown, for an offence against the revenue laws, (39 Geo. III. c. 59), proved to have been committed before such sentence and sale; or, whether the previous forfeiture was not purged by the proceedings and sale, and the right of seizure for ever lost to the Crown.

The material facts of this case, as they appeared on the trial of the information, and respected the question before the Court, were, that the ship had unquestionably incurred a forfeiture in the month of October 1813, (whilst she was the property of Messrs. Eberstein and Co. of Nordkoping, in [98] Sweden, in having committed the offence charged by the information, which was, the having re-landed at Deal some bales of Bandanna silk handkerchiefs, which had been shipped on board of her for Lisbon, but without any participation or knowledge on the part of the owners or their agents:—that in the course of the voyage to Lisbon the ship was run foul of in the night time by another vessel, whereby she was so considerably damaged and disabled, as that the captain and crew thought it necessary to desert her for the sake of their personal safety: and they accordingly left her, and took refuge on board a transport. The ship, however, did not founder, as had been expected, and eventually righted. In that state, she was soon afterwards found by his Majesty's ship "Seylla," who took her and towed her into Scilly, as derelict, on the 7th December 1813. She was there, (as was proved by the certificate of the commissioner and auctioneer) sold by public auction, (25th April 1814) by virtue of a commission of appraisement and sale issued from the High Court of Admiralty, under an order of the Court to pay the demand of salvage, and other expenses.

The commission, [after reciting the proceedings in the Admiralty against the ship "Triton" and cargo, as being a ship and goods derelict, &c. and as such, the right of the Crown,—and against the officers and crew of the sloop "Seylla," intervening as salvors,—and against George Cowie, claimant of the ship, and R. A. Gray, claimant of the cargo, intervening;—and that the Court, duly proceeding at the joint petition of the proctors of the salvors and claimants, [99] (the Procurator general, of the King in his office of Admiralty, not objecting thereto,) required the commissioners to cease

the ship to be inventoried and appraised, to be exposed to public sale, and sold to the best bidder: and to bring the produce money into the registry of the Court, within two months from the date of the commission, to be there kept for the use of the person who should be entitled thereto. The proceeds were (after payment of the salvage) paid over to Cowie & Co. See p. 132.

At the sale under that commission, she was purchased by a person who acted as the agent of Samuel John Billing, the late master. The net proceeds of the sale, after those payments had been made, were accounted for to the underwriters on the ship, who had paid the owners as for a total loss. By Billing the ship was afterwards transferred to Norstedt, the defendant.

These are the leading facts of this case: but there were also other circumstances, which, at first, seemed to cast a shade of suspicion on the transaction: and as they originally went far to justify the proceedings which were instituted against the ship, so, ultimately, they had the effect of rendering the judgment of the Court a much stronger decision in favour of the defendant, than it would, perhaps, otherwise have been: and, therefore, it may be necessary to state them, to make the report of this case the more complete.

They chiefly refer to the apparent connection of the parties interested at different periods in the [100] property in the ship, and gave rise at one time to a suggestion of collusion between them and the other parties, in the cause in the Admiralty Court, for the purpose of getting rid of the forfeiture by means of that suit. All suspicion of fraud, however, on the part of the present defendant, and the former owners of the vessel, was distinctly negatived by the jury on the trial: and, therefore, these circumstances are kept somewhat apart from the main facts, although it has been thought necessary to state them.

They are as follows:—Billing, who was the actual purchaser of the ship, at Scilly, was, in point of fact, the person who had been master of her at the time of the commission of the offence, by which she had become forfeited. He, on hearing of the intended sale, applied to Messrs. Albers and Codner, of London, the former agents of Eberstein and Co. the original owners: and also of the present defendant, to request them to purchase the vessel for him. Billing having satisfied Albers and Co. (as they said) that he knew nothing of the fraud which had been practised on the revenue, they commissioned him to make the purchase, and furnished him with a letter of credit, to enable him to do so, and that without any authority from Messrs. Eberstein and Co. After the completion of the purchase, Albers and Co. wrote to Eberstein and Co. offering them the vessel. They had in the mean time retired from business: but Norstedt, the present defendant, who had been their confidential clerk, and had since succeeded them, accepted the offer, and bought the ship.

[101] The ship so sold, after making several voyages, arrived in England, in the month of May last, where she was seized by an officer of the Customs (one of the searchers), on the ground of the alleged forfeiture: and the present information of seizure thereon, was filed by the Attorney General against the defendant, charging the ship, in substance, with the offences already detailed, contrary to the form of the statutes, (5th Geo. I. cap. 11, sec. 6. 39th Geo. III. ch. 59, sec. 5 & 14); whereby, &c.

The defendant having pleaded the general issue, the cause was tried at the Middlesex Sittings after Easter Term, and a verdict was found for the Crown, with liberty for the defendant's counsel to apply to the Court to set it aside, and enter a verdict for the defendant.

Saturday, 15th June.—Lushington, LL.D. and Gaselee, now obtained a rule to shew cause, &c. on the ground, that the jury had found that the sale to the defendant was *bonâ fide*; and that he was not connected in the transaction with the former owners: so that the case was thereby entirely cleared of suspicion of fraud: and that the judicial sale by the Admiralty, had destroyed the former right of the Crown to the vessel as a forfeiture.

Friday, 28th June.—The Solicitor General, Dauncey, Clarke, and Walton, now shewed cause.

They contended, that the Admiralty Court had no right to sell the ship, in the present instance, because all property in her had become vested in the Crown, by the forfeiture, and *eo instanti*: and could not be [102] divested by any thing which might afterwards have taken place. They submitted, that the Admiralty jurisdiction in

the Instance Court, in a question of salvage, was very distinguishable, in its operation and effect, from that of a Prize Court of competent authority. The latter, being quite a different tribunal, may and does certainly exercise a controlling power under its sentence of condemnation; but that was, because the property was, in cases of prize, always changed by the act of the hostile capture; whereas, a mere collateral question on the claim of salvage, cannot give the Instance Court any authority to sell the ship to the prejudice of the pre-existing rights of absent persons. They urged, prominently, that the ship having completed a forfeitable offence, was presently forfeited; and that the Crown's right, which is indefeasible, attached immediately;—that subsequent condemnation was not necessary to perfect that right, as that ultimate sentence of the Court of revenue is entirely *alio intuitu*, and is only required to ascertain the fact on which the forfeiture is charged to be founded, to afford the person whose property has been seized, an opportunity of traversing the commission of the offence, and to give the Crown a greater facility of disposal of the vessel, and confirm to the person who acquires her, an ostensible title, conclusive against all the world, by the mere production of the record.

That the Crown's right accrues instantly, and is to be preferred (they submitted), sufficiently appeared, from the decision of this Court, in the case of *Score v. The Lord Admiral* (Parker, 273), which [103] was also, in other respects, applicable to the present question. In that case, a ship laden with French goods, coming into the port of Penzance, was seized by the admiral's officers, as a perquisite of the Admiralty. A Custom-house officer afterwards seized her as forfeited on the French Prohibition Act, (for bringing prohibited goods into Penzance,) exhibited an information, and moved for a prohibition; and, upon debate, it is reported to have been granted, for the ship was presently forfeited by the Act of Parliament, upon coming into port, and the seizure, after, of the Admiralty did not prevent the forfeiture. There is also a note to that case, wherein it is said, that Lord Chief Baron Ward cited a case, in the time of Lord Hale, where goods were put on board, the duty not being paid, and became flotsam; and a suit was commenced in the Admiralty, who have jurisdiction of flotsam; and, upon an information in the Exchequer, for a forfeiture in regard they were shipped before duty paid, a prohibition was granted; for the Crown had a title by the forfeiture; and the goods becoming flotsam afterwards, did not purge the forfeiture. These cases, then, clearly establish, that a ship offending against statutes creating forfeitures, is forfeited presently; and also, that the forfeiture cannot be purged by subsequent occurrences. The vessel in question, therefore, becoming presently forfeited by the offence committed by her, the subsequent wreck and its consequences, could not defeat the Crown's right. In the case of the Crown, there can be no laches objected as a reason for precluding its claim at any distance of [104] time, as no delay can defeat its rights; and there is no doubt, also, that the officers were ignorant of the forfeiture having been incurred at the time when this sale took place, though neither the want of knowledge, or even culpable neglect of those officers, can be permitted to prejudice the Crown. To hold that such a sale as the present could extinguish previous rights of property in the thing sold, would be to ascribe a much greater efficiency to a decree of the Court of Admiralty, than is incidental to that of any other Court; for it would be deciding, that a ship being wrecked at sea while in the tortious possession of a wrong doer, might, on a suit instituted by salvors, be sold, irreclaimably, by the Court of Admiralty, to the destruction of the title of the right owner, and that, perhaps, by purpose collusion. The decrees of other Courts affect not to bind others than parties to the suit. An heir at law, not being a party in the cause, is not concluded by a decree for the sale of an estate, by the Court of Chancery; yet it is to be contended, that an adjudication of sale by the Court of Admiralty, is to bind not only the king, even although he is not a party to the suit, but all the world. In both the authorities cited, this Court would not suffer the Court of Admiralty to proceed in cases where the ship had previously incurred a forfeiture, and that on the principle of the Crown's incipient but vested right, depriving that Court of jurisdiction.

[Graham, Baron, put the case of the ship having been sold by a sheriff under execution.]

[105] It was submitted, that that would not be such a conversion of the property as would destroy the right of the Crown to seize it as soon as found.

The salvors, in this case, it was admitted, would have had a lien on the ship against the parties interested in her, under the 27 Edw. III. c. 13; but no more. Yet surely

that could not give a Court which has jurisdiction of salvage questions, a right to sell the ship; and the more especially, as the salvor's lien, the only subject matter of the suit, would continue, till satisfied, as well against all titles of the Crown, as of the subject. This may be called a hard case, as to the bona fide purchaser; but it is no more so than any other case of a sale by a vendor having no title, and caveat emptor. The Crown has no means of following or recovering the purchase-money when once in the possession of the vendor. The goods of a felon are not forfeited till conviction; but a sale of them to an innocent purchaser before attainder, would not divest the right of the Crown. Suppose the owner of this very ship, being a British subject, had been convicted of felony while the vessel was at sea, and the same circumstances had transpired, the Crown's right would certainly not have been barred by the sale.

As to the jurisdiction of the Court of Admiralty to sell vessels without the consent of parties interested, the case of *Reed v. Darby* (10 East, 144), was cited, [106] where the question being, Whether the Vice-Admiralty Courts abroad had authority, on the mere petition of the captain of a ship, bound on a foreign voyage, to decree a sale of her, on being reported to be not sea-worthy? Lord Ellenborough said, that "for the power of making a valid sale under the decree and commission of the Vice-Admiralty Court of Tortola, upon the fullest inquiry we have been able to make, we find no adequate foundation in the legitimate powers of the Admiralty Court." No instance has been discovered, in which such a power has been exercised in the Admiralty Court at home. That, though certainly not the same case, bears, notwithstanding, a near affinity to this, and in *pari materia*, and at least affords matter for argument, as far as it goes. That, also, was a sale by the Court of Admiralty, in the progress of a suit, and held, notwithstanding, to be not binding.

Then, if the Admiralty have a right to sell a ship at all under these circumstances, another question will arise, as to who are bound by the sale? and, whether persons who are not party to the proceedings are? All principle is against such a proposition. The Crown was not a party to this suit, at least as demanding the forfeiture; nor could the Court have entertained the question of forfeiture, or no forfeiture, if it had. This is the only proper tribunal for such matters. To carry the case further—Supposing the Admiralty had ordered the ship to be restored to an offending owner, that, it must be admitted, would clearly not bind the Crown; and their argu-[107]ment has to struggle with that difficulty. It may be said that the purchaser has no means of knowledge of the offence committed against the revenue laws, and of the consequent forfeiture; but if the ship had been merely sold to a purchaser after the act of forfeiture, without this supposed sanction of the Admiralty, there can be no doubt that the ship might have been seizable in his hands; and that would have been a case equally hard. Norstedt, moreover, if really aggrieved, has a remedy by action against Eberstein, as the vendor, the sale being with his consent and for his benefit, if he have sold to him what he had no right to sell. A case was cited, as having occurred in the Court of King's Bench, where a purchaser recovered in an action, against the seller of a ship, which had been seized after such a sale. [It was admitted, that in case of a sale by a private party, under such circumstances, the purchaser would have a right of action.] It was ultimately much pressed, that if a proceeding of this sort should be held to constitute a valid sale, as against the right of the Crown accruing by the previous forfeiture, the statute of 39th Geo. III. would have been passed in vain: for means would then be readily found of eluding the consequences of every act of forfeiture amounting to an offence against that statute. Under these circumstances, and for these reasons, it was submitted that the verdict of condemnation was right, and ought to be retained.

[Graham, Baron, having suggested that the vessel, in this case, being sold as a droit of Admi-[108]ralty, the King's Advocate General must have consented; Dr. Lushington observed, that the King's Advocate General would have had a right to be heard against the sale, but that the Court takes upon itself to sell, whether the Crown consents or not. The counsel for the Crown then submitted, that in that case it would amount to no more than a question between two different departments of the Crown, as to which was entitled to make the seizure: and so it was in the cases cited; for it came to a question between the Admiralty officers and the officers of the Customs; and there was nothing uncommon in the different departments of the Crown having conflicting interests, as was the case between the Treasury and Navy departments, in the much agitated case of *The King v. Mainwaring and Boyd* (ante, vol. ii. page 67),

where there was a question of priority of debts ; and they contended that it was quite clear that one department of the Crown consenting to an act prejudicial to another department, was not binding. As to the concurrence of the Advocate General, his interest in the question was at an end as soon as the vessel was recognized and claimed, for she could no longer be considered derelict, so that the sale is ultimately decreed by consent of the salvors and claimant ; the King's Advocate merely not dissenting, which he had then no right to do ; because he could not be supposed to know any thing of the previous forfeiture, (for it was not noticed in the course of these proceedings,) and was merely a formal mover of the suit (*d*).]

[109] Lushington, LL.D. and Gaselee, supported the rule. They admitted that an act of forfeiture had been committed by the ship, whilst she was the property of Eberstein ; but insisted that there was not a shadow of suspicion attached to him as being party to, or even cognizant of, the offence. They submitted, that nothing further was necessary to the defendant's case, than the production of the decree of the Instance Court of Admiralty, which ordered the sale ; for, being a Court of competent jurisdiction proceeding in rem, that decree was conclusive, and bound this Court and all others : nor had any Court, to whom it should be produced, a right to enquire on what proceedings or merits it had been pronounced. That is a broad proposition of liberal doctrine — of universal law, founded on the commercial intercourse of states, and acknowledged *jure gentium*. A detail of the course of proceedings in the Admiralty Court, may, however, serve to render more intelligible some of the arguments meant to be used in support of this rule, and to shew the propriety and necessity of giving unquestionable effect to such decrees. Whenever a ship is brought in as derelict, she is arrested by the Admiralty, and the warrant of the Instance Court for that arrest, contains an order for general citation of all persons interested to come forward with their claims ; and that is, per se, notice to all the world. After ordering the marshal to arrest the ship, it proceeds (*e*) : — “and the same so arrested you keep under safe and secure arrest until you shall receive further orders from us ; and that [110] you cite at the premises all persons in general, who have, or pretend to have, any right, title or interest therein, to appear before us, or our Judge of the said High Court of our Admiralty of England, or his Surrogate, in the Common Hall of Doctors Commons, &c.” There is then a process issued by the Court of Admiralty, requiring all persons who may be interested in the property, to come in and assert their rights : that is sometimes served personally, where it is practicable and necessary, and it is also posted in the Royal Exchange. In the present case, the suit being instituted, as is usual, at the instance of the Crown, was proceeded in in the accustomed manner, as set forth in the commission *.

As to the jurisdiction of the Instance Court, — it extends over all cases of bottomry, wages and salvage. It also has, in cases of revenue, an exclusive jurisdiction of appeal from the Vice-Admiralty Courts : the Privy Council having disclaimed on their part all jurisdiction in those cases, and they have accordingly lately refused to receive any appeals from the West Indies. It has, besides, under several of the revenue acts, an original jurisdiction to try forfeitures, given by the express words of those statutes. Thus, by the Navigation Act (12 Ch. II. ch. 18), the commanders of ships of war are authorized and required to seize, and bring in as prize, all such ships and vessels as shall have offended contrary thereto, and deliver them to the Court of Admiralty, there to be proceeded against, and, in case of condemnation, one moiety of the consequent [111] forfeiture is allotted to them : so that it is at least matter of much doubt, whether the Admiralty Court had not jurisdiction to try the question of this very forfeiture, the act (39 Geo. III. ch. 59,) enacting, that the penalties imposed by it may be sued for, and recovered, in the same manner as penalties incurred for any offence against the laws of Customs. The exercise of the jurisdiction of the Admiralty Courts, whether the Instance Court or Court of Prize, is properly in rem, and accordingly, when a vessel has been arrested, whenever they deem it necessary, they order a sale, and that sometimes with, and sometimes without, consent : and it is even a common proceeding to sell ships *pendente lite* ; but whether the sale be *pendente lite*, or after restitution or condemnation, the decree is alike conclusive, and cannot be enquired into. Nor is there a case extant, from the time of Ch. II. to the present day, wherein

(*d*) See pages 60 & 93.

(*e*) Marriott's Formulary, 326.

* Ante, page 98.

it can be found that a sale, under a decree of the Court of Admiralty, was ever impeached: on the contrary, there is a series of cases, standing uncontradicted and unquestioned, recognizing the jurisdiction of the Admiralty Courts, and their power to order an absolute sale of the subject matter of their adjudications. A distinction has been attempted to be made between the Instance Court and the Court of Prize, as it is called. In point of fact, the Instance Court is a regularly constituted Court of the Admiralty, of permanent jurisdiction over the various matters already mentioned; whereas the Prize Court is temporary, and founded on a commission issuing at the commencement of every war, for the decision of questions of prize only. [112] The Judge of the Instance Court is generally named in the commission as the Prize Commissioner, but still it is a distinct jurisdiction: and there can be no reason for giving a greater or more binding authority to the decrees of the Court of Prize, than is due to the Instance Court: and, accordingly, the cases all go to establish that the sentences of the Admiralty Courts are equally conclusive, without any such distinction.

The first case which occurs is that of *Hughes v. Cornelius* (2 Show. 232). That was a case of trover, brought for a ship and goods; and, on the special verdict, there is found the sentence in the Admiralty Court in France, which was with the defendant:—and the Court adjudged, that “as they were to take notice of a sentence in the Admiralty here, so ought they of those abroad in other nations; and that they must not set them at large again, for otherwise,” (said the Court,) “the merchants would be in a pleasant condition.” Now that case goes to establish, that the Court of King’s Bench will take notice of a decree of the Court of Admiralty at home: and the principle is then applied to a decree of a foreign Court of Admiralty. Nor is that principle confined to cases of prize only: for the Court goes on to ask, by way of illustration,—“Suppose a decree here, in the Exchequer, and the goods happen to be carried into another nation, should the Courts abroad unravel this!” Now, a decree by a Court, having competent jurisdiction, whether it be the Court of [113] Exchequer, or whether it be the Court of Admiralty, is equally entitled to respect. We respect the decrees of other Courts, however unjust, and require them to defer to ours:—and shall we not respect them ourselves? While we prohibit the Customs from seizing a ship sold by a French Prize Court, as having incurred a previous forfeiture, are they to be permitted to do so, where the vessel is seized and sold by our own Court of Admiralty?

That case is reported by several other reporters. It is to be found in *Skinner*, page 59: and there it is stated, that the sentence of the Admiralty was produced under seal; and the Court would not suffer this verdict to be argued, but ordered judgment to be entered for the plaintiff: for they said, that sentences in Courts of Admiralty ought to bind generally, according to the *jus gentium*:—and that was a peculiarly strong case; because, there the facts found by the special verdict, negatived those on which the sentence in the Admiralty Court was founded. And when Holt, Lord Chief Justice, had occasion to cite this case, in *Green v. Waller* (2 Ld. Raym. 893, 935), he said, “although the fact was found to be contrary to, and falsifying the sentence in the Admiralty of France, yet that sentence was held to bind the property of the goods.”

That was the first case, in point of time, in which this question came under the consideration of the Common Law Courts: but that was succeeded by several other cases, which are equally in point. *Ever v. Jones* was a case in which the jurisdiction of the Instance Court happened to come in issue: and there, Lord Holt again referring to *Hughes v. Cornelius*, says, that the Court adjudged, that though the sentence of the French Admiralty Court were unjust, the property was altered. There is also the more recent determination of *Ladbroke v. Crickett* (2 T. R. 649), which is materially in point: In that case the master (who was also owner) of a ship had had repairs done to her, for the payment of which she had been hypothecated, by way of bottomry. A suit being instituted in the Admiralty Court on that instrument, the vessel was seized, and decreed to be sold to satisfy the demands for repairs. Subsequent to the seizure, the plaintiff (Sheriff of Surrey) took the ship in execution: but the defendant afterwards sold the ship under a decree. The action was trover against Crickett, who was Marshal of the Admiralty: and the question was,—Whether there was jurisdiction in the Admiralty Court? which seemed to be admitted, when it was gone into; but Mr. Justice Ashurst said, in giving judgment,—“We only look to

the sentence: it does not appear from thence that they proceeded without jurisdiction, and we cannot presume that they acted improperly:” And Mr. Justice Buller said,—“The party who applies for a prohibition after sentence, must shew a nullity of jurisdiction on the face of the proceedings: therefore the plaintiff, in this case, would not go into evidence [115] at the trial to impeach the decree of the Court of Admiralty.” By that case, it appears to be decided, that however good a previous title may have been, if the Marshal of the Admiralty be in possession under the decree of that Court, no trover lies against him: the Admiralty Court, having cognizance of the subject matter, are supposed to act throughout correctly in all their proceedings, which cannot afterwards be enquired into. All the cases on that point are summed up in the case of *Lollian and Others v. Henderson* (3 Bos. & Pul. 499). In the case of *Barnardi v. Mottew* (2 Doug. 580), Lord Mansfield says,—“The first principles are clear, and admitted: all the world are parties to a sentence of a Court of Admiralty. Here, there is a monition published at the Exchange: and in other countries, at some place of general resort: and any person interested may come in and appeal at any time, if there have been no laches; if there have, the time of appeal is limited: but the sentence, as to that which is within it, is conclusive against all persons, unless reversed by the regular Court of Appeal: it cannot be controverted collaterally in a civil suit.” That is a broad, forcible, and comprehensive proposition. It is further supported by the authority of the Privy Council, whose judgment was pronounced by the Master of the Rolls, in the case of *Kindersley v. Chance* (Parke’s Ins. 547 (7th ed.)), who states it to be quite clear, that from the time of Lord Hale down to that period, it has been settled, that a sentence of condemnation [116] in a Court of Admiralty is conclusive. When it proceeds on the ground of enemy’s property, it is conclusive that the property does belong to enemies, not only for the immediate purpose of such a sentence, but it is binding on all Courts, and against all persons. “This has been so clearly understood” (his Honour adds), “that it was not even controverted in the case of *The Duchess of Kingston*, where the conclusive effect of all sorts of evidence was so ably discussed: it was admitted that the sentence of a Court of Admiralty, proceeding in rem, must bind all parties,—must bind all the world.” Now, certainly, in *The Duchess of Kingston’s case* (State Trials), there was not the slightest doubt thrown out but that the decisions of the Court of Admiralty, and the Court of Instance, which are all put together, were conclusive and binding, because they proceeded in rem. It was admitted, and there can be no doubt of it, that they would be binding upon all the world: and unless it be shewn that there is an exception in favour of the Crown, this case cannot be sustained.

The defendant’s Counsel also availed themselves of an opinion expressed by Sir

* The case on which that opinion was given was this:—A vessel having been carried into Scotland by a privateer, was sold under a sentence taking place there, and afterwards claimed by the first owners, who arrested her at Newcastle. The question in the Admiralty Court here was,—What was to be the effect of such a sentence, which was contended to be null? In Sir L. Jenkins’s opinion on it are found these sentiments taken:—“First, From the rules of the Civil Law, the ordinary remedy against a sentence is by way of appeal; every sentence, after the time limited to appeal from it, being to be taken pro veritate, or till it appear to be otherwise by the sentence of a competent Judge that shall reverse it. That we are not competent in this case is evident, in that there lies no appeal hither from Scotland. Secondly, From the practice of Civil Law Courts, which ordinarily intermeddle not with, nor inspect, the merits of those sentences that are given without the limits of their jurisdictions. It is a ruled case, that one Judge must not refuse, upon letters of request, to execute the sentence of another foreign Judge, when the persons or goods sentenced against are within his jurisdiction; and if he do, his superior must compel him to it. Thirdly, From the usage of the Western world, each sovereignty avoiding, as much as may be, to break in upon or interrupt one the other in their judicial proceedings, as appears, first, by the modern treaties, which do most of them provide, that persons wronged shall seek and pursue their remedies in law (not in their own homes, but) in those countries where the wrongs have been done them. Fourthly, From the peculiar usage touching the property of ships, the Parliament of Paris hath determined that ships are not recoverable jure postliminii, when they happen to return from an enemy’s possession to their true owner’s country; and the laws of Spain and Venice do allow their property to be altered (which agrees not with the ancient Law of Nations), even in the hands

Leoline Jenkins, [117] the Judge of the Admiralty Court, in the time of Charles II., to be found in Wynne's History of his Life, vol. ii. p. 762.

The next question is, on the competency of the [118] jurisdiction. As to the argument drawn against it from sales in the West Indies, although it was held by Lord Ellenborough, in the case of *Reid v. Darby*, that a sale by the Vice-Admiralty Court there was not good: that was because they had no jurisdiction over the subject matter: for, by the municipal laws and the constitution of that Court, it had no jurisdiction under the circumstances of that case. That decision, therefore, does not impugn the jurisdiction of the Court of Admiralty here to sell a derelict.

In the case of *The Betty Cathcart*,—which was carried by appeal up to the delegates, who unanimously confirmed the sentence of the Court below,—a ship had been seized by a French ship, and carried into America: it was decreed to be restored to the owners: from which there was an appeal. She was sold, *pendente lite*, in the Courts in America to a Mr. Wenman there, on behalf of the former British owner. The Judge of the Vice-Admiralty Court found that by that he became possessed at once of this ship in trust for the British owner: but that the British owner was entitled to the privileges of a British ship, and that, carrying a cargo to a British settlement, he was not subject to confiscation, because he had not violated the laws. Now, if she had been an American ship, she must have been condemned; and that was a case of sale *pendente lite*. A case was also cited by Dr. Lushington, in which he was of Counsel in support of the sale under a similar decree of the Court of Admiralty. That was the case of *The Experimento*. The "*Experimento*" was a British vessel, which happened to be in America on the commencement of [119] hostilities between America and this country: she was seized by the American Government. The American Government passed an act of Congress, by which all British vessels, which had been in the ports of the United States prior to a declaration of war, should be restored to their respective owners; consequently, the owners of this vessel were entitled to restoration under that act of Congress, and a claim was accordingly made on behalf of the British owners. By that act, the vessel ought to have been restored to the owners on payment of the expenses of the proceedings: but those expenses not being paid, she was, by decree of the Court, sold to defray them, and the balance of the proceeds was paid into Court, for the benefit of the owners. Under that decree, and the sale consequent thereon, she was purchased by Spanish owners, resident in Amelia Island, who brought her to this country. On her arrival here, she was arrested on the claim of the former British owners, and they alleged their former title—the decree of restitution in the Admiralty Court in America, under the act of Congress; and also that the sale was a fraudulent sale, the purchase-money appearing to be very small. The sole argument used on that occasion for the title of the Spanish owners was, the production of the decree of a competent Court of Admiralty; when the Court at once said, that it was not necessary to go further. The Court, on that occasion, said, that "a judicial sale may, and generally is, a disadvantageous sale; but did the sale take place under the authority of a competent Court? There cannot be a question about it. The Court of Admiralty of Savannah had a right to do what this Court is in [120] the habit of doing—to issue a decree of sale for the payment of the expenses incurred in adjudication. There can be no doubt as to the competency of the Court to order a sale for such a purpose. The price appears small, but the Court will not enter minutely into that consideration: it would be impossible to maintain the decrees of Courts, if they were to be entered into in that way."

It was then denied that this was a sale between Eberstein and Norstedt, and that Eberstein was the seller, or that his former title had any thing to do with the title under which Norstedt now held. The mode of selling under a decree of the Court of Admiralty, has the effect of shutting out and destroying all previous titles. The purchaser has no power or means of investigating a title,—it is not open to his inspection. The former owner is no party to the sale; it is the Court of Admiralty which guarantees the title to the buyer, and upon the faith of that Court. That is universal practice, as is shewn by the purchaser's never taking a title-deed of any kind

of pirates, so as to vest legality in others that derive *bonâ fide* from them. Now, if the property of ships, in favour of public commerce, can pass without, a sentence seems not regularly to be void till the sentence itself be reversed by a competent authority."

from former owners, he taking merely a certificate from the marshal of the Admiralty, and nothing else; and it is the same thing in the Prize Court.

[The Court having asked how, in the case of a British vessel condemned, she is registered after such a purchase? it was said that, in that case, the Instance Court would take a copy of the former register, and get her registered over again, supposing her to be a British vessel, and she would then be registered as such. In the Prize Court, they are [121] also entitled to have her registered, (except in the case of recapture) under a particular statute, brought in by Mr. Rose.]

The case was put, of a vessel sold *pendente lite*, in a Court of Prize, where there should have been no final condemnation: yet it could not possibly be contended, that that ship, in the hand of a purchaser, would be liable to a former forfeiture. That is the general principle, and it stands unquestioned. To the arguments founded on the purchaser having a remedy over, it was answered, that this having been a purchase by a British subject, under a decree of the Court of Admiralty, if the vessel should afterwards be condemned for a prior forfeiture, no action could be brought against the former owner, because he not having been cognizant of the fraud, nor a party to the decree, (for the former owner has nothing to do with the sale) the defence to that action would be, that the defendant did not sell what was so purchased, under a decree of the Court of Admiralty. Norstedt therefore could not support an action against Eberstein, should the Court determine that this ship should be held to be forfeited.

Admitting it to be the general rule, that the forfeiture attaches the moment the act is committed, it would still be analogous with the common case of *debitum in presenti, solvendum in futuro*. Felons' goods, between the time of committing the felony and the time of conviction, if disposed of, for his own maintenance, would be protected in the case of a *bonâ fide* purchase: that is a case which was lately before the [122] Court of King's Bench. But they have gone further, in the great *Prisage* case in *Bulstrode* (3 Bulstr. 17), where this point is put. A termor is distrained for rent behind; afterwards he is attainted for felony, done before the distress taken. *Per Curiam*. The King shall not have this distress as a forfeiture, unless he do satisfy the party who distrained, for this was lawfully taken *tempore captionis*; so that there is a case where, though the King would be entitled to the forfeiture, yet because it was lawfully taken *tempore captionis*, the right would attach only, subject to the claim of the party making the distress. There are several other cases in *Bulstrode*, where there is the same sort of law applied to the case of a lease, where the felony has been committed after the lease granted. These cases shew, that the right of the Crown, by forfeiture, does not completely override all other rights; and if adverse rights, founded on principles of common justice and equity, should have accrued subsequent to the forfeiture, they ought not to be permitted to be overthrown. That rule of justice is supported by authorities, and the practice of the Courts. Thus, in the case of the payment of bonds by an administrator, before seizure, or notice of the King's debt, that is held to be a good plea against the King, where his debt is not of record; but where the King's debt is of record, all the world are bound to take notice of that debt; and, therefore, such a plea would be bad: but this is not such a claim as is notice *per se*. So also in cases of Extents, where a proper assignment has been made before the Extent be taken out, the King's pre-existing debt is bound. If, then, the Instance Court [123] of Admiralty has power to decree a sale, and in such cases as this; and if a decree of a Court of competent jurisdiction is conclusive, it cannot be brought into question, nor can the merits on which it proceeded, be re-discussed in any other Court but a Court of appeal, so specially appointed; and this Court would assume, on what it does not possess, appellate jurisdiction from that in which this decree was pronounced, if on this collateral question, it should entertain any objection which might be taken to the circumstances under which it was made; as, for instance, whether there were fraud and collusion among the parties to the suit, and whether the suit itself was merely proceeded in for the express purpose of doing what has been suggested.

Much stress was laid on the argument, that the proceeds in Court were responsible for the claims on the ship, and it was put, that the Crown should have required them to be paid to the Customs; and that whenever a claim of that description was made, it was always attended to: as for instance, in the case of Sir Home Popham, where the Court actually condemned the "*Etrusco*," on a charge of illegal trading. So they

would, no doubt, have done in this case, but the sale once decreed, even the right of the Crown is shut out.

The defendant's counsel then adverted to the cases which had been cited for the Crown, and contended that they furnished no decision applying in support of the positions assumed; that they [124] were differently circumstanced, and fell short of all that was necessary to raise, on that occasion, any of the questions now before the Court. All that was decided there by the Court was, that under the circumstances of those cases, neither a seizure of the vessel by the Admiralty as a *droit*, nor her becoming flotsam, after a forfeiture, could operate to purge that forfeiture. But among those circumstances, this is not to be found, that the Court of Admiralty had actually proceeded in the exercise of its jurisdiction, to decree the vessel to be sold, or that a sale, under that decree, to a third person, had taken place*, which are facts widely distinguishing those cases from the present.

In opposition to those authorities, (as far as they went) they cited the case of *Minnitt and Hoos v. Robinson* (Bamb. 121), which was a motion by the plaintiffs for a prohibition to the Admiralty Court, then proceeding on a libel for wages, (due before the seizure) upon a suggestion that the ship had been seized for a forfeiture under the Navigation Act: and that claim was put in by the master, on the information filed by the seizer, to which the master pleaded the general issue; but [125] he afterwards, and before trial, submitted and compounded, on which there was judgment *quod vas deliberetur*, &c. It was insisted, that the Act of Parliament had so altered the property of the ship, that by the seizure, submission to the fine and judgment, all precedent incumbrances were discharged. But the Court (it is reported,) discharged the rule, on cause shewn, though they admitted, that if there had been a condemnation, that would have been a good ground for a prohibition, and a discharge of all precedent incumbrances: on which the Reporter makes a quere: the fine being tantamount to a condemnation. That case shews, that a condemnation is necessary to supersede the jurisdiction of the Court of Admiralty. Now, if a sale had been ordered in that case, *pendente lite*, and the purchase money brought into Court to answer demands existing against the vessel, the purchaser would surely have been protected: otherwise it must be held, that that which represents the ship might be used for one purpose, while the ship itself might be seized for another. But it can never be contended, that the same property may be seized and sold twice over, or *ad infinitum*; and that must be the consequence of holding the sentences of Courts competent to decree a sale to be not binding or conclusive. And that that rule should be solemnly established, mercantile policy, and the respect due to Courts, the fiscal rights of the Crown, and the security of property acquired by the subject, all combine to require.

It was further observed that, in the present case, the purchase-money was, after the sale, by the [126] course of the proceedings, brought within the power of the Crown, by having been paid into the registry of the Admiralty Court: and then also, the Crown's claim might have been made. The king's proctor, in his office of Admiralty, who was the party moving the suit, and continuing to prosecute it to the last, might have done so. The money may, perhaps, even now, be followed, but the ship should be secured to the purchaser. With respect to the confliction of claims between different departments of the Crown, that should not prejudice third persons; and, to the argument derived from other Courts not having power to bind conclusively all the world by their decrees, the answer is, that the proceedings of this Court, in such matters as are now the subject of discussion, are all in *rem*; whereas those of other Courts, in the instances put, are merely in *personam*. They direct parties to act as they think right: and, consequently, if any person who has an interest in the subject matter of dispute, be not before the Court, there can be no decree as to him.

In this case, Commissioners, named by the Court, are appointed to sell the property, and the only conveyance which the purchaser has, is a short certificate of the sale, setting forth the circumstances under which that sale was ordered, and he takes no further conveyance from the parties interested: whereas, in Courts of Equity, the

* It was also said, that some doubt had been thrown on that case in *The King v. Applyby* (3 Anstr.) by Thomson, Baron, having said, that he had found on examination that it did not correspond with the record: but that his Lordship said, he did not recollect. It was suggested, too, that George Prince of Denmark being at that time Lord High Admiral, he had a right as against the Crown.

course is to order the parties interested in the estate to be sold, to convey, and the Deputy Remembrancer does not profess to confer a title by his mere certificate, as the Marshal of the Admiralty does.

[127] The proceeding being in rem, was also put, as an answer to the case suggested, of goods taken in execution by a sheriff.

[Wood, Baron. If under an Extent against A., the goods of B. should be seized by the sheriff, and specifically returned into this Court, and sold, in default of the person in whom the property is claiming, they are bound.]

And that is the case in the Court of Admiralty, who do not affect to sell the property of Eberstein, or any one else; they order a sale of property found, and brought in, (under circumstances enabling them to do so,) and they make the proceeds answerable for all demands; which demands, without a sale, could not be severally satisfied. The case was also put, of the ship being the property of the Crown, and sold to pay salvage due from the Crown; and it was asked, if the Crown could, after so employing the purchaser's money, seize the ship in his hands as forfeited?

[The question was then ably taken up, on the principle of the necessity of encouraging universal confidence among the different nations of the commercial world.]

Reasoning ultimately from the mischiefs inseparable from the doctrine which had been advanced in confirmation of this verdict,—the learned counsel insisted much on the injury to the government itself, [128] in point of revenue, which must necessarily result from defeating, by subsequent seizures like the present, the rights acquired by judicial sales; for thus the Crown would, by depressing the confidence of purchasers, and checking the facility of sale, decrease or destroy the value of its rights. Who would purchase an Admiralty droit, which would be always liable to seizure by the Customs for old forfeitures, of which no knowledge could be obtained, and against which, therefore, there could be no guarantee? and while, in cases of private sales being rendered nugatory by previous forfeiture, the purchaser would have a remedy over against the vendor, that, on the other hand, which ought to be (and usually is) a stronger ratification—a judicial sanction,—would have no other operation than to defeat that remedy; stripping the fair dealer of his security, and affording the offender impunity. Thus every man whose title is derived from the decrees of Courts, would have no claim to what he now considers his property, if the ship he has bought should ever have committed a forfeitable offence, and that, however remote a purchaser he may be; for the defendant, in the present instance, being the next immediate purchaser, is an accident, and does not affect the principle.

Then inverting the argument, they insisted, that no one object of the penal enactments against the offence of smuggling, would be answered by such a decision;—the guilty would not be deterred, the fair trader encouraged, nor the revenue advanced. [129] For these reasons it was submitted, that the verdict of condemnation ought to be set aside, and entered for the defendant.

The Solicitor General replied. He observed, that the whole of the very ingenious argument which had been raised, was founded, and proceeded, on the assumption that the decrees of the Instance Court of Admiralty (in questions of salvage between the salvors and owners,) were equal to those of the Courts of Prize, whose decisions are necessarily, and, by the comity of nations, held to be binding on all the world. But even admitting that the definitive sentences of the Instance Court on a question of, whether droit of Admiralty or not, were conclusive; here, at least, that question was not finally determined by a condemnation of the vessel as an Admiralty droit, which she certainly was not, under the circumstances of this case; for the order on which the sale was had, is merely interlocutory; and that divests at once all the cases which have been cited for the defendant, of application to the present. But no authority has been cited, in support of this extraordinary power of the Instance Court to sell the ship; altering thereby the right of property, and purging all previous forfeitures incurred by her, and that even (for the argument must go the whole length,) in the case of restitution to the owner being decreed. That Court is the competent judge, perhaps, of a salvor's claim; and they may order the ship to be detained for salvage, but not to be sold to pay it, without the consent of all parties, who would have had them [130] selves an interest, however small, and so far a right to sell. Now none of the parties to this proceeding in the Court, could have had any right to sell, by reason of the previous forfeiture; and therefore could not consent, so as to effect a sale through the medium of the Instance Court. But even if that were so, then the

other objection in the present case arises, that this was a mere interlocutory order of the Court, and really had nothing to do with the merits of the question before them. Where the Courts have held the decisions of other jurisdictions binding, it has always been confined to the points conclusively litigated. Here there was really nothing litigated in effect : and there was no decision on the question of property, for that was never at issue : nor was the question of droit or no droit, prize or no prize, definitively adjudged. The decisions of the Prize Court, undoubtedly, are held, in Courts of common law, of so much weight as to be conclusive on all questions of prize : and the common law Courts will not entertain inquiry of prize or not prize, without the previous interference of the constituted Courts of Prize ; but then the question of prize must be adjudicated, to render the sentence conclusive. The cases cited on that point all turn on that, and therefore they are out of the question. That of *Ladbroke v. Crickett*, amounts to no more than that a ship seized by the Admiralty, to enforce payment for repairs, cannot be taken by a sheriff, under an execution, against the previous owner, at the suit of another creditor : and that the plaintiff cannot maintain trover against the Admiralty officer in possession.

[131] He denied that the Court of Admiralty (as such) had any jurisdiction, in cases of forfeiture, within the kingdom : although the Vice-Admiralty Courts in the West Indies had, under particular statutes, by which they were expressly constituted so far Courts of Revenue, but still, not qua Courts of Admiralty.

He then adverted to an opinion of Lord Thurlow, (when Attorney General), that a sale, even in market overt, of a thing forfeited, would not so alter the property as to bind the Crown : but admitted that a felon might sell his goods and moveables, but that is because the Crown has no title till conviction. In cases of forfeiture, unless the decisions are wrong, the right attaches immediately : and it never has been heard of, that the right of the Crown, by forfeiture, is defeated by an adverse title acquired subsequent to the act of forfeiture. If such a special plea (of a subsequent title in a third person) were put on the record, to an information in rem, for a forfeiture of a specific thing, it would be absurd : and that, because it matters not, in such cases, in whom that property is at the time. The case of the King being bound by the provisional assignment, before an Extent issued, has been put : but in Extents, the lands of the debtor are liable to be seized, though sold a hundred times over ; and that, also, may be said to be a case of hardship.

As to the argument used, of the ignorance of law in the owner of the offending ship, or even his own personal innocence of the offence ; that may be [132] well addressed to the Court, or the Crown rather, in mitigation of severity, and is always attended to ; but it is nothing like a defence in law.

Cur. adv. vult.

The Court enquired, Whether the Crown considered itself no party to the suit, in the person of the Procurator General :—and, Whether it insisted on the forfeiture vesting the property presently, with regard to the time of the offence being committed.

The Solicitor General answered the first question in the negative, and the last in the affirmative. And, to an inquiry, —of what subsequent proceedings had been had after the sale,—and whether the Crown received any thing under the claim of derelict ; —it was answered, that the proceeds had been brought into Court, and the expenses of the Admiralty ; the salvage, to the officers of the King's ship : and the balance, to the claimant, Cowie and Co., as agents for the party claiming the property, were decreed to be paid thereout. The Crown received nothing.

22d July.—THOMSON, Chief Baron, now delivered judgment. His Lordship stated the substance, and object of the information : the latter, he observed, did not seem to be of any great value, having been appraised at the sum of 300l. only.

He also desired to be considered as laying great stress upon the circumstance of the ship having been [133] libelled in the Admiralty Court, by the King's Proctor claiming her as derelict.

In this situation (said his Lordship) —[having finished his statement of the facts of the case previous to the suit]—upon the application of the litigant parties (those litigating, I mean, for the salvage) and the owners, and with the consent of the Proctor for his Majesty in the Admiralty, a sentence was pronounced, directing the sale of the ship, and the produce to be brought into Court. In consequence of this, a writ issued from the Court of Admiralty, directed to certain persons to appraise the ship, and then to expose her to public sale : this was accordingly done, and she was

sold. I should state that she was a foreign ship, a Swedish or a Danish ship, no matter which : but she was a foreigner. She was purchased on behalf of the original owner, who declined having any thing to do with her ; and then the present defendant (who had been a clerk in his service, and succeeded him on his having declined business, as it is stated,) accepted the ship, and took the bargain upon himself. It was thrown out (but that was mere matter of statement and representation, and without any proof, I believe, whatever being brought forward to support it,) that this was all a juggle between the master and this clerk of the former owner, as well as the salvors, and all the others, to get this ship so sold, in order, if possible, by means of that proceeding, to get rid of, and to purge the forfeiture which the ship had before incurred. The vessel, however, was, in point of fact, sold, and the jury, as [134] I learn from the report of my brother Richards, who tried the cause, negatived every circumstance of fraud in that transaction. Then after she was so sold, and after the purchase-money was fairly paid, she was seized by an officer of the Customs, on behalf of himself and the Crown ; that is, she was seized in the hands of the new purchaser, in order to proceed to a condemnation of her, for the original offence committed before the transfer of the property took place. Then the question is, Whether, under these circumstances, and notwithstanding the authority under which the vessel was sold, the ship still remains answerable, and is liable to forfeiture to the Crown ?

[His Lordship then noticed the cases in Parker, cited for the Crown, which he read at large : but those decisions, he observed, did not go the length contended for.]

Now the distinction (continued his Lordship) between those cases, and the one before the Court, seems to be, that there the subject which was to be forfeited remained in its original situation. It had not been sold, or disposed of, nor had any thing been done to condemn it, as a right of Admiralty, before the seizure by the Custom house officer ; and, unquestionably, the forfeiture had been incurred by her importing those French goods, though she was also liable to be seized as a right of Admiralty, for coming under those circumstances into the port ; but however, the claim of the Crown was there asserted before any act had been done to [135] alter the property, and in consequence of that claim having been so asserted, the prohibition went to stop the proceeding in the Court of Admiralty. The other case turns upon the same distinction I have already taken.

I think the learned Doctor, who argued this case, on the part of the defendant, contended very ably, and very satisfactorily, in my judgment, for the jurisdiction of the Admiralty in the Instance Court, as well as in the Prize Court. It will be borne in mind, that there is a distinction in the Court of Admiralty, and that there are two branches of its jurisdiction : the one judges of matters of prize ; and the other (which is its general maritime jurisdiction,) includes, among a great number of articles of which it is its province to judge, the question of salvage upon ships brought in for that purpose. That Court proceeds, as the Exchequer does, in informations, in rem ; the ship itself is liable to be sold under its proceedings, in order to answer the demands that are made upon it. It generally, I believe, happens that the ship is not ordered to be sold till after a definitive sentence upon the subject, and possibly not till after the quantum of salvage is allowed ; but here, upon the application of all the parties, and with the consent of the Crown in this instance, (though not in its right as claiming the ship as a forfeiture, but in its right of claiming it as derelict,) a sale is ordered, and a sale does take place. Now, as to these judicial sales, there seems to be no reason for any distinction between such as are made under the authority of the Prize [136] Court, and such as are made under this clear jurisdiction of the Admiralty, in the Instance Court ; and the effect of a sale, under either of them, is to vest in the purchaser the absolute property in the ship, inasmuch as it is sold for the purposes for which the suit requires it to be sold : whoever was entitled to the produce of that sale, might have come in and claimed it in the Court.

In the present case, before they proceeded to this sale, there was no prohibition, and, indeed, no seizure, had been then made ; but if the seizure had been made before, it appears to me it would have been a good ground for their coming and praying a prohibition, as they did in the case cited, on the footing of the Crown having a right by forfeiture—a right prior to that which the other claimants had, and therefore prohibiting the proceeding there ; at the same time, it seems to me to be clear, that the salvors, even in that case, would have been entitled to salvage ; and if that were not paid, they would of course have been entitled to a sale, in order to make good that

salvage, for whosoever property that ship may be taken to be, still, they who meritoriously preserved it from destruction, would be entitled to compensation in the shape of salvage; but, however, that has not been done in the present instance. The jurisdiction of the Admiralty, therefore, undoubtedly did apply, in this case, before any notice was taken of the forfeiture incurred to the Crown, or of any intention in the Crown to assert its right to this forfeiture; and this judicial sale, as I call it, made by consent of all parties, still was a judicial sale: and [137] therefore it seems to us, that the party purchasing under the authority of the Court, had a judicial title given him: which must secure to him the property, —the sale was made for the payment of the salvage, and for other purposes, —the money was brought into Court, the purchaser having fairly paid it: —and, consequently, we are of opinion that the claim of the Crown now to have this ship, after it has been so transferred, as forfeited by reason of the offence committed before this transaction of the sale took place, is not at all well founded. The jurisdiction of the Court of Admiralty was explained to us, in a very luminous manner, by the leading advocate for the defendant, and with great candour and ability.

This case was brought on (which was somewhat irregular) in the way in which it now stands, by agreement between the parties. In point of form, the only issue that was joined upon the record, between the parties, was,—Whether the ship had incurred a forfeiture? And, perhaps, strictly speaking, upon that issue this question of the alteration of property between the act of forfeiture and the seizure, could not have arisen: but it was stated, and the Court took it up upon that, that it was agreed that all strictness of form should be waived, and that it should come on as if the question had been brought forward in the proper shape. Probably, the proper way would have been, for the defendant to have applied for leave to plead the subsequent facts of the actual judicial sale, and the purchase by the defendant. If that had not been sufficient, the Attorney General [138] might have demurred, and thus the matter would have been brought regularly before the Court. That, however, has not been done: and therefore we will dispose of it according to the agreement of the parties, that this should be considered as a decision upon the point arising out of the circumstances which have taken place, without regard to the form in which it comes before us: and, upon the best consideration we can give to the case, we are of opinion, that this claim of the Crown is not well founded; and that this ship is not now liable to the forfeiture she is charged to have incurred before the judicial sale.

We therefore make the
Rule Absolute.

End of the sittings after Trinity Term.

[141] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, MICHAELMAS TERM, 57 GEO. III.

MEMORANDA.

In the preceding vacation, Mr. Serjeant Onslow was promoted to the degree of King's Serjeant.

Samuel Marryatt, of the Middle Temple, and John Gurney, of the Inner Temple, esquires, were appointed of his Majesty's Counsel in the Law.

[142] *MILLS v. ELTON*. Friday, 8th November 1816.—A trader being informed, by the attorney of his petitioning creditors, that he has delivered a warrant to arrest him to a sheriff's officer, who is seeking him for the purpose of executing it: and is advised by the same attorney to repair to his office, to avoid the publicity of being arrested in the street; which he does, and remains there a considerable time:—held not to have committed an act of bankruptcy within the meaning of the statutes: so as to defeat an action against the sheriff, by a judgment creditor to recover the proceeds of his goods, taken and sold under a fieri facias, sued out since the supposed act of bankruptcy.

This was an action against the Sheriff of Devon for a false return. The defendant had levied, on the 25th September 1815, 1095*l.* 7*s.* 9*d.* on the goods of William Shiles,

against whom the plaintiff had sued out a writ of fieri facias. On the 8th October following, the Sheriff had notice of a commission of bankrupt having been issued against Shiles, under which he had that day been declared a bankrupt, on an act of bankruptcy alleged to have been committed on the 16th September. He then took an indemnification from the petitioning creditors, for returning nulla bona after the sale of the goods taken in execution. The question on the trial was, therefore, whether an act of bankruptcy had been committed on that day by Shiles.

The facts adduced to prove the act of bankruptcy, which was the defence to the present action, were these. Cox, the attorney of the petitioning creditors, (and who was called as a witness on the trial) had sued out a writ, on their behalf, against Shiles, on which a warrant had been delivered to the sheriff's officer. Cox, meeting Shiles in the market-place, apprized him of it, and recommended him to come to his office, to avoid the publicity of being arrested in the street, which he did, and expressed himself obliged to Cox for his civility. While he was at Cox's office, he sent [143] a message to one of the plaintiffs to come to him, for the purpose of making some arrangement, who promised to meet him there in half an hour. In the mean time Shiles asked if he could take the opportunity of going out on some other business which he had, when Cox observed, that as the officer had the writ in his possession, for the purpose of executing it, he would most probably be arrested if he did; and that he had no authority from his clients to prevent it. Upon which the witness sat down again, and said, "Then I will not go out," and remained in Cox's office till three o'clock, and then went away.

On this evidence, Mr. Justice Parke directed the jury to find a verdict for the plaintiff, ruling, that what had been proved did not amount to an act of bankruptcy; distinguishing this case from *Chenoweth v. Hay* (1 M. & S. 676), inasmuch as it appeared, in the present instance, that Shiles had not kept out of the way to prevent the arrest taking place; but that it might be done in a less public manner, and not in the street; observing, also, that the act was the effect of a recommendation by the attorney of the petitioning creditors; and the jury, in consequence of the learned Judge's direction, found a verdict for the plaintiff.

Pell, Serjeant, now moved for a new trial, on the authority of the case of *Chenoweth v. Hay*, [144] where it was ruled that it is not necessary that the plaintiff be actually delayed by the act of bankruptcy: for that the mere possibility that the act might so operate, was sufficient to bring it within the meaning of the statutes.—Here, the insolvent was concealed from the officer, knowing that he was in search of him, and was actually prevented from going out about his common business by that apprehension; the attorney having no authority to prevent the arrest. The case of *Gunningham v. Loring* (2 Marsh. 240), also decides, that the statutes were meant to extend to any evasion of creditors, and that any absentsing, with a view to delay, would constitute an act of bankruptcy.

Per Curiam. Under all these circumstances, there has not been such an act of bankruptcy committed by Shiles as will defeat this action. Had Cox not been the attorney of the petitioning creditors, the case would, perhaps, have borne a different complexion. As it stands, we see no ground for granting the rule.

Rule refused.

[145] IN THE EXCHEQUER CHAMBER.

THE KING (ON THE PROSECUTION OF MESSRS. HEATHCOTE & BODEN) v. TOWLE, BADDER & SLATER. Wednesday, 13th November 1816. —An indictment on the 43d Geo. III. ch. 58, charging in one count, that A. feloniously, wilfully, maliciously and unlawfully, and of his malice aforethought, did shoot at B., with intent feloniously, &c. to kill, &c.; and that C. and D. were then and there aiding and abetting said A. the felony aforesaid, in manner and form aforesaid, to do and commit, against the form, &c.; and in another count, charging the act of shooting on a person unknown, in the same words as before; and that all three, A., C. and D., were then and there aiding and abetting him the felony aforesaid, in manner and form aforesaid, to do and commit (omitting the word feloniously to the aiding and abetting);—held good on the whole, notwithstanding that omission: the statute having made aiders and abettors principal felons, although

the Jury, having found A. guilty generally and acquitted the others, afterwards expressly negated that A.'s was the hand that fired.

The prisoners were indicted at the last Summer Assizes at Leicester, before Mr. Baron Graham, on the stat. 43 Geo. III. c. 58*, for shooting at [146] John Asher. The indictment consisted of six counts:—The first count stated, that James Towle, on, &c. with force and arms at, &c. to wit, with a certain pistol loaded, &c. feloniously, wilfully, maliciously, and unlawfully, and of his malice aforethought, did shoot at John Asher, a subject, &c. with intent in so doing, and by means thereof, feloniously, &c. to kill and murder him said Asher:—and that Badder and Slater were then and there aiding and abetting the said Towle, the felony aforesaid, in manner and form aforesaid, to do and commit, and were knowing of and privy to the committing of the said felony, against the form of the statute, &c.

The second count alleged, that the act was committed with intent to disable him.

The third count laid the offence with intent to do and inflict upon him a grievous wound, such [147] wound then and there being a grievous bodily harm.

The fourth, fifth, and sixth counts, charged the same acts, in the same words, to have been committed, with the like several intents, by some evil disposed person to the jurors unknown; and that all the three prisoners were then and there (omitting the word feloniously) aiding and abetting, &c. the said unknown person, the felony aforesaid, in manner and form aforesaid, to do and commit, and were then and there knowing of, and privy to the committing of the said several felonies, against the form, &c.

The jury acquitted Badder and Slater, and found Towle guilty generally. The learned judge then put it to the jury, whether Towle was the man who fired; and they found that he was not. On that finding, the objections were taken: first, that the three last counts of the indictment were bad, for the omission of the word "feloniously" in that part of those counts which went to affect the prisoner Towle: and, secondly, if that were so, that no judgment could be entered up on the three first counts, because the jury had negated the charge to which they applied, by finding that Towle's was not the hand which fired.

The judge pronounced sentence on the prisoner, but respited the execution of it till the opinion of the twelve judges should be taken. The case now came on for argument, when

[148] Denman, in support of the objections, submitted (taking the second first)

* By Sect. I. it is enacted, "That if any person or persons, from and after the first day of July in the year of our Lord one thousand eight hundred and three, shall, either in England or Ireland, wilfully, maliciously, and unlawfully shoot at any of his Majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded fire-arms at any of his Majesty's subjects, and attempt, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons, or shall wilfully, maliciously, and unlawfully stab or cut any of his Majesty's subjects, with intent in so doing, or by means thereof, to murder, or rob, or to maim, disfigure, or disable such his Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his Majesty's subject or subjects, that then and in every such case the person or persons so offending, their counsellors, aiders and abettors, knowing of and privy to such offence, shall be and are hereby declared to be felons, and shall suffer death as in cases of felony without benefit of clergy: Provided always, that in case it shall appear on the trial of any person or persons indicted for the wilfully, maliciously and unlawfully shooting at any of his Majesty's subjects, or for wilfully, maliciously, and unlawfully presenting, pointing, or levelling any kind of loaded fire-arms at any of his Majesty's subjects, and attempting, by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons, or for the wilfully, maliciously, and unlawfully stabbing or cutting any of his Majesty's subjects with such intent as aforesaid, that such acts of stabbing or cutting were committed under such circumstances as that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, that then and in every such case the person or persons so indicted shall be deemed and taken to be not guilty of the felonies whereof they shall be so indicted, but be thereof acquitted."

that there could be no charge of felony framed, without employing the word "feloniously" in the indictment:—that that word was indispensably and essentially necessary to mark the felonious intent with which the act was committed, and to characterise the offence charged—that no other word could be substituted to supply the omission—and that such words as wilfully, knowingly, or any other, were insufficient: because it would be still doubtful what offence the will and knowledge constituted.

The rule of pleading is, that the offence itself must be alleged, and the manner of it, and both in apt and technical words:—"An indictment of felony," says Sir M. Hale, (2 Hist. P. C. ch. 25, s. 7, p. 181,) "must always allege the fact to be done felonice: an indictment of burglary must lay the offence to be felonice et burglariter fregit et intravit: an offence of high treason must be laid to be done proditorie: petit treason felonice et proditorie." Then (citing Stamf. P. C. p. 96 a.) he proceeds, "A. is indicted, quod furatus est unum equum; it is but a trespass for want of the word felonice." Of so great importance, says the same authority, are the words of art, that if by omission, or misplacing of letters, they become insignificant, they vitiate the indictment; as burglariter for burglariter, feloniter for felonice, muredavit for murdravit. (ib. ch. 24, p. 169 187, Stamf. P. C. 94 b.)—In 2 Hawkins, (P. C. 23, s. 73, p. 258,) it is said, that "no periphrasis or circumlocution whatever, [149] will supply those words of art which the law has appropriated for the description of the offence: from whence it follows that an appeal of death cannot amount to a charge of murder, without the word murdravit," and that however particularly the circumstances and malice be set forth. Nor of rape, without the word rapuit; of larceny, cepit: of mayhem, mayhemavit: nor would any of those appeals be sufficient, without the word felonice.

[Ellenborough, Ld. C. J. It cannot be disputed that periphrasis is not sufficient. But it will be contended, that the word "feloniously" is virtually inserted, and without any periphrasis, here, because the unknown person is alleged to have committed a felonious act feloniously; and the prisoner is then charged with aiding and abetting the said unknown person to do and commit the felony aforesaid, in manner and form aforesaid, and to have been knowing of and privy to the committing of the said felony.]

That would be still liable to the objection of requiring the aid of construction by reference, and calling in former words, which is never admitted in criminal cases; nor is there any instance of that sort. It would clearly be insufficient, in an indictment against a receiver of stolen goods, to refer to the felonious act of stealing, without also stating that the stolen goods were feloniously received.

[Bayley, J. You do not cite any authority for that.]

[150] The rule is clear, that nothing can be left to intendment; and all the precedents are uniformly framed on that rule. In 2d Hawkins, P. C. c. 29, s. 17, p. 445, it is said, "it doth not seem necessary, in any indictment or appeal against a man as accessory before the fact, to set forth the special manner by which he abetted it, but only to charge him generally, quod felonice, &c. abettavit." The word felonice, therefore, is more necessary in charging an abetting than the setting forth the special manner of such abetting.

In many cases of charge of felony, the facts alleged might be true, and yet no felony may have been committed. Thus, if a constable, acting with his staff of office, were to abuse his authority, and were to call upon A. to assist him (which A. would certainly be bound to do), and death were to ensue, the constable would be guilty of murder; but A. would not; and yet A. would be aiding and abetting an act which was felony in the constable; but he would not be privy to what was passing in the mind of the constable, and which gave the act its felonious essence.

[Ellenborough, Ld. C. J. Here a felony is laid to have been committed, and the prisoner to have been knowing of and privy to the committing of the felony. That includes the motives under which the felony was committed, and gives to the guilty privity the quality of the principal act.]

[151] The Counsel then put the case of a man labouring under mental derangement, doing an act which would, in a sane person, amount to a felony, and submitted, that in cases of felony, particularly where the offence was created by statute, judges were not astute in deducing inferences. This indictment could not be true, unless felony had been committed: still the technical words, which the law requires to be introduced for the certainty of charge, can never be dispensed with, and that (in favorem vitæ) even though the act be clearly a felony.

It was then contended, that if the three last counts were bad, the prisoner could not be convicted on the three first, because he was there charged in terms with the act of shooting, which was expressly and distinctly negatived by the jury. In certain cases, a person aiding and abetting, may be said to be a principal, under circumstances specially found, by the jury charging him with doing the act. That was so held in *Wills's case* (East, P. C. 414.—Starkie, Cr. Pl. 400).—So also in *The King v. Borthwick* (Doug. 207), and *The King v. Francis* (Str. 1015); but in the present case, neither was the shooting found, nor any other equivalent circumstances. The two offences created by this statute, are entirely distinct, though the punishment is the same in both. The only authority inclining against this doctrine, is to be found in Foster (C. L. 351, 3d ed.), where it is said, that in the case of murder, the mortal stroke, though given by one, is considered, in the eye of the law, as given by every individual [152] present and abetting, the person actually striking, being only the hand or instrument by which the others struck. It is further said there, that if the indictment charged that A. gave the mortal stroke, and B. and C. were present, aiding and abetting; if it cometh out in evidence that B. gave the stroke, and that A. and C. were aiding, the proof would sustain the indictment.

[Gibbs, C. J. Independent of the authority of Foster, it is a doctrine no one can doubt, that, in murder, whoever gives the blow, all present are guilty: for the act of one is the act of all.]

But there, the offence is *malum in se*, and a life must be lost, and therefore the principle of the common law applies.—Here, no life has been lost, and the impunity of the common law, in such a case, is provided against by statute, and by that alone the felony is created: the statute must therefore be strictly followed in laying the charge, and the whole charge precisely proved. Were it otherwise, a man might not know what he was called upon to answer, or might be convicted of a crime which he did not come prepared to defend.

It was then urged, that the cases of shooting were to be governed by the decisions on the statute of stabbing; and the authority of Foster (C. L. 355) was again resorted to, to shew how strictly the statutes which took away clergy are to be construed; so much so, that aiders and abettors were, in the case of *The King v. Page and Harwood* (Alevyn, 43—Stiles, 86), admitted [153] to their clergy; and the statute (1 Jac. I. ch. 8) was held to extend only to such as actually made the thrust, not to those who, in construction of law, might be said to make it: and that is a strong case, for the offence was felony at common law.

[Ellenborough, Ld. C.J. That statute looks only to the individual act.

Gibbs, C.J. No argument can be drawn from the statute 1 Jac. I. c. 8, in the present case, because that statute was passed against the very hand which struck the blow, and that only.—The words are,—“every person which shall thrust or stab.” Whereas, by the statute now under consideration, all counsellors, aiders and abettors of the crime, though not actually present, are made felons, and no mention is made of those who are present.]

The act now in question is very analogous to the statute 3 Hen. VII. c. 2, *de muliere abducta*: by which, says Lord Coke (3 Inst. 61), “not only the takers but the procurers, abettors of the felony, and receivers of the woman, knowing the same, are all adjudged as principal felons: the like whereof we find not in any other statute.” Yet in *Lady Fulwood's case* (Cro. Car. 482, 484, 488), who was indicted on that statute, with other persons, for aiding and abetting in the county where the marriage took place: and some of the same persons were also indicted in another county, from whence the woman was carried: a distinction was taken and recognised, as to the latter not having [154] been guilty of a felony within the statute. Where aiders are made principals, the indictment always describes the fact as it actually occurred, or the greatest injustice would otherwise ensue. For thus, persons charged as accessories before the fact, might be convicted on a case made out against them in evidence as principals: because, their defence resting on quite a different footing from the charge, they might be indicted for one offence, and convicted of another, from mere want of preparation:—and thus, a man might be convicted of shooting a person whom he never saw, though on a charge of counselling the act. Such are the evil consequences which would arise from not adhering to the terms of the statute, whereby distinct degrees of offence are created. The same observation applies to the Coventry Act (22 & 23 Car. II.), on which this act was framed. The indictment on that act always

alleges, that one party cut, and that the others aided and abetted : —it did not charge all generally, but each with committing the appropriate offence. By the Black Act (9 Geo. I., c. 22,) persons maliciously shooting, were made felons, without benefit of clergy. In *The Coalheaver's case* (Leach, Cr. L. 76) it was held, that aiders and abettors might be found guilty as principals ; but the statute creating the felony, with which they were charged, was silent as to aiders and abettors, and the common law took its course. In the present case, the statute on which the indictment proceeds, has made the aiding and abetting a distinct offence from the principal act, although of the same degree as to the [155] punishment. It was learnedly questioned by Mr. J. Foster, in *Mulvinter and Sims's case* (Foster, C. L. App. 415), whether that statute, on which they were indicted, (the Black Act,) could be extended to aiders and abettors, so as to oust them of their clergy ; and the same doubts are entertained in subsequent cases, to be found in East (Cr. L.) He stated, in conclusion, his general proposition to be, that wherever an act of parliament furnishes a description of the person intended to be brought within it, the charge must be stated and proved to accord with the law and the fact : and that if it be not, no inference or implication can help it. Here, that had not been done, because the second species of offence, (aiding and abetting,) of which alone the prisoner had been convicted, had not been laid to have been done feloniously : and therefore he submitted, that it had not been brought within the act. And of the first and larger offence (the actual shooting) the prisoner had been, in point of fact, acquitted, by the subsequent express qualification of their verdict by the jury.

Reynolds, for the Crown, admitted the necessity of employing apt terms of law in indictments of felony : but he contended, that in the present case the verdict recorded was, in effect, a verdict of guilty generally, notwithstanding what passed afterwards as to the qualifying answers of the Jury to the questions of the Judge, which he contended were wholly immaterial facts as affecting the law of the case. He submitted, that the whole of each count must be taken together as forming one entire count, [156] and as uniting the former part, in which the word “feloniously” occurred, with the latter, in which it did not, thereby supplying the omission, by the connection of the latter with the former part. The charge was, that the act (of shooting) had been feloniously committed by certain persons, and that the others were aiding in the felony aforesaid, in manner and form aforesaid.

In the case of the constable, put by the other side, the person assisting him would not be wilfully aiding and abetting the commission of the felony, because the felonious intention (the consenting mind) would be wanting : but that is not so here, because the indictment distinctly alleges all that is necessary to constitute the felonious offence, and adopts all the necessary terms.

The word “feloniously” is certainly to be found in most precedents of indictments for felony ; but it does not therefore follow that its repetition is indispensable or necessary : that must always depend on the particular case. In *Heyden's case* (4 Rep. 41), the jury on the coroner's inquest found “Quod Jacobus Heyden de S. &c. T. M. W. M.” (and several others) “quarto die, &c. ex malitiis suis preecogitatis felonice ut felones dictæ Dom' Reg' in dict. Edw' Savage adtunc & ibidem insultum et affraiam fecerunt et quod præd' Jacobus Heyden cum quodam gladio valor', &c. prefatum Savage felonice percussit et dedit eidem Edwardo adtunc et ibidem unam plagam mortalem super sinis [157] trum genu, &c.” On that finding, it was objected that the indictment did not say that Heyden “felonice et ex malitiâ suâ præcogitatâ dedit plagam, &c. :” but as the conjunction et coupled the sentences together, so that the words felonice, &c. first mentioned, referred to all the subsequent verbs, it was held sufficient. In *Mary Nicholson's case* (1 East, P. C. 346), also, it was decided that an indictment was not bad for not repeating the word “feloniously” in the allegation of the delivery of the poison to the deceased. The last three counts, therefore, he submitted, were well sustained.

It was then urged, that on the three first counts also Towle was properly convicted ; for he must be considered, in point of law, to have fired the pistol, and therefore was a principal in the first degree under the statute, and the verdict must be taken to be a general verdict of guilty, convicting him of the whole charge, and that, notwithstanding the subsequent and incidental finding of the Jury, after they had given their verdict, that his was not, in point of fact, the hand which fired : he was indicted both as principal and accessory, and might have been convicted as either.

In 2 Hawkins, P. C. c. 23, of Appeals, sect. 19, p. 236, it is laid down, "That it is in the election of the plaintiff to declare against him who actually gave the wound, as the principal offender, and against those who abetted him as accessories, or against them all as principals;" and in sect. 76 of the same chapter, [158] it is said to be in the election of the plaintiff to suppose, in his declaration, that every one of them did the fact: because, in such a case, the act of one is, in the judgment of law, the act of all: or, to shew the special manner of the case as in truth it was, and set forth the fact to have been done only by the person who did it, and the others to have been his abettors, &c. Here the prisoner was charged both ways.—In *Benson v. Offley and Lippon* (3 Mod. 121. 2 Show. 510, S. C.), where A. was charged with giving the wound, and B. with being present, aiding and abetting, a verdict finding the facts inversely, was held good, because both were principals, and equally guilty; and it was added, that an indictment ought to be as certain as a count in an appeal. To the same point he cited 1 Hale (H. P. C.), 437,—*Muckelley's case* (9 Rep. 67),—*The King against Gibson* (1 East, P. C. 413),—and Plowden, 98.—As to *Wills's case* (1 East, P. C. 414), which had been cited for the prisoner, that, it was argued, operated rather against him: because it confirmed the case of *The Coalheaver's*, which was on a statute wherein aiders and abettors are not mentioned, and shewed that any of the associates of the person shooting were equally guilty. As to the doubts entertained by Mr. Justice Foster, in the case of *Midwinter and Sims* (Post. App. 415), who differed from all the rest of the Judges, the reason given is, because aiders and abettors are not mentioned in the act which created the felony; and if, notwithstanding, that indictment was held [159] not to be bad, à fortiori must this be good which is on a statute where aiders and abettors are in fact expressly provided against?—Whether therefore, on the present indictment, the prisoner were charged with actually firing the pistol, or with being present, aiding and abetting the person actually firing, it is not necessary that the allegation should be strictly according to the fact: it would be sufficient to support a verdict of guilty, if it bring the offender within the statute which expressly makes the aiders and abettors principal felons.

Denman, in reply, insisted on his former arguments. And, in answer to the cases cited, observed that in *Heydon's case*, and that of *Mary Nicholson*, the word felonice was in fact introduced, and in the very counts; and the question in those cases was merely, whether the word, although so introduced, ought not to have been repeated?—and it was held, (as was obvious,) that the conjunction carried it through all the rest of the count, which was entire and undivided; and not as here, consisting of distinct branches, and charging distinct offences. In the first of those it charged, that the "prisoners felonice affraim facerunt, et quod Heydon gladium tenebat ad tunc et ibidem præd. S. felonice percussit, et [felonice subaudiendum] dedit eidem Edw. ad tunc et ibidem unam pla-[160]-gam mortalem." So in the other case, the indictment (in the same count, and applying to the same charge and person) alleged, that "Mary Nicholson did wilfully, feloniously, and of her malice aforethought, mix poison with flour, &c. and the said flour so mixed, &c. did, with the intent aforesaid, then and there deliver," &c.—Here, the count consists of two distinct branches, involving distinct offences, and charging distinct persons, and therefore they require distinct allegations; for there is no such connection, either in matter or manner, as can admit the two sentences or the two charges to unite, or give to either of the latter, even by reference, any of the terms which qualify the former.

All the precedents negative such a mode of framing the count in practice, for not one indictment, charging a felony, can be produced, wherein the word "feloniously" has been omitted; nor would it be proper or safe, that such laxity should be allowed in criminal pleading. He again insisted on the distinction taken between such offences as were felony by common law, and such as were made so by statute. He denied that the act itself, of firing the pistol, having been negated by the Jury, was immaterial in a statutable offence.

* In *Heydon's case*, too, (it is observable,) the word "felonice" is also used in the last count of the same inquisition, which charges other persons with being present, aiding and abetting. The count runs—"Et ulterius præd. Juratores, &c. dicunt quod præd. T. M. & W. M.—tempore felonie & muredred præd. in forma præd. fact' scilicet, &c. felonice fuer' presentes cum gladiis, &c. tunc et ibidem auxiliantes assistentes, &c. &c."

GRAHAM, Baron. In my charge to the jury I said, that I considered the persons present, aiding and abetting, as principals.

GIBBS, Chief Justice. The error seems to be in taking up the argument on the answers returned [161] by the jury, without preserving a reference to the object of the questions.

ELLENBOROUGH, Lord Chief Justice. Suppose the jury had returned the same answers, and this indictment had consisted of the first count only?

The sentence was afterwards carried into execution.

TURNER AND ANOTHER v. CALVERT AND OTHERS. Friday, 15th November 1816.—

After a plaintiff has twice amended his bill, and filed a replication for cause against a second order nisi to dismiss, as against a defendant who has not caused delay, the Court will not permit the replication to be withdrawn for the purpose of further amending the bill, by striking out the name of such defendant, and in other respects: for they will set bounds to dilatory proceedings.

Martin moved, pursuant to notice (two days) that the plaintiffs might be at liberty to withdraw the replication filed to the answer of Charles Dignum, one of the defendants, and re-amend their bill, by striking out the names of the defendants, R. Ladbroke and E. Philipps, and otherwise, as they should be advised, upon payment of 20s. costs to Dignum in respect thereof, and without costs as to the other defendants in the cause, amending their office copies of the bill.

Dauncey and Raithby shewed cause, stating, that the bill was filed Easter Term 1811, that defendant, Dignum, answered January 1812, and on 26th February submitted (to save expense and time) to answer exceptions—that in November following (just before Dignum would have been entitled [162] to move to dismiss) plaintiffs obtained an order to amend, on payment of 20s. costs, which amendments Dignum answered in May 1813, he having in the mean while obtained time, on the ground of ill health—that in December following (18th) plaintiffs obtained another order to amend, paying 20s. costs, which was not served till the 2d day of Hilary Term (24th January 1814) to which Dignum also filed his answer 6th May following—that on the 24th March next, Dignum obtained an order nisi, for dismissing the bill against him, with costs. The plaintiff then shewed for cause, that some of the other defendants had filed insufficient answers, the exceptions to which had been allowed; and that such defendants were in contempt for not putting in further answers, due diligence having been used on part of plaintiffs, on which the order was discharged. Dignum, (that plaintiffs might have sufficient time to get in the answers,) did not afterwards take any proceedings towards dismissing the bill, as he might long before have done, till last Trinity Term, when, understanding that the answers had come in, he then obtained an order nisi, and the plaintiffs, at the Sittings after that term replied (for cause).

Under these circumstances the defendant's Counsel submitted, that such proceedings were merely vexatious, and had for their sole object to harass and delay the defendant in a suit which had already subsisted nearly six years, during which time the plaintiffs had twice amended, paying the defendant [163] 40s. towards his costs, which amounted, in fact, to nearly as many pounds; and that if such proceedings were permitted, the suit might yet be prolonged indefinitely—that the bill had already been dismissed with costs as against E. Philipps, and the Court had refused an application to reinstate him.

Martin, in support of the motion, contended that it was almost of course, as it certainly would have been, if a replication had not been filed, that all the delay and expense had been caused by those of the defendants who had sent in insufficient answers.

Per Curiam. There certainly should be some limit to amendments; and there must, at some time, be an end put to delay. We must, therefore, refuse the application.

Motion refused.

[164] KENSINGTON AND OTHERS v. WHITE, CHALMERS AND COWIE. Friday, 15th November 1816.—A bill filed to restrain a plaintiff at law from proceeding on five different policies of insurance, effected on different ships, between the same parties at the same time, is not demurrable for multifariousness—p. 167.—Where four of many actions against the various underwriters on such policies (individually) had been tried and verdicts passed for the plaintiffs at law, the Court granted an injunction to restrain them (the plaintiffs at law) from proceeding further, in case where there was strong suspicion of fraud in the assured, on the money being paid into Court,—on the ground of the answer of one of the defendants not having come in—p. 168.—But see *Whitmore v. Thornton*, *infra*.—And the Court of Common Pleas enlarged their rule, which had been obtained for a new trial, until the same time—p. 169.—The Court will dissolve the injunction, if the amount of the losses claimed, be not paid into Court: and they will not permit money so paid in to be taken out, on the ground of great lapse of time between the filing of the bill and the putting in the answer, unless it clearly appear that the delay was gross and wilful on the part of the defendant, and that he was plainly not disposed to answer at all—p. 172.—A commission to examine witnesses abroad will be granted, under such circumstances, on the coming in of defendant's answer, although not prayed by the original bill, and the injunction will be in the mean time continued—pp. 173, 174.—Note, The defendant had been very dilatory in putting in a sufficient answer.

[Commented on, *Shackell v. Macaulay*, 1824, 2 Sim. & St. 79; in House of Lords, 1 Bl. (N. S.) 809.]

This was a motion on the part of the plaintiffs, for a commission to examine witnesses at Amsterdam, returnable without delay, with all usual and necessary directions: and also a duplicate and triplicate of such commission, if necessary.—And that the injunction issued in this case, to restrain the defendant White from further proceedings at law against the plaintiffs, might be continued until the return of such commission.

Many points of practice arose in the course of these proceedings, which are detailed in the order of time.

The plaintiffs (72 in number) had filed their bill on the 7th July 1802, with the object of furnishing a defence to the several actions brought against them, (individually,) on certain policies of [165] insurance, underwritten by them in 1798, on voyages to be performed by the ships "Orion" and "Elizabeth," from the East Indies to Hambro', or North America:—praying that the defendants might be ordered to produce certain papers and documents, said to be in their possession, and to relate to the subject matter, and to disclose the names of the persons who sailed on board the said ships;—and that an injunction might be issued in the mean time, to restrain the proceedings at law.

The bill charged, that four policies had been effected by defendants, Chalmers and Cowie, on the "Orion," and on the "Elizabeth," upon ship, goods, freight, and money advanced and disbursed:—that the plaintiffs had been called on, on behalf of defendant White, for money, as for a partial loss of the said ships and cargoes: and that certain papers had been handed over by White to them, to satisfy them, as to such alleged losses: but that many material documents relating to the transaction, which were among the papers in their possession, and which would have served the plaintiffs, as defendants at law, had not been produced;—that the adventure on which the policies had been effected, was not *bonâ fide* on the account of White, but was contraband and illegal, being in fact, for the purpose of bringing to Europe, (Holland,) from Batavia, the property of the Dutch East India Company, to a very large amount: and that the whole of the insurance was fraudulent, and the pretended loss a contrivance for the purpose of charging the plaintiffs with the amount of their subscriptions, as the correspondence and suppressed documents would, if produced, [166] enable them to prove: amongst which latter was a notarial copy of an agreement between White and the commissioners of the company at Amsterdam, by which White had engaged to use his privilege, as a neutral, to effect the illegal object charged;—and that White, combining with the other defendants, had declared in the actions at law, averring the interest in himself, (White,) (pretending that he was, at that time, a citizen of the

United States of America,) and that the ships were American, and were, in fact, bound on the voyages specified in the policies, with cargoes purchased of the Batavian Asiatic Company, on account of himself and other American citizens; and that the "Orion," being driven by stress of weather into the Isle of France, was seized, and condemned as prize; and that the "Elizabeth," on her arrival there, was found to be so much damaged as not to be worth repair, and therefore was abandoned:—whereas the plaintiff charged, —that White was not, at the time of effecting the insurance, an American, but a British subject: and that the cargoes of the ships, when they sailed from Batavia, were the property of the Dutch East India Company.

The defendants at first demurred to the bill, as containing in itself several and distinct matters alleged against the defendant, which had no relation to, or dependance on one another; whereby the defendant, if he should be compelled to answer, would be put to great inconvenience in making his defence.

Plumer and Steele, in support of the demurrer, [167] admitted that demurrers for multifariousness were generally applicable to several matters of different natures, charges against different defendants; and that the present ground, as against the same defendant, was novel. But they submitted that it was sufficient, inasmuch as, otherwise, the defendant might be compelled to defend himself in equity against several charges, to some of which he might have a defence, and to others he might not: and an injunction might be obtained, because the defendant might not be able to answer both cases; and that the present bill was multifarious against White, the policies being distinct, and on distinct subjects: as well might a policy and a mortgage be made the ground of the same bill.

Richards and Cox, *contra*, contended, that the objects of the bill were compatible; and that in discouraging multifariousness in pleading, the evil of allowing multiplicity of suits, ought not to be overlooked. That the whole was one transaction; and that the other objections were not matter of demurrer.

Demurrer over-ruled.

The actions at law, now sought to be suspended by the injunction, were commenced against each of the underwriters (the plaintiffs) in the Court of Common Pleas, in June 1801, White being then in India. In Trinity Term 1802, four of the causes were set down for trial, after a delay of twelve months: when the plaintiffs, (the defendants at law) finding it was intended to try them, and fearing [168] that they had not sufficient evidence of the defence of fraud, on which they relied, filed the present bill: but the defendants' attorney having delayed compliance with an order of this Court, to appear for the defendants, until it was too late for the plaintiffs to move for an injunction, the causes were tried, and the defendants (plaintiffs at law) obtained verdicts in all: the jury finding that the property was American, and not Dutch. A great number of the plaintiffs then voluntarily paid into the hands of certain persons, named in an agreement signed by them, the amount of their several subscriptions, in trust, to be applied in satisfaction of whatever judgment should be pronounced by the Court of Common Pleas.

On the 16th November following, the plaintiffs obtained an injunction, for want of the defendant White's answer.

On the 22d November, Shepherd, Serjeant, shewing cause against a rule for a new trial at law, which had been granted by the Court of Common Pleas, stated to the Court, the fact of the plaintiffs (in equity) having obtained the injunction, for want of White's answer, since the rule had been granted; which he submitted that they had no right to apply for, under such circumstances when—

HEATH, Judge, suggested that the rule should be enlarged, till the defendant's answer should have come in; which might put an end to the cause.

[169] ALVANLEY, Chief Justice. They had a right to get the injunction, and to suspend the effect of the verdict: and we will not give the plaintiff (at law) the fruit of his judgment, till the answer be put in. The object of both parties is clearly this, —the plaintiffs (at law) wish us to give final judgment, so that if the injunction is dissolved, they may take out execution, and prevent the cause from being tried again. But why should we shut the door against future investigation? On the other hand, the defendants desire we should grant a new trial; so that when the injunction shall be dissolved, they may have the benefit of the new evidence? Shepherd objected that that was what they ought not to be allowed to do, as they should have enjoined

the plaintiff before the trial, and not lie by till after the verdict.] That might be a reason why the Court of Exchequer should not have granted the injunction. And when I sat in a Court of Equity, I considered that a plaintiff, who had waited till a trial was had, was not entitled to the interference of the Court: but as the Court of Exchequer have done so, considering the defendants entitled to it, we must enlarge this rule until the answer is put in. In this case, (which is a suspicious one,) the defendants want to avail themselves of the plaintiffs' own oath: if that should furnish them with no advantage, the plaintiffs will not be prejudiced by it. In the mean time, the defendants shall pay the money recovered against them into Court.

Rule enlarged, till the coming in of the plaintiffs' answer.

[170] On the 26th November (1802), the defendants (in equity) applied to this Court, by motion in the cause, that the injunction might be dissolved; or, that such of the plaintiffs as had not deposited the money claimed on the losses, subject to the deed of trust before adverted to, should now pay that money into Court within fourteen days, to abide the event of the pending actions at law: otherwise, the injunction to be dissolved as to them.

Plumer and Steele for the motion.

Richards and Cox opposed it.

The Court granted the application: and made an order accordingly, (18th December,) in the terms of the motion.

On the 29th October 1811, White's answer was filed, which denied the principal charges in the bill: and referred to a schedule for an account of all the papers in his possession, or in that of Chalmers and Cowie, (the latter of whom, the answer stated to have got the material document in question, but which he, in his answer, denied,) relating to the whole transaction. That answer was excepted to, and all the exceptions allowed. The plaintiffs amended several times: and finally, on the 10th February 1812: to which no further answer was [171] for some time put in. And still this agreement with the Dutch East India Company was not forth-coming.

In this stage of the cause, and under these circumstances, the plaintiffs applied, on the 29th June 1815, (White's further answer to the amended bill not having yet been filed,) to be allowed to take out of Court the money by them invested in the Three per cents. in trust, in the cause, under the order of the 18th December 1802, with the accumulations thereon.

Danucey and Winthrop supported the motion; submitting, on a full statement of all the proceedings, that the plaintiffs ought not to be prejudiced by the defendant's delay in answering: who thus might lock up their money to an indefinite period, if permitted to withhold his answer from time to time.

Martin and Abercromby, on the other hand, contended that the object of the application was impracticable. The defendant having obtained a verdict, has been restrained from taking the fruits of it: although he has, by his answer, denied the foundation of the plaintiffs' equity, as he has sworn that the property was his. The Court must be satisfied that the delay is gross and wilful on the defendant's part. Among the present applicants, there may be many who are the assignees, or personal representatives of the original plaintiffs. White is not shewn to have been the cause of the delay: he is himself in [172] South America, whither the commission to take his answer is gone, which was to have been returned by a ship of war. It not being by his neglect, therefore, that the commission has not been executed, he ought not to be deprived of the benefit of the common order which he has obtained, for securing to him the result of his verdicts.

Per Curiam. The Court will certainly use great caution in parting with money paid in under such circumstances. If, however, they saw clearly that a defendant was decidedly indisposed to answer, they would release the money: but that decided indisposition is not made apparent here. Great allowances are to be made, in consideration of the part of the world to which the commission has gone to be executed, and the other difficulties which must attend its execution and return. The persons to whom it is entrusted are, probably, but little conversant with such things, and may require to receive instructions in the matter from hence. The Court would probably bear in mind, on any future application for the same purpose, that it was not the first: but at present, we cannot make the order.

Motion refused.

In September last, the defendant's further answer came in ; and

15th November. —It was now moved, by Dauncey and Winthrop, pursuant to notice given for this day, (on the 13th,) on an affidavit of one of the solicitors for the plaintiffs, [173] stating the leading facts of the bill ; and that the deponent believed that there were persons living at Amsterdam, particularly Sperasz Wiseluis, and Daniel Arbmán, Johanz, who would be able to give material evidence on the subject of the agreement, (between White and the agents of the Dutch East India Company, alluded to in the bill,) which would go to prove, that the property in the cargoes of the two ships was really that of the Dutch East India Company, and not of defendant White : that without such testimony, the plaintiffs (in equity) could not make out their defence to the said actions ; that the commission was not applied for from any motive of delay ; and that the money sought to be recovered by the defendants, from such of the plaintiffs as continued to resist the claim of loss, and the actions at law, had all been invested in the 3 per cent. consols in trust, to be applied according to the ultimate result of the proceedings.

Martin and Abercromby objected to the application for a commission being now made, after a delay of sixteen years. There is nothing on the record to justify the granting a commission : and the plaintiffs have not prayed a commission by their original bill.

THOMSON, Chief Baron. I see no reason why the commission should not go, as prayed. The delay alluded to has chiefly arisen from the defendant not having answered as he ought to have done. He [174] did not put in his answer till nine years after the filing of the bill : and when it came in, it was very insufficient, and hardly any answer at all. The amended bill prayed a commission to examine witnesses residing at Amsterdam. Before White's answer came in, a trial was had, and a verdict found for the plaintiffs at law, which, it is stated, was owing to their having proceeded without the testimony of the witnesses sought to be examined. It is most likely, that if the plaintiffs had obtained a commission at that time, they would not have been able to get it executed, as Holland was then, and until lately, under hostile dominion. There is nothing, therefore, as it seems to me, to preclude the granting the commission prayed, which may be proceeded in in the ordinary way.

GRAHAM, Baron. The novelty of this application, is answered, by adverting to the particular situation of the parties to this suit at different periods. And in all cases of this description, the Court must be guided by the circumstances brought before them.

WOOD, Baron, concurred.

RICHARDS, Baron, of the same opinion. —The right of a plaintiff in equity, ought not to be affected by any delay on the part of the defendant. Here, the defendant has not in fact put in any answer till September last ; for that is the only answer on which the plaintiffs could have proceeded. The [175] injunction ought to have been applied for before, and then it would properly have staid the proceedings at law before the trial.

Motion granted.

The injunction to be continued, till the return of the commission, and publication passed.

SIR WATKIN LEWES v. MORGAN AND OTHERS. Tuesday, 19th November 1816. —

The Court will not direct the Deputy Remembrancer to proceed to make a general report, until the previous orders for separate reports are regularly disposed of, although he have before him a full state of facts.

Dauncey moved, that, notwithstanding the order of the 20th June 1801, for making a separate report in this cause, and subsequent orders with respect thereto, and the order of the 11th July 1810, for a further separate report, the Deputy Remembrancer of this Court may be directed to proceed, without delay, to make his general report, pursuant to the decree pronounced on the hearing of this cause, dated 2d July 1796, he having now before him a full state of facts.

The Court refused to make the order, holding that they could not direct a general report to be made, until the separate report had been regularly disposed of in the usual course.

[176] BIRDWOOD, Assignee of Hart, v. STEPHEN HART AND MORRIS HART. Tuesday, 19th November 1816.—If a copy of subpoena ad resp. be left with a servant of defendant's brother (who was also his partner and a co-defendant in the suit), at whose house such servant acknowledged that he resided at, will be good service, although the party be out of the kingdom at the time.—And a rule (for setting aside an attachment) obtained on a representation that the party was abroad at the time of service, will be discharged, on such cause shewn, with costs.

The defendant, Morris Hart, had been taken on an attachment for a contempt, in not appearing to a subpoena taken out against the defendants, on an affidavit of service, "by delivering a copy thereof to Ann Cox, a servant of the above-named defendant Stephen Hart, at his dwelling house, where the said Morris Hart also resided."

[6th November.]—Spankie obtained a rule to shew cause why the attachment should not be set aside, with costs, on an affidavit of Morris Hart, that he had quitted England, before the issuing of the writ of subpoena, on a voyage to Holland, and did not return till the 6th September, that he had not received the copy till his return, and that, at the time of the service, he was actually at Helvoetsluys on said voyage.

[19th Novemb.]—Dumcey now shewed cause, by an affidavit, that Stephen had been personally served with a copy of the subpoena, that Ann Cox, Stephen's servant, had acknowledged that Morris resided at his (Stephen's) house, but was then out of town:—that a copy was then given to her, which she promised to give to him when he returned. He stated, also, that the defendants were brothers and partners in trade, that they lived together, but were each occasionally absent on the joint business of both. [177] In *Lady Carrington v. Cantillon* (Bunb. 107), service of subpoena on one partner, was held good service on his partner then in France. It is acknowledged, that he resided at Stephen's house, and that he received the process on the 6th September, when he might have appeared. The subpoena issued on 28th June, and the attachment issued on the 31st of October.

Spankie, in support of the rule. It does not appear that defendants were partners. Ann Cox was not a servant of the party himself, nor does it sufficiently appear that Morris resided at Stephen's house. Morris being out of the kingdom at the time, could not be brought into contempt by such a service of process.

Per Curiam. This is the case of service of process, by leaving it with a servant, at the house which was the general place of abode of the party when in England, who occasionally goes abroad on business, and was out of the kingdom at that time. Such a service of subpoena is good *, and an attachment may be well founded on it.

Rule discharged, with Costs.

[178] THE KING v. ABBOTT. Tuesday, 19th November 1816.—G. having a fee simple in lands, mortgages for a term of 1000 years; he has no longer any estate or interest in the lands higher than an equity of redemption only.—And if, on his becoming bankrupt, his assignees take upon themselves to sell the whole property absolutely as the estate of the bankrupt, such a sale is not within the exemption of the 19th Geo. III. ch. 56, sec. 15, and is therefore liable to the auction duty.—Quere—If the assignees had previously redeemed the estate.—Nor will the Court, on such a sale, deduct the proportional part of the duty payable on the value of the equity of redemption, for they consider the entire duty to be payable by the auctioneer on the whole, at the conclusion of the sale; and if the interests are blended so indiscriminately by the assignees, whose duty it is to keep them apart, the Court will not relieve them.

[8th November.]—Gaselee obtained a rule to shew cause, why the verdict which had been taken for the Crown, on this scire facias, for duties on an auction bond, should not be set aside, and entered for the defendant. The cause was not tried, but the following statement of facts was agreed on by the counsel on both sides, which the Lord Chief Baron reported as having been proved:

[19th Novemb.]—"That Mr. John Abbott, the defendant, is a licenced auctioneer, and executed the bond in the pleadings in this cause mentioned. That, on 1st August

* The officer certified that the service was regular.

1813, the defendant gave the annexed notice^{*1} and catalogue to the proper officer of Excise, of an auction sale, to be held by him at West Cowes, in the Isle of Wight, on the 4th [179] August 1813. That the sale took place on the day mentioned in such notice, when the property in the pleadings mentioned, was sold at auction by the defendant, to the highest bidder, for the sum of 800l. That on the 21st September 1813, the defendant accounted for this sale in London, with the proper officer of Excise, by delivering the annexed printed copy of the particulars of sale, and writing thereon, "sold for 800l." That the defendant, at the same time, made before the proper officer the usual affidavit. That such particulars, so delivered by the defendant, were, at the time of such delivery, endorsed^{*2} by the certificate of the assignees, hereinafter mentioned, appearing thereon. That the auction duty on such sale was, on the 4th November 1814, demanded of the defendant by the Commissioners of Excise, under the following circumstances:—That the property in the pleadings mentioned, and sold by the defendant at auction, were purchased by John Gely, on 10th October 1799, and were, by indentures of lease and release, conveyed to the use of Thomas Sewell, his executors, administrators and assigns, for the life of the said John Gely, in trust; nevertheless, for the said John Gely and his assigns, for the term of his life, [180] and, to prevent dower, with remainder to the use of the said John Gely, his heirs and assigns, for ever. That by an indenture, dated the 4th day of April 1810, the same premises were demised, by the said John Gely and Thomas Sewell, to Thomas Godsell, his executors, administrators and assigns, for a term of 1000 years, to secure 400l. and interest, with a proviso and covenant for redemption, on payment of such 400l. and interest, on the 4th day of October 1810. That on 4th April 1811, by a further indenture, the same premises were charged by the said John Gely with a further sum of 130l. and interest, to the said Thomas Godsell, of which indenture the said John Gely, for himself, his heirs, executors and administrators, did covenant and agree with the said Thomas Godsell, his executors, administrators and assigns, that the said indenture of demise, by way of mortgage, and the said premises, and also the title deeds, evidences, writings and muniments of title of and concerning the same, should from thenceforth stand, remain, continue and be charged and chargeable with and be a security for the payment of the further sum of 130l. with interest: and that neither the said John Gely or his heirs, or any other person or persons then claiming, or therefore to claim, from, by, or under him or his heirs, or any other person or persons whomsoever, should or might have or claim, or be entitled to have or claim any right, title or interest, in law or equity, of, in, or to the same premises, or any part or parcel thereof, or to the said title deeds, evidences, writings, and muniments of title, or any of them, until such sum of [181] 130l. with interest, and also the said sum of 400l. with interest, should also be fully paid and satisfied to the said Thomas Godsell. That on the 18th April 1812, a commission of bankrupt was issued against the said John Gely, under which he was duly declared a bankrupt: and that Benjamin Mew and William Spickernell were chosen and appointed assignees of his estate and effects. That, on the 2d June 1812, an assignment was made by the Commissioners to such assignees, under the said bankruptcy, of the estate, right, and interest of the bankrupt in the said premises, and of other his estates and effects, subject to such mortgage or mortgages, and other charges and incumbrances, as the same were legally charged with and liable to. That the bankrupt continued in possession until the time of the bankruptcy, and that the premises were put up to sale, and sold by order of the assignees. That, on 31st December 1813, after the sale before mentioned, the said premises were conveyed to the purchaser in consideration of 800l. of which 602l. 12s.

*1 "West Cowes, Isle of Wight. To be sold by auction, by Messrs. Briggs and Abbott, by order of the assignees of John Geley, at the Vine inn, West Cowes, on Wednesday, 4th August 1813, at two o'clock in the afternoon, a freehold close of meadow land, with a labourer's cottage thereon erected, situate near West Cowes aforesaid, containing about four acres, late in the occupation of John Geley."

*2 Endorsement:—"We humbly certify, the land, as specified in this particular, was the property of Mr. John Geley at the time of issuing out a commission of bankrupt against him, and was sold for the benefit of his creditors. As witness our hands this 4th day of August 1813.

"Witness, F. Worsley.

"WM. SPICKERNELL, } Assignees."
"BEN. MEW, }

were paid to the said Thomas Godsell, for principal and interest due to him upon his aforesaid mortgages, upon which he assigned the aforesaid term of 1000 years to the purchaser; and Thomas Sewell, the trustee of John Gely, conveyed his right and interest in the premises to the purchaser, and 197l. 8s., the residue of the sum of 800l., was paid to Messrs. Mew & Spickernell, the assignees of the bankrupt, and they, in consideration thereof, conveyed also their right and interest to the purchaser. That the defendant having refused payment of duty upon this auction, [182] contending that, under the circumstances, no duty was payable, the *scire facias*, mentioned in the pleadings in this cause, was issued against the defendant.

The Solicitor General, Dauncey, Clarke, and Walton, now shewed cause. They stated the main question to be, Whether, under the circumstances of this case, the subject matter of the sale by auction, to recover the duty on which this proceeding was founded, was liable, as having been so sold, to the duty imposed on sales by auction, by the 19 Geo. III. ch. 56?

By the 43 Geo. III. ch. 69, Sched. A. (Excise Consolidation Act) a duty of 6d. in the pound is imposed on "any sale at auction of any interest, in possession or reversion, in any freehold, customary, copyhold, or leasehold lands, tenements or hereditaments, &c. &c." But then the 15 sect. (19 Geo. III.) provides, and enacts, that "nothing in this, or in the said recited act contained, shall extend, or be construed to extend, to charge with the said rate or duty, any estate, goods or chattels sold at auction, under the authority of any sheriff or under-sheriff, for the benefit of creditors, in execution of any judgment had or obtained, or any estate or effects of bankrupts, sold by order of the assignee or assignees under any commission of bankruptcy." Unless, therefore, the subject matter of the present sale can be brought within this provision it is, as the Crown contends, clearly liable to the auction duty.

[183] The argument then will be reduced to the single question, Whether that which has been so sold by the defendant, was, or was not, at the time of commission issuing, the estate of the bankrupt?

On that point there is to be found a very high authority, in a decision *at nisi prius*, which bears strongly on this question, and is itself decisive of the point. That is the case of *Croze v. Croed* (2 Espinasse, 699). The action was *assumpsit* for money had and received, and was brought against the defendant, an auctioneer, to recover a deposit, made by a purchaser, on the sale of an estate. One Palin had mortgaged the estate to the plaintiff, and having subsequently become bankrupt, it was put up to be sold. By an order made by the Lord Chancellor, it is decreed, that "all the estates of a bankrupt in mortgage, shall be sold before the commissioners." The sale in question had been made before the commissioners acting under the commission against Palin by the defendant as auctioneer; and the sum of 65l., for which the action was brought, had been paid as a deposit.—The defendant paid into Court 45l. 10s. and claimed a right to deduct the remainder for the auction duty, and one guinea for his trouble. The plaintiff relied on the 15 sec. of the 19 Geo. III., and contended that the sale being of a bankrupt's effects, was not liable to the duty. The defendant pleaded that, as auctioneer, he was bound to pay over the duty to the collector; and insisted, that the sale, being on the part of the mortgagee, was [184] not the estate of the bankrupt, and therefore liable to the auction duty which he had so paid. Lord Kenyon was of opinion, that the estate was liable to the auction duty, and directed the jury to find a verdict for the defendant, which they did. That case establishes that the sale of an estate, mortgaged by a bankrupt, is not a sale of the *bonâ fide* property of the bankrupt, and, consequently, not of such property as this statute meant to protect from the duty, that is, property out of the sale of which creditors, under an execution or a commission, would be entitled to be paid a dividend—such alone was the property intended to be relieved from the duty. That intention is further supported by the 15th section, which, for the better preventing frauds, enacts (after a similar enactment respecting estates, goods, &c. sold under an execution) "that every auctioneer who shall be employed by the assignees under any commission of bankruptcy, to sell the effects of any bankrupt, shall likewise specify and enumerate in the catalogue, to be by him delivered, the particular goods and effects then to be sold, and the assignees, or the assignee, if only one under such commission, shall subscribe and sign such catalogue, and certify, at the foot thereof, that all and every the estates, goods, chattels and effects, in such catalogue respectively specified and enumerated, were really and truly the property of the said bankrupt at the time of suing forth the said commission." It

concludes by imposing a penalty of 50l. on every offence of permitting to be inserted in such catalogue any other estate, goods, &c. than should be really and [185] truly the property of the debtor or bankrupt. Everywhere the statute contemplates property only as is really and truly the property of the bankrupt.

In this case, the equity of redemption was the only property which the bankrupt had in the subject of sale, or could himself sell; but the whole has been sold, and the mortgagee has been satisfied; and shall he not pay the auction duty on a sale by which he is benefited? The sale of the whole has most probably been more advantageous in increasing the purchase money, than it would have been to have sold either the equity of redemption, or the mortgage term alone; and if so, neither party should hesitate to pay the duty on the mode of sale which has benefited both.

Nor does it affect this case, that the nature of the bankrupt's interest may be greater or higher than that of the mortgagee; and whether it be real property, or a chattel in one or the other, is a consideration out of the present question, which leads merely to an inquiry, not of the quality, but of the quantity of the bankrupt's interest.

Now the bankrupt and the incumbrancer have distinct and separate estates in the property: both are the subject of sale, and each might have been sold independently of the other, and for the benefit of either alone. There could be no doubt, if the mortgagee had sold his term by auction, that that sale would have been liable, as much as the adjoining land of a third person would have been, if it [186] had, for the accommodation of this lot, and for advancing the sale of it, been put up and sold with it. The mortgagee is not to be protected, then, under colour of a sale of the property of the bankrupt mortgagor; for if that could be done, it would be an effectual means of evading the auction duty whenever there were parties to collude, which might be whenever there were parties in the situation of these. In this instance, too, the actual interest of the bankrupt was a mere trifle, compared with that of the mortgagor; and yet, because so slender an interest happens to be sold at the same time, it is contended, that the greater and more valuable subject matter of the sale is to be exonerated from the duty.

Had the assignees paid off the mortgage-money, then a question might have arisen; at present, they have undertaken to sell the whole: the whole was not the property of the bankrupt at the time of issuing the commission, and therefore not within the exemption; consequently, the auctioneer is liable for the whole amount of the duty on the sale.

Gaselee and Pollock, F. for the defendant, admitted that if the law was against them, the certificate of the assignees would be nugatory; but contended, that the estate which had been sold was literally the undoubted estate of the bankrupt, at the time of issuing the commission and the sale. He had the fee—the freehold the paramount estate in the property: it was entirely his in equity, while the mortgagee had nothing more than a minor interest [187] in it, subservient to that of the bankrupt; of which interest the estate of the mortgagor might at any time be discharged and exonerated, by the payment of the principal and interest due on the mortgage, and that without requiring the assent or concurrence of the mortgagee.

Then it was sold by order of the bankrupt's assignees, as the property of the bankrupt without any consentaneous concurrence on the part of the mortgagee, who could not in any manner interfere effectually to prevent the sale, and who would be compellable, on tender of what would be due to him at the expiration of six months after notice, to join in executing an assurance to a purchaser; and six months would have elapsed by the time this sale could have been completed. His assent was not necessary to perfect the sale, nor could his dissent have obstructed it. The property was still the bankrupt's, although the mortgagee had an interest in it, and a lien on it. There is a strong case on that point in *Atkyns, (Eli), and Mary Casborne v. Scarfe and Inglis* (1 Atkyns, 603), the substance of which is this:—The father of the plaintiffs, devised to Anne his daughter, the plaintiffs' eldest sister, all his estate, freehold and copyhold, in fee, charged with 200l. a piece to the plaintiffs. Anne, after her father's death, possessed the several estates, and afterwards intermarried with the defendant Inglis; but before her marriage, she mortgaged part [188] of the freehold to the defendant Scarfe for 900l. She died soon after her marriage, leaving a son, who died without issue. The question was, Whether the defendant Inglis was entitled to be tenant by the curtesy to the estate comprized in the mortgage? The Master of

the Rolls held, that he was not entitled to be the tenant by the curtesy, of that part of the premises comprised in the mortgage: but the Chancellor was totally of a different opinion; and, on giving his judgment, said, "It is certain the mortgagee is not barely a trustee to the mortgagor; but to some purposes, videlicet, with regard to the inheritance, he certainly is, till a foreclosure." In this case the mortgagee must also be considered as merely a trustee of the inheritance for the mortgagor, whose property, till foreclosure, the freehold certainly is. His Lordship, proceeding in his judgment on that case, gives, as one reason of his decision, that an equity of redemption has always been considered as an estate in the land, for it may be devised, &c.; and adds, "the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets;" and therefore he reversed the decree of the Master of the Rolls, as to that part of it which held the defendant not to be tenant by the curtesy.

Nor is it ever for the benefit of the mortgagee that the mortgaged estate is sold: he must be paid his full principal and interest, if the estate shall produce it, and that free of all sort of deduction—expenses of sale—of collecting mesne profits—of repairs, and all [189] incidental charges. He can acquire no advantage by the sale; on the contrary, he might be a loser. This sale was involuntary on his part, and he might have been totally ignorant of it. Then, on what pretence can he be called on to pay the duty? It is true, he consents to receive his principal and interest due on the mortgage after the estate has been sold, and about a month before the time when he might have been compelled to take it; but such an act is no proof of his assent to, still less of his moving the sale: nor does that conduce to his benefit; for he gains nothing by receiving his money sooner than he might have been obliged, by adopting the proper course, to accept it.

The doctrine said to be held by Lord Kenyon, in the case of *Coarc v. Creed*, would totally do away the object of the statute, the spirit, if not the letter of which would be contravened by such a construction; for in many instances the duty would fall ultimately on the creditors, for whose benefit the exemption was intended to operate. Suppose this estate had sold for considerably less than the mortgage-money due at the time of issuing the commission, the mortgagee would in that case be entitled to prove under the commission for the amount of the deficiency, which would be so much the greater as the produce of the sale of the estate would have been less, by reason of the deduction of the auction duty; for the net produce of the sale-money would be all that would be payable to the creditor.

[190] In the case of personal property pledged by a bankrupt, for less than its value, to secure money, that undoubtedly would still be the actual property of the bankrupt, notwithstanding the lien of the pawnbroker; and if sold by order of the assignees, would be sold as the property of the bankrupt, and not as the property of the pawnbroker. The same might be said of goods warehoused in the London Docks, which if sold by assignees of the bankrupt, to whom they had belonged, they would be sold as his goods, and not as those of the company having a lien on them for warehousing. If the assignees are liable to the auction duty on this sale, they would also be liable if it were a case of penalty proceeded for in default of payment: and surely that can hardly be contended.

There is no injury done to the Crown, or loss sustained by the revenue, for the redemption of the mortgage term, before the sale of the estate by the assignees, would have entitled them to sell the whole, free from the duty: and where is the difference, if, for the benefit of a bankrupt's estate, the property is sold, as this has been, without that having been previously done, which would be merely a formality?

It was then pressed, that if the Court should be ultimately of opinion that this sale was chargeable with the auction duty, still there will be the value of the equity of redemption to be deducted: for that, undoubtedly, was the property of the bankrupt, and clearly within the exception of the statute.

[191] The Solicitor General, in reply, submitted, that the word "estate," in the statute, did not mean the ownership of the land, but the beneficial interest of the bankrupt, and that, in truth, was all which they could sell; and in this case, he had merely the equity of redemption. If the bankrupt had been entitled to an undivided moiety, that would not have sold so advantageously as the whole; but should the whole be sold, the whole must pay the duty, because it was not the property of the bankrupt, nor could it have been so certified; and the auctioneer (for the onus of pay-

ment falls on him *) must have paid the duty on the whole. It would be the fault of the assignees so to blend the interest of the bankrupt with that of other persons, as to furnish opportunity for the committing of fraud on the revenue, which would be often the consequence of such confusion; when the proper and clear course would have been to sell what the bankrupt had, and no more; thereby obviating all difficulty and danger, as well on the part of the bankrupt's creditors, as of the Crown †. If those who have the care of the bankrupt's interests, do not take [192] due means to protect them, by ascertaining and describing what it is that he is actually entitled to sell, it is not for the Crown to do it. Legal and equitable interests are perfectly distinct. Here, the bankrupt had merely an equitable, and not a legal, interest in the estate sold.

[193] In the case of sale of personal property pledged also the assignees could only sell the bankrupt's qualified interest in it, and subject to the lien.

As to the distinction taken between the actual estate of the bankrupt sold (the equity of redemption) and the claim of deduction made on the amount of that interest, that is not a question for the Court on this motion; but must be the subject of consideration on an application for the allowance of such a claim, to be made elsewhere.

He abstained from the discussion of the case put, of the estate having been previously redeemed.

THOMSON, Chief Baron. Unquestionably, the auctioneer is liable to the payment of the duty charged on this sale by auction, unless he can shew the estate to be within the exception of the act. Now he has, in point of fact, sold the whole, without any distinction of the interest of the bankrupt, or of the mortgagee. It was sold by order of the assignees, certainly; but all that they had a right to sell was the equity of redemption merely. They had undoubtedly a right to redeem the mortgage, and thus make the estate their own; and had they done so, it would have been a very different question, although the statute enacts that the assignees shall certify, that all and

* 19 Geo. III. c. 56, s. 7.

† By sect. 16 it is enacted, That "every auctioneer who shall sell at auction any estates, goods or chattels that have been seized by any sheriff or under-sheriff, or by their authority, and by them or either of them taken for the benefit of creditors, in execution of any judgment had and obtained, shall specify and enumerate in the catalogue by him to be delivered under the directions of this act, as well the particular estates and effects to be sold, and also the exact sum to be levied under such execution; and the sheriff or under-sheriff respectively shall, and they are hereby required to subscribe and sign every such catalogue, and to certify at the foot thereof, that all and every the estates, goods and effects in such catalogue respectively specified and enumerated, were really and truly the property of the person against whom such judgment was had and obtained, and that the same and every part thereof were actually seized in execution of the same judgment; and every auctioneer who shall be employed by the assignees under any commission of bankruptcy, to sell the effects of any bankrupt, shall likewise specify and enumerate in the catalogue to be by him delivered as aforesaid, the particular goods and effects then to be sold; and the assignees or assignee, if only one under such commission shall, and he and they is and are hereby required to subscribe and sign such catalogue, and to certify at the foot thereof, that all and every the estates, goods, chattels and effects in such catalogue respectively specified and enumerated, were really and truly the property of the said bankrupt at the time of suing forth the said commission: which respective catalogue so signed and certified as aforesaid, shall be produced by every such auctioneer to the person to whom such auctioneer is by this act directed to deliver his account, before such auctioneer shall be permitted to pass his account, or to have the same allowed; and if such sheriff, under-sheriff, assignee or assignees respectively shall insert, or suffer or permit to be inserted in any such catalogue so to be subscribed, signed and certified as aforesaid, any estate, goods, chattels or effects whatsoever, other than such as were really and truly the property of the debtor or debtors, bankrupt or bankrupts as aforesaid respectively; or if any sheriff or under-sheriff shall omit or neglect to certify on such catalogue the true sum to be levied, or shall certify thereon any false sum to be levied, then and in every such case the party offending shall, for every such offence respectively, forfeit and lose the sum of twenty pounds."

every the estates, goods, &c. specified in the catalogue, were really and truly the property of the bankrupt at the time of suing forth the commission. It is not necessary, however, at present, to consider that question. They might also have ordered [194] the equity of redemption only to have been put up, and that would certainly have brought it within the excepted cases. The meaning of the exception is, that the produce of that property which would go, when sold, to the satisfaction of creditors, should not be liable to the duty, as matter of commiseration; and in this case that was merely the produce of the sale of the equity of redemption. If the assignees could have ordered an absolute sale of the whole estate in this way, they might have done the same thing if the bankrupt had been entitled to an undivided share, however small, in the same estate, in common with other persons; and in that case, can there be any doubt that the produce of the sale would have been liable to duty? I think not.

As to the hardship of the case, all that might have been avoided (as has been suggested by the Attorney General) by pursuing the clear course pointed out by the act, for the express purpose of preventing confusion and fraud.

The defendant has, therefore, not brought himself within the exception provided by the act, and he is therefore liable to the whole duty chargeable on the amount of the produce of this sale. Whether any favour may be shewn as to allowing a deduction to be made of any part of that duty, in consideration of the equity of redemption, that is not for us to say.

RAHAM, Baron. The general policy of the act is quite clear, and this clause is only applicable [195] to the exemption of the convertible estate and effects of a bankrupt sold, and to those alone; and it is incumbent on the assignees to ascertain of what they consist. Nothing is plainer than the common distinction in equity between the interests of a mortgagor and of a mortgagee,—between the legal and equitable estate. It is a frequent practice to direct a sale of an equity of redemption alone, and that is what the assignees should have done here. It is not important whether the mortgagee's assent was expressed or implied. The assignees chose to sell the whole, and may have pledged themselves to make a title to the purchaser; and if, in doing so, they take upon themselves to sell the property unincumbered, for their greater advantage, they must do it with all its consequences.

In the case of pledges of personal goods, the property is substantially in those who have the rightful possession. In this instance, I am clearly of opinion, that the assignees have made themselves liable to pay the duty.

WOOD, Baron, absent.

RICHARDS, Baron, of the same opinion. The bankrupt was, at the date of the commission, seised in fee of the estate in question, subject to the mortgage; the mortgagee having the legal estate, and the bankrupt, only the equity of redemption; and while the mortgagee has a term of 1000 years as a security, I cannot understand that he had not the property; and if he had, the mortgagor had not. [196] Their interests are perfectly distinct, and that distinction is very familiar to Courts of equity. The mortgagee is not, in any respect, under the control of the mortgagor; nor could he be compelled to receive his money, even at the expiration of six months notice; for then he might have driven the mortgagor into equity to redeem the estate. It is frequently of great advantage to both mortgagor and mortgagee, that the estate should be sold free of the incumbrance; the former, if he wants his money, gets it sooner, and the latter sells his estate better: then, why should they have the benefit of the exemption? The case which was put of a sale by a tenant in common, is strongly in point. Another case is that of a bankrupt having a reversionary interest, and his assignees should sell the whole: it would be no ground of exemption, under this statute, that the tenant for life should concur with him to make a title presently to the whole estate: could it be said that the assignees, in that case, were selling the property of the bankrupt? And where is the difference between such a case and the present?

I am clearly of opinion, therefore, that the auctioneer has become liable to the duty charged on sales of estates by auction, and that the present case is not within the exception.

As to the hardship,—that must always give way to the circumstances of the particular case: that is a subject matter for arrangement among the parties themselves. The disposal of property is often subjected to various unforeseen inconveniences,

which [197] cannot be remedied. If the mortgagee had sold his mortgage by auction, he would have become liable to pay the duty, although the sale had not proved sufficiently productive to satisfy his debt. If we should decide that this sale was not liable to the duty, we should hold out an encouragement to collusion between bankrupts and mortgagees, by which the revenue might be enormously defrauded. According to my construction of this statute, I think we ought to discharge the rule.

Rule discharged.

RICHARDS, GENT. one, &c., AND ANOTHER v. SETREE. Wednesday, 20th November 1816.—If a plea in abatement be not supported by a proper affidavit, the plaintiff may sign judgment immediately.—A mistake in the parties of the suit, in the title to such an affidavit, renders it insufficient to support the plea, although it refer expressly to the annexed plea, in which the title of the cause is right.—Quere,—Whether an attorney of another Court is entitled to plead his privilege in abatement, against the privilege of the officers of this Court.—The Court will not permit cause to be shewn, before the day for which the rule is drawn up, for the sake of enabling the party to save the Term.—Sed quere, if that be suggested at the time of the application.—Nor will they impose terms with a view to expedite the execution of a writ of inquiry.

Dauncey and Jones, D. F. now shewed cause against a rule which had been obtained by Owen, the 16th instant, for setting aside the interlocutory judgment, (which had been signed in this cause in default of plea,) for irregularity, with costs.

[198] [The rule having been drawn up for the 19th, the plaintiffs' Counsel claimed a right to shew cause against the rule, on the day following that on which it was obtained, to save the term; which was opposed, and the Court said, that till the day after it could not be moved to make the rule absolute; nor could they decide to-day ex parte, and to-morrow hear the other side. It is contrary to practice to allow cause to be shewn till the day after that for which the rule is drawn up.

Jones then applied that conditions might be imposed, to afford the plaintiff the advantage he would have had of executing his writ of inquiry if the rule had not been obtained, and to obviate the consequences of the intermediate delay; but the Court refused the application.]

The defendant, who was an attorney of the Court of King's Bench, was sued as the acceptor of a bill of exchange by the plaintiffs, who were indorsees. The process, which was a *venire facias ad respondendum*, described the plaintiffs as Stephen Richards, gent. one of the six clerks of Benjamin Price, gent. one of the sworn clerks in the Office of Pleas in our said Exchequer, and Charles Clarke:—and was returnable the 6th November. On the 7th November, notice of declaration *de bene esse* (to plead in eight days) was regularly served, judgment was signed on the 11th, and notice of inquiry served on the 12th.

The defendant's affidavit, on which the rule was granted, stated that he was served with notice of [199] declaration on the 7th November, that on the 9th he filed a plea of privilege, as an attorney of the Court of King's Bench, and an affidavit of verification.

On shewing cause, it was submitted that, notwithstanding the defendant had originally till the 15th to plead, yet, by having put in a bad plea, he had waived his time, and the plaintiff became entitled to sign judgment *instanter*. *Bramble v. Pagan* (1 T. R. 689).

As to the validity of the plea, the plaintiffs' Counsel urged, first, that the affidavit of verification was a nullity, because it was entitled in a cause of Stephen Richards, gent. one of the six clerks of B. Price, gent. one of the sworn clerks in the office of Pleas, in the Court of Exchequer at Westminster, plaintiffs, and Henry Setree defendant: whereas, the true title of the cause was, as given in the affidavit, with—“and Charles Clarke plaintiff.” All affidavits should be entitled, and as of their proper cause (Tidd's Practice, p. 196 (5th ed.)). Secondly, that the plea of privilege, which, as a dilatory plea, was to be received with strictness. *Robinson v. M.* (5 T. R. 488), was superseded by the plaintiff's privilege in this Court, as there could be no privilege pleaded against privilege, *Lander v. Cockayne* (Barnes, 44), and when ever a plea may be treated [200] as a nullity, the plaintiff may sign judgment, *Grove v. Sydnoff* (3 Bos. & Pul. 395), *Lockhart v. Mackintosh* (5 T. R. 661).

Owen, in support of the rule, submitted that the objection taken to the title of the affidavit, being a mere clerical error, was not a fatal defect, particularly as the affidavit itself, which is attached to the plea, removes any apparent uncertainty, by its express reference to the plea and the cause. The language of it is, that "Henry Setree, one of the attorneys of our Lord the King, before the King himself, the defendant in this cause, maketh oath and saith, that the plea, hereunto annexed, is true in substance and in fact;" so that there could be no doubt about the identity of the cause in which the affidavit is made. It has been recently established, that where the cause, relating to which an affidavit has been filed, can be sufficiently ascertained, by reference to it in the body of the affidavit, so as to admit of an indictment for perjury, it will be enough. *Prince v. Nicholson* (5 Taunt. 333). In that case, which was in the Common Pleas, the affidavit was not entitled at all, but as it referred to the annexed plea: that reference was held to supply the defect of title,—and so, here, the same reference may cure the same defect, on the same principle of *verba relata videntur in esse*.

[Graham, Baron, expressed some doubt of the point, as ruled in that case.

[201] Thomson, Chief Baron. Every affidavit made in the course of a cause, after its actual commencement, should be entitled as in that cause, and should be correctly entitled.]

The affidavit is incorporated in the plea, and forms a part of it, and therefore the title might be rejected altogether as surplusage.

[The question of privilege was much discussed, but the Court gave no opinion on it.]

THOMSON, Chief Baron. This is a question as to the validity of the plea of privilege, which has been pleaded in abatement. There is no objection made to the form; but it is said that it has not been properly supported, by the affidavit of the truth of it, which is required in all pleas of abatement. The body of the affidavit, too, is admitted to be right in itself, but an objection is made to the title of it, which is, that it purports to have been made in another cause than that now before the Court. [His Lordship stated the title of the affidavit, and of this cause.] Certainly, wherever an affidavit is made in a suit that has been commenced, it ought to be entitled, and as of the precise cause in which it is to be used.

A case has been cited where, it is said, the Court of Common Pleas received an affidavit without title, because the Court thought, that by reference from the body of it, the title of the cause might be supplied by the one prefixed to the annexed plea: but even supposing that to have been rightly decided, it does not apply to the present case: for here, a specific title is given to this affidavit, and that turns out to be not the title of this cause. In assigning perjury, it must be shewn that there was such a cause pending as that from which the affidavit takes title.

The plea, therefore, was insufficient, for want of a proper affidavit in support of it. So that, independent of the other question on the validity of a plea of privilege, which, under the circumstances of this case, it has become unnecessary to discuss, the plea was, on that ground, a nullity, and the plaintiff was entitled to sign his judgment at the expiration of the four days.

GRAHAM, Baron, of the same opinion. It is necessary that every affidavit should carry intrinsic evidence of the cause in which it is used; but the title to this affidavit, on the contrary, shews that it was not made in this cause: and one made in any other might as well be offered as this. I also cannot think that the case cited from the Common Pleas, is right, on the point which it goes to establish, that the defect of title to an affidavit may be supplied by reference.

WOOD, Baron, absent.

RICHARDS, Baron. The objection, that the plea was not supported by the proper affidavit, is [203] quite sufficient to entitle the plaintiff to sign judgment. Had it been necessary to go into the other point, I should wish to see the record.

Per Curiam. Rule discharged, with Costs.

THE KING v. McLEOD. Wednesday, 20th November 1816.—The bonds given by masters of vessels, under 26 Geo. III. ch. 40, are continuing bonds, and remain in force as long as the same person is master of the same ship; but not when he becomes master of any other vessel.—It is not necessary, therefore, that a fresh

bond should be given on every voyage made by the vessel while in his charge, for the same bond covers all voyages made in her by him, and may be sued on for a breach of the conditions during any one or more of them. —A motion cannot be made, in arrest of judgment, on a *scire facias*, after the first four days of Term.

This was a proceeding by *scire facias* against the defendant, as master of the ship "Ann," on the usual bond given by persons in that character, under the 26th Geo. III. ch. 40, sec. 15, for breach of the condition *. Plea, performance.

[204] It was tried before the Lord Chief Baron, at the Sittings after Trinity Term, when a verdict was taken for the Crown, with liberty to move to enter a verdict for the defendant, on objection taken at the trial on the construction of the statute.

The suit was founded on a charge of the master having fraudulently unshipped goods, with intent to defraud the customs; and that was clearly proved and admitted. But it was also proved and admitted, that the bond in question had been given by the master, on the vessel clearing out at the port of London for foreign parts, on the 13th August 1814;—that she was then bound to St. Petersburg, and performed that voyage;—that she then [205] returned to Lynn, and having sailed to Shields, took in a cargo of coals, with which she arrived in London;—that from London she afterwards proceeded on a voyage to Pernambuco, and during that last voyage it was that the smuggling took place.

On that evidence the objection taken was, that the bond was confined to the first voyage, and that therefore the Crown could not put it in suit for any breach of the condition alleged to have been committed on any subsequent voyage; and on that ground,

Pell, Serj'., obtained a rule to shew cause why the verdict should not be set aside, and judgment entered for the defendant.

The Solicitor General, Dauncey, Clarke, Walton, and Roe, shewed cause. They admitted that on a change of master, a new bond would be necessary, and that the bond given did not affect the master when in command of any other ship; but they insisted, that so long as he should continue master of the same vessel, the bond remained in force during the whole time, and for whatever voyages he might make, as appeared both by the construction of the words of the act and the terms of the bond. The last provision of the act, particularly, shews that the legislature did not mean to impose on the master the troublesome necessity of entering into a fresh bond on every voyage, and therefore it enacts, that a certificate of such bond [206] having

* The argument turns entirely on the words of that sect. which are,—“That, from and after the first day of August one thousand seven hundred and eighty six, it shall not be lawful for any officer or officers of his Majesty's Customs in Great Britain to permit or suffer any ship or vessel to be cleared out for foreign parts, from any port or place whatever in Great Britain, until the master, or other person having or taking the charge or command of such ship or vessel, and the mate of such ship or vessel, shall severally and respectively give security to his Majesty, his heirs and successors, by bond, in the penalty of two hundred pounds (which security shall be taken by the Collector, or other principal officer of the Customs, at such port or place, who is hereby authorized and required to take such security), with condition that such master, or other person having or taking the charge or command of such ship or vessel, or such mate, as the case may be, will not at any time thereafter land, or cause to be landed, any goods in any part of this kingdom, in any manner which is or shall be prohibited by law, or take the same on board, in order to their being so landed, nor be anywise concerned, or aiding or assisting in fraudulently importing, unshipping, or landing the same, and will not hinder, molest, or oppose, any of his Majesty's officers of the Customs or Excise, or any other person or persons assisting them, or either of them, in the due execution of their respective offices or employments; or until such master, or other person having or taking the charge or command of such ship or vessel, shall produce a certificate, under the hand of the Collector, or other principal officer of the Customs, at some other port or place in Great Britain, of such security having been before given at such other port or place, to such Collector or other principal officer, by such master and mate.”

been once given at some port from which he shall have cleared out, shall be sufficient to entitle him to clear out at any other port ; which could have no other meaning than that by having made one voyage out, the bond then given would entitle him to make another ; for having cleared out at one port, she would obviously not require to clear out at any other for that same voyage. The terms of the condition of the bond are, that "he will not at any time hereafter," &c. not "at any time during the voyage." The bond, therefore, is not taken with reference to the particular voyage, but to his having charge of the particular ship, and is a continuing bond during such his charge, and would cover all voyages made in her by him indefinitely. The object of the statute, its language, and the terms of the bond, are all general ; and there are no words restraining or limiting either. The usage also, which is much, in construing these acts, is not to take fresh bonds on every voyage.

Pell, Serjt., and Lawes, E. in support of the rule, contended, that if the construction put on the act by the Crown were the true one, it would continue the master's liability on this sort of bond, not only on any voyage, but with any other ship ; for the words do not limit expressly his liability even to the time of his commanding the ship, and that proposition, there is no doubt, would not be tenable. By the 32 Geo. III. ch. 50, § 9, coasting vessels are put on the same footing with vessels bound on foreign voyages, as to the necessity of these bonds : [207] but in those cases the penalty is only 100*l*. Now, when this vessel proceeded from Lynn to Shields, it cannot be contended that this bond covered that intermediate voyage. Nor can it be supposed that the legislature should intend that one single bond, in so small a penalty, should cover all the breaches of the condition which the master should commit during every voyage he might make. They submitted, therefore, on the whole, that from the general policy of the statute, as well as from the true construction of the words, it was obviously the intention of the framers of it, that the master should give a bond of this description on every voyage which he should make to a foreign port while having the command of the ship, and that therefore each bond could only be considered as relating to each voyage, and would end with that voyage ; and whatever might be the usage in respect of taking a fresh bond every voyage, that would be no argument either way as to the true meaning of the act : and, in point of fact, that often became a question between the masters of ships and the collectors of the customs at the ports.

The Solicitor General replied.

THOMSON, Chief Baron. There has certainly been great ingenuity displayed by the Counsel who made this motion originally, and have attempted to support the rule ; but on the best consideration I can give it, I am clearly of opinion that the action brought on this bond may be well maintained. It was a bond given under the directions of the 20th Geo. III. to suppress the clandestine re-lading [208] of goods shipped for foreign parts. [Here his Lordship read the section, and the condition of the bond, (observing, that the words "such port or place" must be taken to mean the port at which the clearance for foreign parts from thence is to be allowed,) and the provision relating to the production of the certificate : and then recapitulated the circumstances of the case, as stated.]

The question on the case for judgment is, Whether the bond so given is to be confined to the voyage made on the clearing out, when it is given ; or, whether it is not to be extended to all the voyages which the obligor shall make as master of that ship.

I certainly agree, that when his character of master of that ship is at an end, the obligation of the bond ceases ; but there is nothing, on the other hand, in the act, which confines it to the first subsequent voyage which the ship makes. The terms of the act are general ; but the provision, that a certificate of the necessary security having been given shall suffice to entitle the ship to clear out at another port, is quite conclusive, and explains the meaning of the act ; for that would be idle, if fresh bonds were necessary : and it would be mischievous if it were not so ; for it would be most burthensome to masters of vessels to subject them to such formalities. I am of opinion, therefore, that this bond covers the illegal transactions of the master on this subsequent voyage, and that the Crown is therefore entitled to retain its verdict.

[209] GRAHAM, Baron, expressed himself as of the same opinion, giving the same reasons, and dwelling on the terms of the act, and particularly on the provision regarding the certificate.

WOOD, Baron, absent.

RICHARDS, Baron, concurred.

Per Curiam. Rule discharged.

The defendant's Counsel (Lawes) then applied for leave to move in arrest of judgment.

The Solicitor General objected, on the ground that such a motion ought to have been made within the first four days of term, and that it was therefore now too late. The only course that could now be taken was, by writ of error; and though the consent of the Attorney General would be necessary in that case, he intimated, that if any point really arguable was raised, that consent would not be refused.

The Court said, that the present application was quite irregular after the first four days of the term, and that they could not grant the indulgence unless by consent.

[210] *WOLLEY v. HADFIELD AND OTHERS*. Thursday, 21st November 1816.—A modus of 2l. 8s. 1d. payable for certain tithes within a township, the occupier of each farm or tenement within the said township respectively, paying his rateable proportion, is bad for uncertainty, even in an answer. It is defective in form and substance.—Neither can it be treated as a composition.

To this (rector's) bill for tithes, the following modus was (amongst others which were afterwards given up) pleaded by the defendant, "That from time immemorial, there hath been payable and paid, and of right ought to be paid, at or about the Feast of Easter, or when lawfully demanded, to the person entitled to the tithes of the said rectory or parsonage, as a modus or customary payment, in lieu of the tithe in kind of corn and hay, and of agistment tithe, yearly arising, growing, and renewing within the two several townships of Matley (save as aforesaid) and Longden, the respective sums of money next hereinafter mentioned, to wit, within the township of Matley (except as aforesaid), the sum of 9s. 2d.; and within the township of Longden, the sum of 2l. 8s. 1d. the occupier of each farm or tenement, within the said township respectively, (except as aforesaid), paying his rateable and proportionable part of the said modus or customary payment due from the township in which the farm or land occupied by him is situated." It was objected to, for uncertainty, in not stating by whom it was to be paid, or in what proportions for each farm.

Wetherell and Spence, for the defendants, contended that proof of the immemorial payment of [211] the sum of 2l. 8s. 1d. would, notwithstanding the objections taken, substantiate the defence, as to those of the defendants who have regularly paid their contributory share of the modus set up, who contend that they are therefore entitled to exemption. They admitted that there were some uncertainties in the modus, as laid, but urged, that as this was the case of an answer, where the same strictness was not required as in a bill, there are several authorities which support moduses laid with as great uncertainty as the present. And they cited *Atkins v. Hutton* (2 Anstr. Gw. 1406), and *Atkins v. Lord Willoughby de Broke* (Gw. 1412. Anstr.), where the Court held that the modus set up, and objected to as being laid with too great uncertainty to found a decree, was (although that might be so, if it had been so laid in a bill to establish it) sufficient for the Court to proceed on; for, in an answer where so much strictness is not requisite, it is enough if there appears to be a good defence. So here, if the payment be proved, the validity of the defence should be inquired of by a jury. And in *Markham v. Laycock* (4 Gw. 1339), the Court said, that customary payments pleaded, and being likely to be made out in evidence, were to be treated with some degree of indulgence; and it might be sent to a jury, who might negative the inaccurate modus, and find the true one. All the objections made to this modus, were also decidedly overruled in the case of *Hardecastle v. Slater* (ib. 1342. Gw. 790), [212] where the uncertainty was said to be accountable for, by reason of the probability that the tract prescribed for had been originally the property of an individual, and that the subsequent alteration of that property, ought not to have the effect of destroying the modus.

Martin, Clarke, and Dowdeswell, for the plaintiff, were not called on to reply.

THOMSON, Chief Baron. I put this question:—Can any evidence help this modus, which is not only defective in point of form, but also in point of substance? The answer

not like any other case that I ever saw or heard of; it is a modus to be paid by the township, the occupier of each contributing his proportion. Now, by what reference, or by what means, is that proportion to be ascertained? Is it according to the rate or value of the land? And how is that to be ascertained, or to be made known to the clergyman?

The defendant's counsel were perfectly right in saying, that there is not the same strictness of precision required in laying a modus in an answer, as in a bill; but still there must be some degree of certainty as to the means of collecting it, and how it is to be paid, and from whom to be demanded. The cases cited, are quite different: this uncertainty seems to belong to no modus whatever. It seems to me this modus is intrinsically bad, and that it is impossible to make it good for any thing.

GRAHAM, Baron. I entirely concur with my [213] Lord Chief Baron. It seems to me impossible that this modus can be supported. There is nothing which shews how the rector's right to recover the 2l. 8s. 1d. is to be enforced. It neither states by whom it is payable, or the respective contribution of each individual towards making up the amount within themselves; and even that would require it to be shewn, further, to whom the owner of the tithe was to resort for his remedy, in case the payment were resisted. You tell him he is to have his proportionable part from this or that occupier, but what proportionable part has he a right to demand of each? And, as my Lord Chief Baron asked,—how is he to ascertain how that can be come at?

RICHARDS, Baron. I think the very statement, upon the face of the modus, is against it. [His Lordship read the words of the modus, as set out above.]

The very reading of the words, as it seems to me, furnishes the obvious objection to it, without more, and puts this modus out of all question.

It was then submitted, that the defendant might insist upon this payment, as being a composition, requiring notice to determine it.

But the Court decided, that it could not be so considered, and for the same reasons as determined the rejection of it as a modus, for its uncertainty applied equally to its destruction when considered [214] as a composition, as it was not stated what the composition was, or with whom it had been made, or in what proportions it was to be paid.

BOWMAKER v. MOORE, SHIRREFF, AND TRELFs. Friday, 22d November 1816.—

The Court will grant an injunction to restrain a landlord from proceeding at law on an assignment of a replevin bond against the sureties, if there have been an agreement to refer, and a reference between the landlord and a tenant (without the concurrence of the surety) of the matters in difference, whereby the performance of the condition of the bond (to proceed with effect) have been suspended. —On such an agreement having been entered into, the bond became functus officio.

Martin and Tinney moved, that the defendant Moore might be restrained (by injunction) from proceeding at law, in an action commenced in the Common Pleas, against the plaintiff, on a common replevin bond.

The material facts, as stated in the bill, and admitted in the answer of Moore, were, that at the time when the plaintiff (as co-security with defendant Trelfs, for defendant Shirreff) executed the replevin bond, dated 3d February 1814, which was upon a distress levied for one year's rent, (19th January 1814), disputes were pending between Moore (the landlord) and Shirreff, (the tenant,) respecting the terms of holding the same, and otherwise relating thereto; and that another action of [215] replevin was then pending for the rent of a former year:—(the answer stated that Moore did not know whether the plaintiff, when he became surety, was or was not acquainted with these facts:—that after the plaintiff had become surety, Moore and Shirreff, by an agreement dated 23d March 1814, agreed to refer the matters in dispute between them to arbitration. The terms of the agreement (as they affected this motion) were, "That Shirreff should be allowed to deduct all monies which should be awarded to him, in respect of his claims, out of the arrears of rent due and to become due;—that the arbitrators should appoint a day for payment of the rent, or the balance thereof;—that nothing therein contained, should be construed so as to prejudice the distress made on the 19th of January 1814: or to discharge the sureties of Shirreff, in the replevying of such distress; and that pending the aforesaid reference, no proceedings

should be taken in the action of replevin, upon such distress." That the agreement was proceeded upon, and the plaintiff was not, in any measure, apprized of it;—that pending the reference, the plaint, in replevin, was removed by the defendant Moore into the Common Pleas by mistake;—that on being reminded of the agreement, he suspended proceedings during the reference;—that Shirreff did not pay the sum awarded;—that he afterwards confessed the action, admitting Moore's right to distrain; and authorized him to enter up judgment of non pros. unless he should pay the rent by the first day of Michaelmas Term;—that judgment was accordingly entered up, — a writ de [216] retorno habendo sued out,—and an eloignement returned;—upon which the defendant Moore procured an assignment of the bond, and commenced the action in question. In the mean time, Shirreff's goods had been taken in execution by Moore, for the former rent. It did not appear whether, if the agreement to refer had not been entered into, the defendant Moore could have obtained his judgment of non pros. sooner than he did.

On these facts it was submitted, that the suit having been delayed by the subsequent conduct of the defendants Moore and Shirreff, (by their agreement entered into, without the privity of the surety, who was materially interested,) he was thereby discharged from the obligation of the bond; the condition, (that the defendant Shirreff should prosecute his suit with effect,) having been put out of his power, by the defendant Moore himself. And it was contended to be immaterial, whether the surety had or had not sustained any actual damage, by the change of his situation, without his own consent, (although it was admitted, that certain facts in the case shewed that damage had, in this instance, been sustained;)—it was enough, that the surety's right to force his principal to bring the question in dispute to an immediate determination, that so he might be discharged from his liability, had been suspended by the act of the creditor. They cited various cases on the doctrine of discharge of the surety, by time given to the principal; and, amongst others, *Croft v. Johnson* (5 Taunt. 319), in which the [217] doctrine of discharge of bail by a cognovit, given by a defendant to the plaintiff, (see *Hodgson v. Nugent*, 5 T. R. 277, and *Thomas v. Young*, 15 E. R. 617), had been put on its true footing;—and particularly *Boulton v. Stubbs* (18 Ves. 20), in which the Lord Chancellor had granted an injunction against suing the surety in a bond, where the obligee had taken a mortgage from the principal for part of the debt, and agreed to receive the rest by instalments, expressly without prejudice to any security which he held for the debt, or any part of it.

Rowpell, contra, contended that this was not the common case, of time given to the principal, to the prejudice of the surety. The plaintiff was surety for Shirreff, to the Steward of the Liberty, not to Moore; and there was no privity between him and Moore;—that Moore had nothing to do with Bowmaker's knowledge or ignorance of Shirreff's situation;—that there had been, in fact, no injurious delay; and, in the agreement of reference, between Moore and Shirreff, the remedy against the surety was expressly reserved;—that Moore was not bound to give notice of former distresses, or actions of replevin then pending, to Bowmaker. He could not have proceeded on the bond, till it was assessed by the steward; and the reference has not deprived the surety of any advantage which he would otherwise have had; or placed him, in any respect, in a worse condition.

Per Curiam. This question lies in a narrow [218] compass. The bond was (of course) conditioned,—that the principal should prosecute his writ, with effect, against the landlord. The action of replevin is in fact entered; but, afterwards, an agreement is entered into between the landlord and the tenant, without the concurrence of the surety, whereby the tenant is precluded from proceeding according to the condition. By that agreement, a mode is chalked out for ascertaining and arranging their mutual demands, and, in the mean time, all proceedings are to be stayed; so that the tenant is restrained, by the act of the landlord, from doing that which his surety has engaged he shall do. It turns out, indeed, that the same parties afterwards agree, that the action shall proceed, so as to give the landlord his original remedy against the surety;—but that is what we cannot suffer, after what has been done. When the agreement of reference was executed, the bond, as against the surety, was functus officio.

Injunction granted*.

* See *Moore v. Bowmaker*, 6 Taunt. 379. 2 Marsh. 81 & 392.

[219] EASTMOND v. HOLL. Friday, 22d November 1816.—The Court will not refer it to the Master to take an account of what is actually due on bond for principal and interest, and costs, after a verdict for the plaintiff, on the bond having been put in suit.

The plaintiff having obtained a verdict in this cause, (which was debt on bond, dated 19th February 1793,) for the principal and interest then due; exceeding, in amount, the penalty, which was 100l.;

Gifford now moved that it might be referred to the Master, to take an account of what was due to the plaintiff, for principal and interest on the bond, and for costs;—and why, upon payment into Court of the balance of such principal, interest and costs, the bond should not be delivered up to be cancelled, and satisfaction of the judgment entered:—and that proceedings in the mean time, might be stayed, on bringing the penalty into Court.

The affidavit of the defendant (who was surety for his deceased brother) stated, that before the action was brought on the bond, he received a letter from the plaintiff's attorney, demanding the money stated to be then due, for the principal and interest on the said bond, amounting to 100l. : "out of which," (the letter added,) "I believe you have paid, in cash and cattle, about 30l." That in the progress of the cause, over of the bond was demanded, and given: and that, on the production of the bond, there were certain credits for interest, written on the [220] said bond, and also the following words and figures in pencil:—

3 Bullocks	£12	0	0
6 Sheep	15	0	0
	<hr/>		
	£27	0	0
Cash	12	0	0
	<hr/>		
	£39	0	0

which entry in pencil, the defendant considered as a credit in his favour, strengthened by the terms of the said letter:—that defendant relied on said pencil memoranda appearing on the said bond, at the trial of the cause, but that the same were then found to be rubbed off, and obliterated: and that he believed he was entitled to credit for the delivery, by his said brother, of the said items. The affidavit of the defendant's agents, corroborated the existence of the said items of credit, in pencil, as stated by defendant.

It was admitted, that the present motion was novel, after verdict; and that though the statute of the 4th Anne, ch. 16, sec. 13, had authorized such application pending suit, there might be some difficulty, on the ground of delaying the plaintiff's execution. But it was urged that the present was a proper case for the interference of the Court, if they should consider that they had jurisdiction. The plaintiff had not entered up judgment, and the Court might exercise a controul over their process in furtherance of justice.

[221] Sed, per Curiam. The present summary motion would, if granted, clearly operate to delay the plaintiff; and if it could be done, such applications would have been numerous. Another objection arises in point of time. The defendant now seeks to do what he might have done before, when he would have saved to the plaintiff much trouble and expense. We should, therefore, be unwilling to make the precedent.

Motion refused.

THE ATTORNEY GENERAL v. LARAGOTTY. Saturday, 23d November 1816.—The Court will not postpone the trial of an information on the application of the defendant, on the ground of his commission to examine witnesses abroad not having been returned, if they think that there have been sufficient time for its return.—It should be stated in the affidavit, in support of such an application, that the return is expected, and when.

It was moved on the part of the defendant, to postpone the trial of this informa-

tion, on the ground of the commission which had been granted to examine his witnesses at Corunna, had not been yet returned.

Per Curiam. There has been time enough for the return of a messenger; and in a matter of such importance to the defendant, the depositions ought to have been here. The interrogatories must lie in a very narrow compass, as they chiefly relate to public documents. There is no statement made in the affidavit, that there is any expectation of [222] their being forthcoming, or at what time. As to the delay which is charged on the Spanish proceedings, we can take no notice of that.

Motion refused.

HURD v. PARTINGTON AND BENT. Saturday, 23d November 1816.—Where an action at law has been brought on a bail bond, given to the sheriff on an attachment from the equity side of this Court, for not answering according to the condition, and a verdict have been recovered, if the defendant, instead of pleading the answer put in, pleads non est factum, and refuses to settle with the plaintiff by paying the costs pending the action, when he had an opportunity, before the Judge on a summons, this Court will not restrain the plaintiff from taking out execution, (although the defendant has answered since the action brought) but on the terms of all the costs at law being paid: notwithstanding the plaintiff has not (as he ought to have done) refused to accept the answer when it came in, till the contempt was cleared, but has actually waived them, by excepting to the answer and amending his bill. —But the Court will not order the defendant (at law) to pay the costs in equity also, because they were waived, by the plaintiff accepting the answer.

The plaintiff had filed a bill against the defendants, and an attachment having issued against them in Easter Term last, for not putting in their answer, they, and Robert Turner, had given the usual bail bond to the sheriff of Lancashire, in the penalty of 40l.: but at the return of the attachment, their answers not having been yet put in, the plaintiff brought three several actions at law against them on their bond in the Court of Common Pleas, in the name of the sheriff. On the 20th June the defendants, having filed their answer, and on exceptions taken, submitted to answer further, the plaintiff, on the 22d July, obtained an order to amend his bill, and that the defendants should answer [223] the exceptions and amendments at the same time. The bill having been amended, the plaintiff countermanded his notice of trial in the actions on the bail-bond against Bent and Turner, but intended to proceed to judgment and execution against Partington. The plaintiff had obtained a verdict.

Under these circumstances Dauncey and Martin obtained, on the 16th November, an order on the plaintiff to shew cause why he should not be restrained from so proceeding, on the ground that the object of the bond had been satisfied, by the answer having been subsequently put in, and having been accepted by the plaintiff, he had waived the objection of the defendants, not having cleared their contempts.

[The Court expressed a doubt as to the ground of the actions in the Common Pleas, the bond being conditioned that the defendant shall appear and answer, and intimated that the course was, on the condition being broken, to get an order, on the return by the sheriff, of *cepi corpus* for a messenger to bring the defendant in.]

Clarke and Agar now shewed cause. They submitted that the conduct of Partington, who was an attorney, was most reprehensible, in having thrown every obstacle in the way of the plaintiff, and delayed him to the last moment in the equity suit, by having pleaded non est factum to the action. He had not (as he should have done) taken out a summons to stay proceedings on his answer [224] being filed, and therefore he ought to pay the costs incurred in the action which had been tried.

As to the right of action, they cited the case of *Morris v. Hayward* (2 Marsh. 280), where it was held on demurrer, that an action on a bond to the sheriff, under an attachment out of the Court of Chancery, was maintainable.

It was stated, from an affidavit made against the rule being made absolute, that Mr. Justice Burrough had refused, on summons, to consolidate the three actions, but offered to make an order to stay proceedings in all, to give the defendants an oppor-

tunity of settling them in the mean time, by paying the costs, and withdrawing his plea of non est factum.

Dauncey and Martin, in support of the motion. The Court will not encourage the course of bringing three several actions in a case of this sort. The sheriff is to be protected, in whose name the actions are brought. The plaintiff should have made the costs at law the ground of an integral objection to accepting the defendant's answer when it came in, and the Court would not have suffered him to clear his contempt, till the costs had been paid. The plaintiff has taken a wrong course, and must abide by the consequences. They were not warranted in bringing any action, but should have proceeded in this Court in the usual manner on the attachment, and have got a return of *cepi corpus*, and a messenger.

[225] THOMSON, Chief Baron. The question here is, as to the right of the plaintiff at law, and defendant in equity, to have the costs of these proceedings which have been had on the bail-bond. Those proceedings were necessarily carried on in the name of the sheriff, and the plaintiff at law was certainly justified in bringing the action, no answer having been put in whereby the condition of the bond was broken. The defendant might, perhaps, have pleaded compliance, but he chose to give the plaintiff trouble, and therefore pleaded non est factum. On the summons for consolidating the actions, he had an opportunity of making an arrangement, on paying the costs, which he refused. Now the plaintiff must not entirely lose these costs, for the proceeding was rendered necessary to compel an answer.

The costs in equity, he has certainly waived all right to, by accepting the answer.

The costs at law, however, are on a different footing: to those, I think, the plaintiff is entitled, and therefore the defendant must pay them.

GRAHAM, Baron. There is a slight shade of difference in the opinion which I have; notwithstanding the conduct of the defendant, who is an attorney, by standing out as he has done, and trusting to contrivances to get rid of the bond, excites much indignation. It appears to me, that the plaintiff has not done what, by the practice of courts of equity, he was bound to do. For when the answer [226] of the defendant came in, he should have refused to accept it, till the costs at law had been paid, when they would have been within the reach of the Court, who would not have suffered him to clear his contempts, until those costs had been paid. The plaintiff might then have moved to take the answer off the file, and that it might not be suffered to be restored till the contempts had been cleared.

Though I think that bringing three actions was not right, yet, under all the circumstances, I think we should not restrain the plaintiff from proceeding, until all the costs shall have been paid.

WOOD, Baron, absent.

RICHARDS, Baron. I agree with my Lord Chief Baron, that all the costs at law ought to be paid. I have never known any such application made to the Court as that suggested by my brother Graham. The party applying has conducted himself improperly certainly, and that is an additional reason why the Court would not be disposed to interfere.

Order made absolute.

All the plaintiff's costs at law to be paid him by the second day of the Sittings, or the plaintiff to be at liberty to move to dissolve the injunction.

[227] GRAHAM AND OTHERS, Assignees of Leigh, a Bankrupt, v. RUSSELL. Monday, 25th November 1816.—An underwriter is entitled (where the assured has become bankrupt after the policy of insurance was effected) to deduct what was due to him before the bankruptcy, on a balance of accounts between the assured and himself, from out of the amount of his subscription to the policy, in the event of a loss subsequent to the bankruptcy, under the 5th Geo. II. ch. 30: the statute 19 Geo. II. ch. 32, sec. 2, suspending the effect of a bankruptcy in the case of an assured and the underwriter, on both sides, so as to let in the former statute, till the result of the voyage shall have been ascertained, and the accounts stated: because the 19 Geo. II. c. 32, (admitting persons assured to claim losses against bankrupt underwriters, although happening after the bankruptcy,) is in *pari materia*, and the two statutes are to be construed with reference to each other, so as to make them mutually beneficial: and therefore it was held that a set-off

must be allowed to a solvent underwriter, by the assignees of a bankrupt assured, under the 5 Geo. II. ch. 30.

[S. C. 5 M. & S. 498. Referred to, *In re Daintrey*, [1900] 1 Q. B. 566.]

The plaintiffs had brought an action of assumpsit on a policy of insurance, on the ship "Vedra," against the defendant. The interest was averred, in one count of the declaration, to be in Leigh up to the time of the bankruptcy, and since, in his assignees: in another, it was averred to be in Leigh (only). The money counts were laid in the name of Leigh before his bankruptcy, and in the names of his assignees since. The plaintiffs recovered a verdict (damages 200*l.*) at Guildhall, at the sittings after Hilary, 1814, before Lord Ellenborough, subject to the opinion of the Court of King's Bench, on the following case:—

"The plaintiffs are assignees of the estate and effects of John Leigh, a bankrupt, under a commission of bankrupt, issued on the 11th day of August 1811, upon an act of bankruptcy committed on the 9th day of that month. John Leigh was a merchant and owner of the ship 'Vedra,' and he was also an insurance broker. On the 31st day of July 1810, he effected the policy in question at Lloyd's, on his own account, and which was [228] subscribed by the defendant, at a premium of ten guineas per cent., with a stipulation for returns, not material to the present case. The policy contained the usual acknowledgment, by the defendant, of the receipt of the premium; but the premium was not in fact paid to the defendant, but was carried by the defendant to the debit of an account subsisting between him and Leigh, in respect of other policies effected by Leigh, partly as broker, and partly on his own account. The 'Vedra' sailed in prosecution of her voyage in September 1810, and was captured on her homeward voyage on the 24th day of November 1811. At the time of the bankruptcy of Leigh, he was indebted to the defendant in the sum of 128*l.* which was made up of the premium on the policy in question, and of the premiums of other policies effected by Leigh, partly as broker, and partly on his own account: and Leigh at that time had credit with the defendant for 19*l.* 19*s.* 11*d.* for returns of premium and settlements of general average, leaving a balance of 108*l.* 0*s.* 1*d.* then due from Leigh to the defendant. The defendant refused to pay the loss upon the policy in question, contending, that he had a right to set off the 108*l.* 0*s.* 1*d.*, the balance due to him from Leigh at the time of his bankruptcy, or that, at all events, he was entitled to set off, or retain the premium on the policy in question."

The Judges differing in opinion on the argument, in the next Easter Term, it was sent up, by their desire, to the twelve Judges in the Exchequer Chamber, and came on in Easter Term last, when

[229] Littledale, on behalf of the plaintiff, submitted that the sole question was, Whether the plaintiffs were entitled to the whole of their demand of 200*l.*: or, whether the defendant was not entitled to deduct the sums due to him on the balance of accounts subsisting before the bankruptcy, on the ground of a mutual credit, whereby he was protected from the operation of the bankruptcy of Leigh, by the statute 5th Geo. II. ch. 30, sec. 28*? That would depend on, whether the transactions between these parties amounted to what might be deemed a mutual credit, within the meaning of the act. In this case they did not: the whole rested on contingency. The debt, such as it was, was neither certain nor reducible to a certainty: nor could any account have been stated between the parties, on which a balance might have been struck. A debt must be in a sum certain. Here, it was doubtful whether a debt would ever arise at all: and if it should, to what extent, and at what time. It is even more uncertain than a debt arising on a quantum valebant: for that may be ascertained, and at some definite period. [230] The same uncertainty destroys the

* "And be it further enacted by the authority aforesaid, that where it shall appear to the said commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another, and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively."

positive existence of a precise credit, which should be something, at least, in the nature of a debt. When the assignees became possessed of this policy, they obtained merely a remote possibility on which a future contingent credit, depending wholly on chance, might at some time arise. The 28th section of the statute is applicable only to the situation of the parties at the time of the committing the act of bankruptcy; and if there existed not then between the parties a positive credit, capable of being defined, it could not be brought within this statute. In the case *Ex parte Groom* (1 Atk. 119), Lord Hardwicke says, (speaking of this statute)—“Suppose a debt due from Mr. Groom to the bankrupt before his bankruptcy, and that the bankrupt owed him a debt on bond upon a contingency that took place after the bankruptcy, would it not be a great hardship on the rest, that such creditor should be at liberty to set off?”

The cases of *Dobson v. Lockhart* (5 T. R. 138), and *Hancock v. Entwistle* (3 T. R. 435), were also cited to the same point; and more particularly that of *Glennie v. Edmunds* (4 Taunt. 775), as quite deciding the present case. It will perhaps be contended, (it was urged) that that case is not law, or that this is the case of a trust; but if so, can it be contended that all trusts come within the act? and the argument, if good, must go so far. Besides, if the bankrupt were a trustee, the assignees can have no interest; and if they had [231] received money under the trust, it would be for the use of those entitled under it. There are cases of trusts where the doctrine of mutual credit has been acted on; but all those are cases of pecuniary transactions between the parties, and of credit absolutely created by money, not goods. Where personal chattels are entrusted to a person to be sold, a foundation of credit is certainly laid; but no actual credit arises till the goods are sold. And in this case, nothing of a pecuniary nature arose between the parties, so as to establish a mutual credit, till the loss, and that was after the bankruptcy.

[Ellenborough, Lord Chief Justice, suggested, that the case of *French v. Fenn* (Coke's Bankrupt Law, 555, 6th ed.), was destructive of such doctrine, where the mutual credit was absolutely created by the bankrupt entrusting the defendant with the possession of the pearls to be sold, he being at the same time indebted to the defendant, for his share of the purchase-money, which the defendant had advanced.]

Gibbs, Chief Justice. It is impossible to contest the proposition, that goods being entrusted to another to be sold by him, for the benefit of the person depositing them, creates a credit: the fallacy of the argument lies in assuming that no credit arises until the goods are sold.]

The credit on the policy was, in invitum, as against Russell, who was to pay the amount of the [232] subscription, which distinguishes this from the case of *French v. Fenn*, and the other cases, where the party has a chattel, with which he is to do something in favour of the bankrupt, and for which purpose he is entrusted with the possession of it. The last case on the subject is that of *Oliver v. Smith* (5 Taunton, 56), where the doctrine of trusts was much discussed.

[Gibbs, Chief Justice. Two questions arose in that case,—first, Whether the broker was entitled to a lien? and if not, Whether it was not a case of mutual credit? I did not chuse to decide whether the balance went beyond the defendant's general brokerage account, but left it to the jury; for if it had been restricted by the agreement, there would have been an end of all notion of mutual credit.]

The distinction in that case is, that the defendants were so far entrusted with the policy, as that they were actually to receive the losses on it.

[Gibbs, Chief Justice. The ground on which that case was decided was, that the bankrupt had entrusted the defendant with the policy, and the defendant the bankrupt with the amount of the money advanced, so that if the assignees had brought trover for the policy, the defendants would not have been obliged to deliver it up, unless the assignees first paid them their debt, for the money and the policy stood in the place of each other.]

[233] Ellenborough, Lord Chief Justice. Where so many trusts are intruded into a case, I should hardly consider it as one of mutual credit. What is the acknowledged distinction between mutual credits and mutual debts? It seems to me that credit, in the statute, means an inchoate or contingent debt.]

That distinction is to be found in *Ex parte Prescott* (1 Atk. 230). In all the cases on the doctrine of mere trusts creating credit, if rightly decided, there is nothing which touches this, for here, the defendant is so far from being a trustee of the policy for the bankrupt, that he is himself the person against whom it is to be enforced; so

that it lays, therefore, not even a foundation for mutual credit. The case of *French v. Fenn*, arose on a mutual adventure on a purchase of pearls, and produced a question of set-off; but that was a case of embarking in a speculation of profit and loss, and nothing like this. As to the case *Ex parte Decze*, though approved at the time (*ib.*), the principle has been subsequently much narrowed, as appears from *Ex parte Ockenden* (1 Atk. 235), and *Green v. Farmer* (Bur. 2215. 1 B. C. 651, S. C.), in which last case the incongruity between the cases *Ex parte Decze*, and *Ex parte Ockenden*, is commented on, and the latter doctrine preferred: or that case could not have been decided as it was.

[234] [Gibbs, Chief Justice. The question of mutual credit was never started in *Green and Farmer*. The sole question there was, Whether the plaintiff had a general or limited lien?]

The question of mutual credit is certainly the point here: and, whether the dealings of these parties come within the statute 5 Geo. II. That statute was not meant to apply to debts depending on contingencies, but to such as were actually in existence, though not recoverable, at the time of the bankruptcy: which is well distinguished by the case of *Ex parte Prescott*, otherwise, (or if the class of cases founded on *Ex parte Decze* were correct,) the doctrine of lien in cases of bankruptcy, would be extinguished by that of mutual credit.

Barnewall, contra, insisted that this was a case of mutual credit within the statute, and submitted that all that it would be necessary to enquire of, to try that proposition was, Whether, in fact, any credit had been given to the underwriters by the assured? He defined credit to be (as the term was used in the act) the reposing a confidence in another's ability and character, in matters regarding money or money's worth. In its etymological sense and popular acceptation, credit signifies confidence. The credit given to testimony means confidence in its truth. The credit given to a merchant means confidence in his responsibility. Credit of the latter sort, when depending also on extrinsic contingencies, is not the less credit. Those contingencies do not alter the nature of credit, but the [235] degree. Thus, a loan of money to be repaid in twenty-four hours, would be a credit: but there is certainly not less credit given to the person whom you place under an obligation to pay you a sum of money in the same time, provided he should live so long. It rather increases than diminishes the credit reposed in him, for confidence is placed in his responsibility, and in his state of health—that credit would be the same in all respects, whether the person were in that time to repay in money or in a supply of goods, and would be equally within the statute, at least, if not more particularly so, as contradistinguished there from debts, and mere pecuniary engagements. As much beyond the period of twenty-four hours as the person under obligation to pay is trusted, so much greater the credit. Credit expires by efflux of time, where it depends on time, but not till the accident of the contingency, where it is founded on contingency, being either more or less in one case than the other, according to the nature of the particular contract. The advantages of commerce arise out of contingencies, and so do its failures, as far as the individuals are interested, and that consideration was probably the foundation of this statute for the encouragement of speculation, for the general good of trade. It has been said that there is no credit given where the event depended on a contingency: if that were so, there would be no credit in the common cases of bottomry and respondentia bonds, the payment of which depends on the arrival of the ship and goods. That is clearly a contingency: yet there is no question but that there there is a credit created by such instruments—the [236] one party has confidence that the other will fulfil his obligation if the ship arrives. So it is with an assured, with respect to his underwriter. If then the term credit be sufficiently comprehensive to embrace this case, and if, notwithstanding the contingency, it be applicable to the demand of an assured against the underwriter, the amount of subscription of the latter is reducible by the amount of the balance in his favour, as being a case of mutual credit within the statute. That that act has always received a most liberal construction, appears from the case *Ex parte Decze* (1 Atk. 229). As to what is reported to have been said by Lord Hardwicke, in *Ex parte Groome*, his Lordship there put the case of a debt, about which there is no doubt: and what he suggested as to the hardship of admitting a debt

proceeding from a contingency happening after the bankruptcy, it is enough to say that it was not said judicially. The case of *French v. Fenn*, was also a case depending wholly on contingencies. The pearls were in England at the time of the bankruptcy, and the amount of their ultimate produce, when sold in China, was altogether uncertain, or whether it would even create a debt; yet that was allowed to be set off.

But the recent case of *Olive v. Smith* (2 M. & S. 112), is strongly in point, and is completely and decisively in favour of the defendant. There, the trusting a broker with the possession of policies, constituted a credit, notwithstanding the contingency; which [237] ripening into a debt, after the bankruptcy, became the subject of a set-off. And if that was a case of mutual credit within the statute, as between the assured and the broker, a fortiori must it be as between the assured and the underwriter, to which latter the credit was in fact given.

In *Koster v. Eason* (2 M. & S. 423), (confirmed by *Parker v. Beasley*) a broker effecting policies in his own name, on account of others, was held to have established a credit between himself and the underwriters. It cannot, therefore, after those cases, be said that this is not a mutual credit within the 5 Geo. III.

Littledale, in reply, contended that inasmuch as unless a loss had occurred, there would be nothing to be accounted for by the defendant at the time of the bankruptcy, there was then no credit existing; and that distinguished this case from that of *French v. Fenn*, where the defendant had been actually entrusted with the possession of the goods at the time of the bankruptcy, for which he was to account, and which were then certainly of some value, though the amount was uncertain, (nor could be reduced to a certainty, till their produce was ascertained by their sale:)—and that distinction was taken by Mr. Justice Heath, in *Glenzie v. Edmunds*, as putting the question, then before the Court, out of the authority of the case of *French and Fenn*, there [238] cited. The case of *Stemforth v. Fellows* (1 Marsh. 184), is an authority that this statute is not to be farther extended in its construction, at least than it has been. In the other decisions cited, the broker was entrusted with the policy:—but here, the policy is to be enforced against the party, and he was not entrusted until an event arose, which might never happen. In the case of bottomry and respondentia bonds, there is an actual existing credit.

ELLENBOROUGH, Lord Chief Justice, in delivering the opinion of the Court, put the decision of the case entirely on a distinct ground from any which had been taken up in the course of the argument.

Although this case, said his lordship, has been argued as if it were merely a question of mutual credit, and—whether, therefore, the defendant was entitled to set off this demand, under the 5th Geo. II. ch. 30; yet, as the 19th Geo. II. ch. 32, sec. 2*, (having provided that the assured, in any policy of [239] insurance, shall be admitted to prove his debt in respect of such policy, although the loss should not happen till after the bankruptcy,) operates to suspend, as it were, the act of bankruptcy, in favour of an assured trader, till the event of the voyage shall be ascertained, that provision ought to be construed for their mutual benefit; and therefore, if the claim is to be allowed in one case, the set-off must be allowed in the other. The object

* “That from and after the said 29th day of October, the obligee in any bottomry or respondentia bond, and the assured in any policy or insurance, made and entered into upon a good and valuable consideration, bona fide, shall be admitted to claim; and after the loss or contingency shall have happened, to prove his, her, or their debt and demands in respect of such bond or policy of insurance, in like manner as if the loss or contingency had happened before the time of the issuing of the commission of bankruptcy against such obligor or insurer; and shall be entitled unto, and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, in like manner as if such loss or contingency had happened before such commission issued; and all and every person or persons against whom, from and after the said 29th day of October, any commission of bankruptcy shall be awarded, shall be discharged of and from the debt or debts owing by him, her or them, on every such bond and policy of insurance as aforesaid, and shall have the benefit of the several statutes now in force against bankrupts, in like manner, to all intents and purposes, as if such loss or contingency had happened, and the money due in respect thereof had become payable, before the time of the issuing of such commission.”

of the latter statute, was to place the parties in an insurance in the same situation as if the bankruptcy had not happened till after the loss, so as to give the assured an advantage he would not otherwise have had; therefore, in the account between the parties, regard is to be had to the nature of the whole transaction, and not to the side of the account on which the balance appears. So that if the assured be, under the 19 Geo. II., entitled to prove a debt due to him, from an underwriter becoming bankrupt [240] before the loss happened on which it arose, so ought a solvent underwriter, in the case of an assured becoming bankrupt, to be entitled to set off a debt due to him before the bankruptcy, against a loss happening after it. In this case, the assured was indebted to the underwriter, in a balance of 108*l.* 0*s.* 1*d.*, and became bankrupt before the loss:—his assignees seek to recover the whole amount of the loss,—the defendant claims a right to set off that balance,—and, we think, that under the beneficial construction of the 19 Geo. II. the defendant is entitled to deduct the general balance of 108*l.* 0*s.* 1*d.* in his favour, from the amount of his subscription to the policy so due from him on the loss which happened. So far, therefore, the

Verdict to be reduced.

[241] WHITMORE AND OTHERS v. RICHARD THORNTON, ROBERT THORNTON, WEST, AND PREHN. Tuesday, 26th November 1816.—The Court will set aside an injunction—(granted after trial and verdict obtained on the ground that one of the defendants (plaintiffs at law) in whom the interest was averred to be, was in contempt for not having answered, and that his answer was most material to the defence at law of the plaintiffs (in equity) to the action, as it might shew that the property was not (in truth) in him:—and that although the affidavit of merits, on which it was obtained, contain allegations of strong facts in support of the plaintiffs' equity; and although the Court of law have since, on the same facts having been brought before them on motion for a new trial, granted a rule nisi, against which cause has not yet been shewn.—Such an order can only be obtained before verdict; and if obtained after, will be discharged on motion—Shewing cause against a rule nisi for a new trial, is not a breach of an injunction.

The defendants, who were merchants in London, had obtained a verdict at law, in last Trinity Term, against the plaintiffs, who were underwriters, for the amount of their subscriptions to a policy of insurance, effected on certain vessels and their cargo, then at sea, (lost, or not lost). The defendants had brought the action in the name of Prehn, a merchant at Petersburg, in whom the sole interest in the ships and cargoes was averred to be. On the 27th June, the plaintiffs filed the present bill, to restrain the proceedings; alleging that Prehn, the foreign merchant, had, in fact, no interest in the property insured, and that his name was merely used colourably: that the other defendants, who they alleged were really the owners, knew of the loss of the vessel before they effected the insurance, as would appear by their correspondence, if produced—the production of which, they prayed, might be ordered by the Court. Richard Thornton answered the 15th July, but the other defendants [242] were in contempt. In support of the application for the injunction, an affidavit (sworn the 11th of November) was filed, verifying the allegations in the bill, and stating some strong facts, to shew that there was good ground for suspicion of unfair dealing on the part of the insured; and that on those circumstances having been brought before the Court, on a motion for a new trial, a rule nisi had been obtained;—and, on the 12th instant, this Court granted an injunction, as prayed;—and

Fonblanque and Raithby now moved, pursuant to notice, That that injunction might be dissolved; or that the plaintiffs might be directed, within a week, to pay into Court the amount of their several subscriptions to the policy of insurance mentioned in the pleadings;—and that the defendant Prehn might be at liberty to shew cause against the rule nisi.

[Thomson, Chief Baron. It is not a proceeding which amounts to breach of an injunction, to shew cause against a rule for a new trial.]

It was submitted, that an injunction should not have been granted in a case like this, after trial and verdict; or, if it were consistent with the practice of the Court, it ought to have been on terms of bringing the money into Court. All the facts detailed in the affidavit, were strongly urged at the trial; and yet the jury found for the

defendants, (the plaintiffs at law). As to Prehn's answer not having come in, it is the plaintiff's fault that it is not [243] on the record; for he has not used all due means and diligence in getting it. If he had applied for the injunction before, that proceeding alone would most probably have produced the answer. And if the answer had been so material to their defence, they should have got the injunction, to stay the proceedings at law, till it should have come in, in proper time,—before the trial. They had no right to wait till they had taken the chance of a verdict, and possessed themselves of the defendant's case. If it were practicable to obtain an injunction, merely for want of a defendant's answer, a defendant at law might, in some cases, have as many trials as there were defendants in equity, if they should answer successively.

[Graham, Baron, observed, that it was not unusual to grant injunctions for want of answer, even after verdict; and alluded to the case of *Kensington v. White* (vide ante, p. 164).]

But it was observed that, in that case, the plaintiffs had brought the money into Court, and very few of the many actions there pending had then been tried. The defendant, too, was constantly abroad in that case; and the delay of his answer coming in was not sufficiently accounted for;—that was therefore a very peculiar case.

Here, the plaintiffs having elected to let the proceeding at law take its course, must now abide by [244] the result, (*Barlow v. Brent*,) (1 Vern. 175); unless in cases where new matter of defence has been subsequently discovered, and then the Court will sometimes interfere. The sole object of the injunction in this case is for delay.

Dauncey and Winthrop opposed the motion.—They admitted that Prehn's answer was material, and that, before verdict, the application for an injunction, on a proper affidavit of merits, would have been almost of course. There is (as is admitted) nothing but the trial, which has been had, that furnishes any objection to this motion. It was so, however, in the case of *Kensington v. White*, where an injunction was granted by this Court, notwithstanding a trial had been had. Here, too, it is a strong circumstance, that the proceedings at law are not yet at an end; for a rule having been obtained, to shew cause why the verdict should not be set aside, and a new trial granted, is the same thing as if there had been in fact no trial. In this case, too, the defendants, who have not answered, are abroad:—Prehn is at Petersburg, and Robert Thornton and West, in Flanders. As to paying the amount of the subscription into Court, if the Court so order it, it must certainly be done.

THOMSON, Chief Baron. The case of *Kensington and White*, which has been alluded to, was certainly under very different circumstances from those of the present. In that case, although four actions had been tried, and verdicts given for the plain-[245]-tiffs at law, there were very many other underwriters against whom actions were pending, that had not then been tried, and it seemed altogether to be a strong case for interfering to suspend the proceedings; for White, who was a mere man of straw, and not to be found any where, though said to be somewhere in America, could not be made to put in a sufficient answer till after many years. There had been no consolidation of those actions, and a great many yet remained to be tried; so that that was, in effect, an injunction, restraining proceedings in any future actions, until ulterior evidence could be got in, rather than against those which had already been tried. White was, in fact, the sole defendant, too, in that case.

Now, here, the question is, Whether we shall grant an injunction, after trial and verdict obtained, without any such qualifying circumstances, till the answer of one of three defendants come in? At the time the cause was tried, Prehn was abroad, and then an injunction, for want of his answer, might have been obtained. The great ground of defence to the action of law was, the fraudulent insurance, the assured having had knowledge of the loss at the time; and the property not being in Prehn, the person in whom it was averred to be, but in the other defendants. Richard Thornton, being examined on the trial, proved the property to be in Prehn. Afterwards a new trial was granted, on an affidavit made by Beardmore, that Thornton, the witness, had, in conversation, ac-[246]-knowledgeed to him that the property was not in Prehn. But that circumstance can have no weight with us in disposing of the present motion. Had this motion been made before the trial, we should have granted it on a common affidavit. At this time it is infinitely too late, and it would be contrary to proper practice to restrain the defendants.

It was strongly put in argument, that if this were practicable, there might be as many injunctions and trials, as defendants in equity. For the sake therefore of the

rules of practice, which is of infinitely more consequence than this question of property, large as the amount is to the parties, we must discharge this order for the injunction which has been obtained by the plaintiffs.

GRAHAM, Baron, of the same opinion. In the case of *Kensington v. White*, there were other defendants at law, who had not tried their causes, and might have had an equity, from which the verdicts that had been obtained should not have precluded them. There should be much stronger ground laid for the interference of the Court after a verdict, than are brought before us here.

[His Lordship stated the circumstances of the case, observing, that the plaintiff was apprized long ago of all the facts on which this application rests, and might have applied in time to have had the injunction as a matter of course.]

[247] The plaintiffs, however, chose to go to trial, and they must now abide by the decision of the Court of Common Pleas. It was indiscreet in them to do so certainly, but by that they have precluded themselves from the available defence which they might have, for it is not the province of courts of equity to remedy the consequences of suitors having acted indiscreetly, or to take from courts of law all jurisdiction.

I think the order for the injunction should be discharged, and of course the rest of the motion is out of the question.

WOOD, Baron, absent.

RICHARDS, Baron. I am perfectly satisfied with the opinions which have been already given.—[His Lordship stated the circumstances of the case.]—In former times, courts of equity exercised a jurisdiction over common law trials, which they do not do now. In the equity cases abridged, there are several instances of the exercise of such an interference to be found, under the head "Injunction" (*b*); but that practice has long ago been put an end to, and at present there is no such jurisdiction exercised.

Such applications as these are properly made to courts of equity, as auxiliary to courts of law on trials between parties, by means of bills for discovering, and commissions to examine absent witnesses: [248] but their object is merely to give the party assistance at the trial of an action. It must therefore necessarily follow, that where there is no trial to be had, there can be no discovery to be sought. If a verdict had passed simpliciter, without more, a bill then filed for a discovery might have been demurred to, for there could be no discovery there, any more than as to a matter not at issue: so, also, an application for an injunction would have been refused on the same principle. And I do not see that there being a rule pending, for shewing cause why there should not be a new trial, can make any difference.

In this case the bill is filed, after trial and verdict, for the plaintiff at law; but the defendant could not demur here, because that does not appear on the record, and therefore it is that he comes to the Court to apply for a discharge of the injunction which has been obtained.

The only distinguishing circumstance in this case is, that there is at this moment a rule to shew cause pending, why a new trial should not be granted. Now let us suppose that that rule should be discharged, then we should be doing what would be nugatory. Are we to order a conditional injunction, in case that rule should be made absolute, with the alternative that it shall stand dissolved, if the rule should be discharged? It is impossible that there should be any such practice in this Court. The only case cited to shew that it may be done, is that of *Kensington v. White*; but that was a very [249] different case. The trial which had been had there ought not to have precluded the other defendants who had not lost a trial. That, therefore, comes to the common case of an application before trial; but if that case were wrongly decided, is that any reason why we should do wrong again? And certainly it would be extreme injustice to refuse the present application to get rid of the order which has been obtained for an injunction.—As to the object of delay, which has been adverted to, that is notoriously often the only motive for applications for injunctions under these circumstances.

Order for the Injunction discharged.

[250] IN THE EXCHEQUER CHAMBER. (IN ERROR.)

DORAN v. O'REILLY AND OTHERS. Wednesday, 27th November, 13th November 1816. —In an action of debt on a foreign judgment, for an entire sum recovered on counts for the balance of a merchant's account, for goods sold—monies advanced and paid—monies due on bills of exchange—and for interest: this Court will not give interest on affirmance of the judgment of the Court below.—Where interest is given, the debt must appear on the record to be one which carries interest.—The Court will not act on facts stated to them by affidavit, because the other party can have no opportunity of contradicting them.

Littledale moved for interest, in the event of the affirmance of this judgment in the Court of King's Bench. It was an action of debt brought on a judgment in the Supreme Court of Judicature in Jamaica, in which the defendant, the plaintiff in error, had suffered judgment by default.

It appeared, from the affidavit read in support of the application,—that in the amount of the damages which had been recovered in the cause in the King's Bench, interest was calculated, included and allowed:—that the declaration in that cause consisted of two several counts on the Jamaica judgment, and other counts in debt, including a count for interest: (but the cause of action, in the Jamaica Court, not appearing on that affidavit, the motion stood over that that might be ascertained;) and now it was moved on a supplemental affidavit, stating that that judgment had been recovered by the defendants in error, in an action for the balance of a merchant's account for goods sold, monies advanced and paid, [251] monies due upon bills of exchange, and for interest: that the amount of the cash-payments or advances, and monies so due on bills of exchange, forming part of the debtor's side of the said account, exceeded the sum recovered by the Jamaica judgment, and that it was the usual course of dealing in general, as well as between these parties, to charge and allow interest upon such accounts.

It was submitted, that the defendants (in error) were entitled to interest on the special counts, and to those the application was confined:—that the affidavits shewed that the sum recovered in the Jamaica Court was on demands which carried interest by the course of dealing there, and that where that was so the cases authorized an application for interest to this Court;—that the judgment recovered in Jamaica had consolidated all the demands in one entire sum, and in an action brought on that judgment there, the Court would have given interest.

[Gibbs, Chief Justice. I am not prepared to admit that we are bound to adopt the practice of the Courts of Jamaica.]

It was also urged, that interest had been given in this Court on a judgment, the subject-matter of which did not carry interest: and he produced a case, furnished by the clerk of the errors, of interest having been allowed on the balance of a merchant's account.

GIBBS, Chief Justice. We should not be war-[252]-ranted in granting this application. In those cases where we give interest on judgments affirmed, it always appears on the face of the record, that the demand of the plaintiff below is of a debt which bears interest of course, as in the case of a bill of exchange, or promissory note. The first count of the declaration in the foreign Court is for goods sold. On that demand no interest could be due, and therefore none ought to be recovered.

Besides, we are called on to do this on facts stated in an affidavit, which would be a mischievous precedent. All those facts might be false, and if they should be so, the party who is to be fixed with them can have no opportunity of contradicting them.

BURROUGH, Justice. Interest is never recoverable on counts for money paid, and money had and received without a special contract. That has been decided on solemn argument.

GRAHAM, Baron. Had the plaintiff below brought assumpsit, he might have recovered interest in the shape of damages.

Motion refused.

WOOD, Baron, absent.

[253] ANONYMOUS. Wednesday, 27th November 1816.—Service of notice of motion for interest on affirmance of a judgment of the Court below, by leaving it with the occupier of the house where the plaintiff in Error had lodged, and who informed the person calling for that purpose, that the plaintiff in Error was abroad, but that she was authorised to receive all papers for him, is insufficient.

Littledale moved for interest on the affirmance of a judgment of the Court below, on an affidavit of service of the notice of motion, the substance of which was,—that the deponent had attempted to effect the service on the plaintiff in error, at the house where he had lodged;—that he was informed by the occupier of the house that the plaintiff had gone abroad, and that she was authorized by him to receive whatever letters or papers might be brought there for him,—and that the deponent left the notice with her.

But the Court said, that the service was insufficient, and refused the motion.

STRATTON *v.* HILL. Wednesday, 27th November, 1816.—Debt lies against the indorser of a bill of exchange, drawn by him and made payable to his order.—Indorsement by the drawer does not give him a new character as indorser, or divest him of any liability to which as maker of the bill he would have been subject.

The plaintiff declared in debt for 2450*l.* rent arrear, and on a bill of exchange: “For that the defendant on, &c. at, &c. according to the usage and custom of merchants from time immemorial, used and approved within this kingdom, made his certain bill of exchange in writing, bearing date, &c. and then and there directed the said bill of exchange to [254] the drawers, by which said bill of exchange the said defendant then and there requested the said drawers, two months after the date thereof, to pay to his the said defendant’s own order, the sum of 500*l.* value received, which said bill, said drawers afterwards, to wit, &c. upon sight thereof accepted, according to the said usage and custom of merchants; and the said defendant, to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on, &c. at, &c. according to the said usage, &c. indorsed the said bill of exchange, and thereby then and there ordered and appointed the said sum of money, in the said bill of exchange specified, to be paid to the said plaintiff.” Averment of due presentment, non-payment and notice,—whereby, &c. *actio accrevit*. There was a similar count on the same bill of exchange, with an averment that the drawees, (having accepted,) were not to be found at the place at which the bill had been addressed to them.

The plaintiff having recovered a verdict, (which was entered on the *postea* generally).

[12th November.]—Merewether now moved an arrest of judgment on the counts on the bill of exchange, on the following authorities:—1 *Mod. Entr.* 312, where it was said, that an action of debt would not lie against the indorser;—*Wish v. Craig* (8 *Mod.* 373. 1 *Strange*, 680, S. C.), where it was held, that debt did not lie on a promissory note, nor, [255] *indebitatus assumpsit*, on a bill of exchange; and an *Anonymous case*, in *Hard.* 487, in which the Court said, that the custom of traders did not extend so far as to create a debt.

Taunton, W. E. and Chitty, now shewed cause; submitting, that as the defendant was maker of the bill of exchange as well as indorser, his indorsement was necessary, to give it currency, because it was made payable to his own order. But that circumstance (they contended) did not alter his original character of principal debtor, nor discharge him from his liability as drawer. His responsibility as the original debtor never ceases. The authority of the cases cited on obtaining this rule, (in *Modern Reports* and *Strange*.) are much shaken by what fell from Lord Eldon, in the case of *Bishop v. Young* (2 B. & P. 78), who says, that in those reports of that case the proposition is merely laid down, and that generally; for it is not made to appear either by whom the action was brought, whether payee or indorsee, or against whom, whether maker or indorser. But his Lordship in that case furnishes the true criterion for deciding the question then before him, which was, whether debt might be

maintained against the maker of a promissory note, —by stating the sole question to be, Who owes the debt? The same criterion will serve us here, and the answer must be in this case, the drawer of the bill. Another conclusive inquiry is, for whose benefit has the apparent consideration enured? Clearly for the drawer's; and that is the reason given in the case of *Hodges v. [256] Steward* (Skin. 346), where the Court allowed, that debt would lie against the drawer of a bill of exchange for value received. Unless therefore the fact of the defendant's having indorsed the bill, divest him of his liability as the original, and ultimately responsible debtor,—between whom and every person becoming possessed of the bill there is a continuing privity,—the present form of action is right, and the plaintiff is entitled to the judgment that he has recovered.

Merewether, in support of the rule, admitted that the question was, whether the plaintiff was liable in the present form of action, as drawer of the bill of exchange payable to his own order, after having acquired the new character of indorser; and whether debt might be maintained against an indorser, who was also drawer of a bill, as, between an indorser and payee there is no such privity of contract as will sustain debt. In the case of *Bishop v. Young* there are several distinctions from the present: the action was brought by the payee against the drawer, not of a bill of exchange, but of a promissory note, which is the case of a special contract and immediate privity, and the note was not indorsed.

Per Curiam. The question in this case appears to us to be quite clear. The subsequent indorsement, by the actual drawer of the bill of exchange, does not render him the less amenable on that account to any liability to which he was originally subject.

Rule discharged, with costs.

[257] DITCHETT AND ANOTHER v. TOLLETT. Wednesday, 27th November 1816.—Proceedings against bail below will be stayed on motion (on payment of costs) where the plaintiff in the original action has been neglectful in proceeding against them on the bond as early as he might have done, even where a trial has been lost, if there has been reason, on the part of the bail, to think that the plaintiff did not mean to proceed in the action; such as the bankruptcy of the defendant.—But the bail-bond will be ordered to stand as a security, if the bail have not applied to stay the proceedings on the earliest opportunity.—An affidavit, made after a rule to shew cause granted, is not admissible.

Littleale shewed cause against this rule nisi, that, upon payment of costs, all proceedings in the actions brought on the bail-bond assigned, should not be stayed.

The rule was obtained on an affidavit made by the defendant's attorney,—that on the 25th March a commission of bankrupt issued against the defendant, under which he was duly declared a bankrupt,—that the writ on which the defendant was arrested, issued on the 1st of April, returnable in fifteen days of Easter (1st May):—that bail was given to the Sheriff;—that on the 2d July (Trinity Term ended the 3d) the plaintiffs, as assignees of the Sheriff of Devon, issued a writ against the defendant and his bail, returnable on the morrow of All Souls. On the 10th of July the bail below put in bail above, before a Baron, and delivered the bail-piece to defendant's clerk in Court, who returned it, with a communication that process had been issued on the bond. On the 12th deponent served him with a summons to stay proceedings in the action on the bond assigned: that finding bail had been served in the present Term, with notice of declaration, deponent gave notice, on the 14th November, that the bail would, on Wednesday then next, justify by affidavit in open Court, which they did; and that plaintiff might **[258]** have taken an assignment of the bail bond on the 10th of May, and have issued process thereon for want of bail being put in in due time, and believes that if he had done so, the bail below would have put in and perfected bail above, and applied to stay the proceedings on such bond.

It was stated, that the reason why bail above was not put in and perfected in time was, that it was thought that as the defendant had been declared bankrupt, the plaintiff would not proceed in the action, and therefore no steps had been taken till the bail were served with process on the bond assigned, on the 2d of July.

In answer to this, it was now urged that the bail had not used such diligence as they ought to have used in perfecting bail above, when, perhaps, they might have

obtained an order to stay proceedings, on payment of costs; but, without first justifying, they could not have obtained such an order. That the summons which had been taken out for staying the proceedings against them, was not followed up by attending a Baron, so that they had also been guilty of laches. And if it should be said that the bail were not bound to justify before application for such order, because they were the same bail as had been given to the Sheriff, yet, the plaintiff having lost a trial here, the defendant is not entitled to the order sought, without an affidavit of merits in the original action, and submitting that the bail-bond should stand as a security.

[259] If it should be argued that the plaintiff, not having filed a declaration *de bene esse*, has not been delayed; the answer is, that it has been determined that a plaintiff is not bound to declare within the time limited for putting in bail (*a*), and after that time he cannot declare till after bail are actually put in.

The original action is on a bill of exchange, the plaintiffs residing in Bristol, the defendants in Devonshire; and whether the venue were laid in London or in the country, the plaintiffs might have gone to trial, and have obtained a judgment of Trinity Term, so that they have lost a trial. For these reasons it was submitted, that the proceedings should not be stayed, or at least that it must be on terms of paying the costs, and letting the bail-bond stand as a security.

[An affidavit, sworn and filed since the rule obtained, was not allowed to be read.]

Dauncey, and M'Mahon, in support of the rule, contended, that if the plaintiff had lost a trial, it was his own fault; that he had, by his delaying himself to proceed in the first instance, (by not having put the bond in suit as early as he might have done, which is ruled in *Hutchinson v. Hardeastle* (Barnes, 103), to [260] be incumbent on him to do,) lulled the bail into security, by giving them reason to believe that he had abandoned the action, (and there was the more reason in this case that the plaintiff should consider the suit abandoned, because the defendant had become bankrupt:)—that the plaintiff had, therefore, by his own laches, forfeited his right to proceed against the bail*,—and they submitted, that the bail below could not have applied to stay proceedings, till bail above had been perfected, which was not done till the 20th of November.

The Court said that there had been laches on both sides, and, in consequence of the plaintiff's neglect in not proceeding with more regularity, they would, even at this time, stay the proceedings; but as the original delay had begun on the part of the bail below, and as they had not subsequently used as much diligence as they might, they would order the bail-bond to stand as a security, and that they should pay the costs: And, on those terms, they made the

Rule absolute.

[261] THE KING v. STANCHER. 28th November 1816.—A defendant having been committed to prison on a forfeited recognizance, whereby his wife and family are become burthensome to the parish, is not a sufficient ground for the discharge of the defendant from such recognizance.

Barber moved the Court for the discharge of the defendant from his recognizances, (which he had entered into for the appearance of one Cartwright, to two indictments, one for perjury, and the other for compounding felony,) and which had been estreated. The defendant had been apprehended, on the forfeiture of the recognizances, and committed to prison, in August 1815, whereby his wife and six children had become burthensome to the parish. The motion was made on behalf, as well of the parish, as of the defendant; but

The Court refused the Motion.

(a) Tidd, 292. *Carmichael v. Chandler*. Tr. 24 Geo. III. Impey, K. B. 208. Prac. Reg. 71. *Merryman v. Carter*. Strange, 1262.

* *Heath v. Astley*. Barnes, 61. *Queenport v. Wall*. Ib. 62. *Ward v. Alderton*. Ib. 84. *Pigott v. Trustee*. 3 B. & P. 222.

JONES AND OTHERS v. RIPLEY. Wednesday, 30th November 1816.—An indorsee of the same bill of exchange on which the principal had been arrested, and another person who had justified as bail in other actions, neither of whom had sworn in the affidavit of justification, (which was in the common form, that he was worth double the sum sworn to, over and above the aggregate of all the other sums,) were rejected as bail for the defendant.—Time being asked, the Court granted it, to put in other bail, but would not allow the defendant merely to amend the affidavit, or to offer again the same bail.

The justification of the defendant's bail (by the usual affidavit) was opposed, on an affidavit, stating that the action was brought against the defendant as indorser of a bill of exchange; and that another action had been brought against Ann Pugh, as [262] indorser of the same bill; and that she and Caleb Smith (the other bail) were also bail in other actions in the King's Bench for large sums. And it was now objected, that the bail should have sworn themselves to be worth double the sum which was the cause of action, over and above all their just debts and the sums for which they had justified in the other Court: and as to Ann Pugh (if she, being liable on the same bill, were admissible at all) that she should also have included, in her affidavit, the amount of the bill.

Owen submitted, that according to the practice of the Court of King's Bench, it was sufficient that the bail swore merely that they were worth double the amount of the debt, over and above their just debts, that Court considering other actions bailed, as included under the word debts (Tidd, Pr. 258, 5th ed.).

But the Court ruled that that was not the practice of this Court, and said, that had the bail justified in open Court, they must have sworn themselves to be worth double the sum sworn to, over and above their just debts, and all the other sums, and that they might have examined on that point.

Owen then applied for time; and

The Court gave till the following Tuesday, but with an express understanding, that they should [263] not be allowed to amend the present affidavit, but to add other bail, and put the plaintiff in as good a situation as he would have been in, if the bail had now justified.

Rejected.

STONEHAM v. PINK. 22d November, 1816.—One of bail, being sworn to be clerk to an attorney rejected.

The Court rejected the bail in this case, on an affidavit that one of them was clerk to an attorney.

NICHOLSON AND ANOTHER v. BOWNASS AND HALL. Thursday, 28th November 1816.—Where a defendant is abroad, a plaintiff may still (since the 51st Geo. III. ch. 124) issue a distringas on service of the venire facias, for the purpose of compelling his appearance thereby, as he might have done before that act; but not for the purpose of enabling the plaintiff to enter an appearance for him, so that he may proceed thereon to final judgment as if the defendant himself had appeared.

Littledale had, on a former day (16th November) moved for a distringas against the defendant Bownass, for not appearing to a writ of venire facias (ad resp.) sued out for recovering a partnership debt, on an affidavit of service (as to Bownass), by delivering a copy of the writ to James Rickarby, and shewing him the original, at the dwelling-house occupied by him (Rickarby) as tenant to the said J. Bownass, and which deponent believed to have been his (Bownass's) last place of residence previous to his going abroad, after three several attendances at such dwelling-[264] house, and also at the counting-house of them the said Bownass and Hall: with the usual allegations.

On that occasion, the Court entertaining great doubt whether, since the Act of the

51st Geo. III. ch. 124 *, they could order a *distringas*, as according [265] to the ancient practice, without personal service of the summons, in cases of defendants not having privilege of Parliament, ordered the matter to stand [266] over; and now, on the motion being mentioned again, they said, that on considering the Act, they were of opinion that the statute had not made any other alteration in the old practice, than that a plaintiff should not be permitted to use the proceeding of *distringas* as a preliminary step to entering an appearance for a defendant abroad, and then carrying on the suit as if he had duly appeared. With that object, therefore, they said they could not grant the process; but if it were to be used only for the purpose of compelling

* Whereby it is enacted, "That in all cases where the plaintiff or plaintiffs shall proceed by original or other writ and summons, or attachment thereupon, in any action against any person or persons not having privilege of Parliament, no writ of *distringas* shall issue for default of appearance; but the defendant or defendants shall be served personally with the summons or attachment: at the foot of which shall be written a notice, informing the defendant or defendants of the intent and meaning of such service, to the effect following:—

"C. D. [naming the defendant.] You are served with this process at the suit of A. B. [naming the plaintiff or plaintiffs] to the intent that you may appear, by your attorney, in His Majesty's Court of _____ at Westminster, at the return hereof, being the _____ day of _____ in order to your defence in this action. And take notice, that in default of your appearance, the said A. B. will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared by your attorney."

"But in case it shall be made appear to the satisfaction of the Court, or, in the vacation, of any judge of the Court, from which such process shall issue, or into which the same shall be returnable, that the defendant or defendants could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant or defendants; that then it shall and may be lawful for the plaintiff or plaintiffs, by leave of the Court, or order of such judge as aforesaid, to sue out a writ of *distringas*, to compel the appearance of such defendant or defendants; and that at the time of the execution of such writ of *distringas*, there shall be served on the defendant or defendants, by the officer executing such writ, if he, she, or they can be met with; and if he, she, or they cannot then be met with, there shall be left at his, her, or their dwelling house, or other place where such *distringas* shall be executed, a written notice in the following form:—

"In the Court of _____ [specifying the Court in which the suit shall be depending] between A. B. plaintiff, and C. D. defendant, [naming the parties.] Take notice, that I have this day distrained upon your goods and chattels for the sum of forty shillings, in consequence of your not having appeared, by your attorney, in the said Court, at the return of a writ of _____ returnable there on the _____ day of _____ and that in default of your appearing to the present writ of *distringas*, at the return thereof, being the _____ day of _____ the said A. B. will cause an appearance to be entered for you, and proceed thereon, as if you had yourself appeared by your attorney."—"E. F." [the name of the sheriff's officer.]

"To C. D. the above-named defendant."

"And if such defendant or defendants shall not appear at the return of such original or other writ, or of such *distringas*, as the case may be, or within eight days after the return thereof; in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made and filed in the proper Court, of the personal service of such summons or attachment, and notice written on the foot thereof as aforesaid, or of the due execution of such *distringas*, and of the service of such notice as is hereby directed on the execution of such *distringas*, as the case may be, to enter a common appearance for the defendant or defendants, and to proceed thereon, as if such defendant or defendants had entered his, her, or their appearance, any law or usage to the contrary notwithstanding; and that such affidavit or affidavits may be made before any judge or commissioner of the Court, out of or into which such writ shall issue or be returnable, authorized to take affidavits in such Court, or else before the proper officer for entering common appearances in such Court, or his lawful deputy; and which affidavit is hereby directed to be filed gratis."

an appearance, by distraining on him till he should appear, they saw no reason why the distringas should not be issued in the usual course. They also said, that service of the venire, for the purpose of obtaining such distringas, ought to be in all such cases by leaving it at the defendant's actual dwelling-house or usual place of abode: but that, if left at his counting-house only, it would be insufficient, unless given to a partner, or some accredited person there*.

The end of Michaelmas Term.

[269] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, SITTINGS AFTER MICHAELMAS TERM, 57 GEO. III. GRAY'S-INN HALL.

THE KING (IN AID OF LUND AND ANOTHER) v. SHERWOOD. Saturday, 14th December 1816.—An inquisition returned, finding special matter, without drawing and stating some conclusion as a fact, is bad, and will be quashed on motion.—As, if it find that money arising from the effects of A. had been placed in the hands of B., a banker, as the property of A., by C. and D., his assignees under a commission since superseded,—but that A. was then indebted to B. in a larger amount than the money so placed in his hands, which still remains owing, unless B. has a right to retain the same towards discharging the said debt.—Quere, whether a set-off can be pleaded against a claim enforced by Extent?—Where the inquisition has been so quashed, it is necessary to issue a new writ, the former having been returned.

Gifford had obtained a rule to shew cause why the inquisition, which had been returned under this Extent, (and which professed to find what [270] debts, credits, specialties, and sums of money, Sherwood, or any person or persons to his use or in trust for him, then had in the bailiwick of the Sheriff of the county palatine of Lancaster,) should not be quashed for irregularity, the finding being uncertain and inconclusive, and therefore not traversable.

The finding of the Jury was set out in the following manner:—

“That the sum of 626l. 19s. 4d. (arising from the effects of the said William Sherwood, who then carried on trade under the firm of William Sherwood and Company, of which effects the persons acting as assignees, as after mentioned, possessed themselves,) was, before the issuing of the said Extent, placed in the hands of Joseph Hadwen, of Liverpool aforesaid, banker, under the title of the estate of William Sherwood and Company, by certain persons then acting as assignees of the estate and effects of the said William Sherwood, under a commission of bankrupt then in force against him; and that such commission, in consequence of an issue at the last March Assizes for the county of Lancaster, directed by the Right Honourable the Lord High Chancellor to try whether the said William Sherwood was or was not a bankrupt, was ordered to be superseded before the issuing of the said Extent; and that the said William

* *Dwerryhouse v. Graham and Others.* Trinity Term, 1811. (Same point.)

This was an action against three persons, who were partners in trade.

The writ of venire was served on one of them, at the counting-house of the three, and two other copies were also given to [267] him for the other defendants as service on them. On that process, so served, the plaintiff issued a distringas, and levied the common issues, 40s.

Littledale moved, on the behalf of the resident partner, to set aside the distringas, on an affidavit of the above service, and that the other two defendants were resident in America, and had been absent from England two years; contending, that such service was irregular and insufficient to warrant the distringas: and he obtained a rule to shew cause.

Dauncey shewed cause; and insisted, that the statute had made no alteration in the ancient practice of issuing distringas on service of the venire.

The Court took time to consider, and on the last day of Term they discharged the Rule Nisi: holding the distringas to have been well issued, according to the ancient practice of the Court.

Sherwood, under the said firm of William Sherwood and Company, when the said money was so paid into the said bank of the said [271] Joseph Hadwen, was indebted to the said Joseph Hadwen to a much larger amount than the money so paid in, which still remains owing, unless the said Joseph Hadwen has a right to retain the same sum towards discharging the said debt. And the said Jurors do further find, that the said sum of 626l. 19s. 4d. was so paid in before the said 24th day of September; and that the same bears an interest at 3l. per cent. per annum, unless the said Joseph Hadwen has a right to apply the same towards discharging his said debt. And they also find, that on the said 24th day of September there was, and still is, a debt of 245l. 15s. owing by John Neal, of Liverpool aforesaid, ship-chandler, for a quantity of soap, part of the effects of the said William Sherwood, sold and delivered under the authority of the said persons, so acting as assignees as aforesaid; which said money and debt the said sheriff hath seized and taken into His Majesty's hands. And the said Jurors further find, that the said William Sherwood hath not any other goods or chattels, debts, credits, specialties, or sums of money, or any lands or tenements, in my bailiwick, to the knowledge of the said Jurors, which can be extended, appraised, or seized, into His Majesty's hands."

It was also pressed, that the inquisition had furnished, on its own shewing, facts which would support a plea of set-off.

[272] Dauncey, and Whetherell, shewed cause; submitting, that there was sufficient ground stated in the return, to shew that the money in the hands of Hadwen was the money of Sherwood;—and that his assignees might have maintained trover for it on the facts stated;—that there was no regular form in practice for returning the finding of a debt, and no reason why it should not be specially found, leaving the question of law to be determined by the Court: nor could there be any stronger objection to this, than to the common return, of the lands of a bankrupt being seized, but that they were subject to a mortgage;—and, that the facts stated in the inquisition were distinctly put, and might, if material, be traversed. In *Monk's case* (1 Vent. 221) the Court were of opinion, that money of Monk's, which had been paid into Court to abide the determination of a question, might be found, on a writ to inquire what goods and chattels he had: because, they said, that the money being but as a depositum there, it might be found, and that the Court did not protect it from the inquisition. Here the money is expressly found to have arisen from the effects of Sherwood, and as such to have been paid into Hadwen's bank, and that the same still remained due and owing to him, unless Hadwen had a right to retain it; and whether he had or not, therefore, the money is found to be the property of Sherwood.

As to the claim of a right of set-off, there can [273] be no such plea against the Crown, as is decided by the case of *The King v. Copeland* (Hughes' Rep. 204).

Gifford, in support of the rule, contended, that the sheriff had no right to find special matters thus, and then to raise questions of law on them, which prevented his returning the simple fact; that on the face of this inquisition, there was nothing definitively returned on which an issue could be taken, or which, if tried, would decide the case, but a venire de novo must be awarded, so that the finding would be altogether nugatory. It is not found, as a fact, that the money is due and owing to Sherwood, nor to whom else; and, in truth, it was the property of the assignees, nor could Sherwood maintain any action for it, till some assent should be given to the conversion of the property. And what defence could Hadwen set up against the assignees? he is to account with them, not with the bankrupt; or is he to be liable to two actions? Sherwood might maintain trover against the assignees.

As to the question of set off against the Crown's debtor, it was insisted, that notwithstanding the intimation in the case of *The King v. Copeland*, there could be no doubt of the result of its discussion on demurrer; for it would be monstrous if the Crown's debtor should be entitled to evade the plea of set off, by seizing his debtor's property for a debt of 1000l., when he at the same time owed him as [274] large, or nearly as large a sum: but there are many such pleas to be found on the records of the Court. At present, however, it is enough to shew that the inquisition ought not to stand as returned. There is no single point in it on which issue can be taken with effect, and the defendant is not permitted to plead double; and therefore the question of the right of set off can not be raised. The inquisition, therefore, is uncertain, argumentative, and inconclusive, and cannot be effectually traversed.

Dauncey replied.

THOMSON, Chief Baron. It is not at present necessary for us to decide the question of Hadwen's right of set-off. The objection now made arises on the finding of the inquisition: and it is, that no fact is found with sufficient certainty to admit of an issue being taken on it by traverse: and I certainly think that it is argumentative throughout, and states that which is rather the evidence from which the Jury should have drawn a conclusion. The distinction is minute: but I give no opinion on what the finding ought to have been, whether as a debt, or money of Sherwood's in Hadwen's hands: but it should have been found in terms so that it might have been traversed. The objection taken is short, and, I fear, plain. Nothing is found charging a debt, so that it may be denied. The question of the plea of set-off can only arise on a proper finding: but this inquisition is argumentative and inconclusive, stating evidence without any conclusion, and there must be a better finding returned.

[275] GRAHAM, Baron. This inquisition is argumentative from beginning to end, whereas it ought to state distinct facts. A doubt arises in limine, as to its being Sherwood's money. It might have been paid in on a different account by the assignees, and this commission might have been superseded merely to question their conduct: and if they had acted wrong, no doubt large damages might have been recovered against them in an action of trespass. This is finding merely a sort of special verdict: and instead of furnishing us with any fact, the sheriff refers a question of law to us.

The question of set-off is certainly one of much nicety, and I confess myself much struck with the cases that appear to have had the sanction of the Court, which rule that debts seized by the Crown process are still subject to all legal and equitable consequences: and this Court may and does often correct its practice, as on the question of seizure of partnership effects, which, when the point came gravely before the Court, were held to be subject to all equities: a *pari ratione*, I should hardly think that on an Extent in aid the Crown can be in a better situation than the Crown's debtor himself would have been. I only say thus much as intimating an opinion, that the question of right of set-off is at least a grave and important question, whenever it shall fairly arise.

At present it is enough to say, that this inquisition cannot be traversed: for there is nothing found which can enable Hadwen to put his claim on [276] the record. It does not dispute his claim, nor does it find the money to be the property of Sherwood, against whom alone any right to set off his debt can arise. This finding, therefore, is altogether nugatory.

WOOD, Baron. As to the question, whether a set-off might be pleaded or not, under the circumstances of this case, I give no opinion: but I think that in point of form, the finding which has been returned on this inquisition fails in two points: first, the title of the Crown is not made to appear: secondly, it is not found (as it ought to be, and that precisely) that the money which has been seized was the property of the defendant. In fact there is nothing found. The only statement is, that Sherwood had become bankrupt, and that his assignees had paid so much money into Hadwen's hands. On that commission being superseded, Sherwood might have brought an action of trover or trespass against the assignees. In trover he might have recovered the money: and in trespass, much more than the amount: and surely, if large damages should be given against the assignees in an action of trespass, nothing could be more unjust than to take this money out of their hands, and leave them still liable to pay those damages.

The sheriff has no right to return this sort of special verdict in the first instance. They might not have had all the facts before them on this inquisition, as they would have on a trial: but still, they had enough to draw some conclusion, and to have [277] found something precisely, which might become the subject of further investigation thereafter. If this inquisition had found the money to have been the property of Sherwood, that might have been traversed, and certainly something should be so found, as that on a traverse, the whole case might be decided. If it had found the money to be Sherwood's precisely, and that some one else claimed it, it might have been sufficient, and then the question of the right of set-off might have been brought forward: but on this finding there is nothing conclusive. It fails on both points, and is therefore bad.

RICHARDS, Baron, of the same opinion.

Rule absolute*.

A question then arose on the practice, Whether a new writ would now be necessary? and

The Court held, that as the old writ had been returned, a new one must be issued.

[278] THE KING (IN AID OF LAMB) *v.* THOMPSON AND ANOTHER, (Executors, &c.). Saturday, 14th December 1816.—The Court will set aside a writ of seire facias, issued on an Extent, if the warrant for the commission to find debts have not been signed by a Baron, no application having been made for such signature.

Hullock, Serjeant, having in the preceding Term obtained a rule to shew cause why the writ of seire facias, which had been issued against these defendants, tested of the same Term, should not be set aside:—on that application, two objections were made to the validity of the proceedings:—that the debt had not been found, by inquisition, in the life-time of the deceased;—and that the warrant, for the commission to find debts, had not been indorsed by a Baron, nor the warrant for the Extent, on which the writ of seire facias was founded: but the judgment of the Court was given on the latter point only.

Dauncey, and Walton, now shewed cause. As to the objection of the warrants not having been indorsed, they said, that that was always considered a mere formality, and that they were all indorsed together when the inquisition came back, and it might be done at any time.

Hullock, Serjeant, in support of the rule, submitted, that however that might be, it had not been done in the present instance: and therefore pressed the objection.

THOMPSON, Chief Baron. The objection is, the want of a Baron's signature to authorize these pro-[279]ceedings. The commission issues under the seal of the Court, but the warrant should nevertheless be indorsed. To give validity to an Extent in aid, there must be a Baron's fiat previously obtained, though none is necessary on issuing a seire facias: and certainly, where a Baron's signature is necessary to give effect to that which is to be the foundation of subsequent proceedings, the want of it must render them invalid. This is not the case of an accidental omission on the part of the Baron applied to, or like it; it is, in fact, a proceeding without any, or rather, on their own authority. It does not appear that any Baron was even applied to, to sign the warrant;—and who shall now do it? The omission cannot be got over.

GRAHAM, Baron, of the same opinion.

WOOD, Baron. This is certainly an irregularity. Had it been an omission of mine, it would have been another thing, but no application was ever made to me. I was applied to for my fiat, for an Extent in aid, which I refused; but on no other occasion. If we were to suffer this sort of proceeding, the consequence would be, that commissions to find debts might in all cases be sued out, without going before a Baron.

Per Curiam. Rule absolute.

[280] THE KING *v.* COLLINGRIDGE. Wednesday, 18th December 1816. The sheriff is entitled to levy costs, under 43d Geo. III. ch. 99, on an Extent against a collector of taxes: and the sheriff's poundage is included in the word charges, and may be levied; and it is payable where the money is paid in, before a venditioni exponas has issued, although that proceeding is obviated thereby.—But if the agent in the country, of the solicitors for taxes, have received any money from the defendant as costs under the levy, or the sheriff have taken any thing for extra costs, as bailiff's fees and keeping possession, the Court will order them to refund.—It does not seem to be necessary, under that act, that the commissioners should issue their warrant against the collector to recover the duties detained, to authorize the issuing of an Extent against him as a condition precedent; or if

Vide *Westcott's case*, 13 Co. 72,—where, on a finding by writ of *diem clausit extremum*, that a moiety of a manor was holden, &c. as it appeareth by a certain exemplification, &c. a *melius inquirendum* was awarded, because the verdict of the jury (with a prout patet) was not full and direct, so as to give the party grieved a remedy by traverse.

it be, it is rather a ground of a motion to set aside the extent, for irregularity. —The bill of the Solicitors prosecuting the Extent for the Crown may be taxed.

Owen obtained a rule, in the last Term, calling on Messrs. Booth and Leggatt, (Solicitors for Taxes,) and the Sheriff of the county of Worcester, to shew cause why the former should not refund and pay back to the defendant, the several sums of 20l. 6s. 8d. received by them, (being the amount of their bill of costs :) 3l. 3s. received by their agents, at Pershore, (as their costs on this Extent, issued by them against the defendant, for the sum of 74l. 13s. 7d. received by him as a collector of taxes :)—and why the said Sheriff should not refund the sums of 5l. 12s. 6d.—2l. 2s. and 10s. received by him for poundage, bailiff's fees, and keeping possession, in respect of the said writ of Extent ; and why Messrs. Booth and Leggatt should not deliver to defendant a bill of costs to be taxed, and pay the costs of this application.

Dauncey, and Nolan, now shewed cause. An affidavit of Leggatt was put in, whereby he stated himself to be ready to hand over his bill for taxation, and that he should have done so on request ; and disclaimed all knowledge of the charges made in the country. But the counsel for the Crown con-^[281]tended, that as this was the case of a collector detaining duties in his hands, it was provided by 43 Geo. III. ch. 99, sec. 41 *, that the same might be recovered as a debt of record, with all costs and charges attending that recovery. The defendant was liable to pay all that had been demanded of him, subject (they admitted) to the taxation of the solicitor's bill, to which no objection was made ; and ^[282]that the poundage, and the other charges, were covered by the words costs and charges, used in the statute.

Owen, in support of the rule.—The general principle is, that the Crown neither pays or receives costs ; and, to render the defendant liable to pay them in the present instance, he must be brought within the meaning of the section of the act which has been adverted to. By that section it is made necessary, for the purpose of entitling the Crown to the costs of recovering the duties, that the collector shall have been previously distrained on, by the warrant of the commissioners : but it does not appear that any such warrant was issued in this case : and it must be shewn by them to have been issued, to found their claim to costs, or enable them to resist this application. The object of the act was to punish contumacy in the collector, and to aid the parish. Non constat, if the commissioners had issued their warrant, that the defendant would not have paid the amount, and the trifling costs which would have been incurred by that proceeding.

As to the Sheriff's claim of poundage, he contended that he was not entitled to it, under this statute ; or, if he were, that as there had been no sale here, he was not entitled to it in the present case ; for, by the late decision in *Graham v. Grill* (2 M. & S. 294), it was held that a Sheriff, who had seized property ^[283]on a *capias utlagatum*,

* By that sect. it is enacted, "That if any collector, being duly summoned, shall refuse to attend such respective commissioners, or shall not answer all such lawful questions as shall be demanded of him by such commissioners, touching the execution of his office of collector, or shall refuse or neglect to produce to them the certificates of assessment, accounts, or vouchers of such receipts or payments as aforesaid, or shall not obey the order of such commissioners, to be made as before directed, every such collector shall forfeit and pay the sum of fifty pounds, to be charged upon him in any assessment as aforesaid, and to be recovered as such assessments may be recovered, over and above any forfeiture or disability that may be incurred by virtue of this act, for detaining monies of the said duties in his hands, contrary to this act : and whenever any money of the said duties herein mentioned shall be detained in the hands of any collector or collectors, or any penalty or penalties imposed on any collector or collectors shall remain unpaid, and the same, or any part thereof, cannot be recovered by or under the warrant or authority of the respective commissioners, or the said respective commissioners shall neglect to issue such warrants, then such part thereof as cannot be so recovered, which shall have arisen from the said duties, shall be recoverable as a debt upon record to the King's Majesty, his heirs and successors, with all costs and charges attending the same ; and such part thereof which shall arise from any penalty as aforesaid, may be recovered by action or information, as other penalties may by this act be recovered, with full costs of suit : and the sum so recovered shall be paid to the receiver-general, in aid of the parish or place answerable for the same."

and taken an inquisition thereon, was not entitled to poundage, because there had been no *venditioni exponas*; for that the debt had not been levied in the words of the statute giving poundage, (3 Geo. I. ch. 15, sec. 3).

To the extra costs (for the levy, and keeping possession,) also, he submitted, that it was clear the Sheriff was not entitled from the defendant; and that there was not even a pretence for the charge made by the agents in the country.

Dauncey, in reply, contended that the Crown was entitled to recover the costs of this proceeding against the defendant, and that, *ultra* the Sheriff's poundage. And he referred the Court to a case, (of *The King v. Kirk*,) said to have occurred in this Court in the year 1809: which was a proceeding to compel a collector of taxes to make up a deficiency. He applied to be discharged from liability, on payment, and a rule was granted. On that rule being made absolute, it was referred to the Deputy Remembrancer, to ascertain what the Sheriff was entitled to for extra costs, beyond the poundage levied.

[Thomson, Chief Baron. It does not appear, from that case, by whom it was to be paid.]

It is included in the word charges, and as the object of the Act was to save the parish, it would be defeated, unless all were to be paid by the defendant; for if he is not to pay all costs and charges, [284] the parish must, and there must be a re-assessment on that account.

THOMSON, Chief Baron. The question of poundage is one in which the sheriff is more immediately interested; and we are under some difficulty in that respect, because he is not before the Court.

It really seems to me, that by this Act the parish is to be completely exonerated from all expenses attending the recovery of the duties which have been received by the collector, and that he is bound to pay them over to the receiver-general. [His Lordship read the 41st section of the Act.] It was urged, that to bring the defendant within this section, it must have been shewn that the commissioners had ineffectually issued their warrant, to enforce the payment of the money received for duties, and so detained by the defendant: for that otherwise the proceeding by Extent was not authorized by this statute. But if that be a condition necessarily precedent, it would rather be a ground of objection against the issuing of the Extent; and if so, this should have been a motion to set it aside for the irregularity: but it has not been so made, and therefore we must take it that this Extent is regular, and then it might, perhaps, have been open to the defendant to shew that the money would have been paid, if the commissioners had issued their warrant; but no such thing has been shewn.

The next question is, whether the payment of the money by the defendant in this way, before the [285] *venditioni exponas* issued, so puts an end to this proceeding, instituted in aid of the parish, as to leave them liable to the payment of the poundage and expenses; for all that Booth and Leggatt have to do with it, is their own bill. The writ was indorsed to levy poundage, and if that were improperly indorsed, it might be a reason why they should be called on to answer for that to the defendant. But it seems to me, that the poundage was properly levied in this case, as well as the other costs. The solicitors' bill has been moved to be submitted to taxation: it would have been handsomer if that had been previously required of them out of Court, but as it is brought before us, we must make the order absolute, as to that part of it, and as to refunding the money received by their agents in the country, and by the sheriff beyond his poundage; and we should discharge it as to all the rest.

GRAHAM, Baron. The question arising on this motion is, whether this Extent was authorized by the Act, without its being shewn that the commissioners had neglected to issue their warrant previously. Now were it a question affecting the right to issue the Extent, we might, perhaps, have expected it to have been shewn, that the commissioners were ready to have issued their warrant, and that the solicitors for taxes had taken the matter out of their hands. The commissioners are not expected to be lawyers, and nothing is more natural than that in cases of difficulty, they should resort to the solicitors for taxes. But, however, no objection is made to the Extent itself; then the question is, whether the [286] defendant is to pay the costs and poundage. Whatever distinctions may have been made, as to the meaning of the terms costs and charges, there is no doubt that the latter word will include the sheriff's poundage; and to say that poundage is not due, where there has been no *venditioni exponas*, is absurd in the mouth of the defendant.

As to the sum taken by Woodward (the agent in the country,) Messrs. Booth & Leggatt have got rid of that, by answering—that it was charged without their authority. It is certainly an ungracious thing, thus to call on solicitors of their respectability for a taxation of their bill; but they have a right to do so, perhaps, and therefore we must order it. As to the costs, that must be reserved for further consideration, when the officer shall have made his report.

WOOD, Baron. The whole question depends on the words of the Act; if the summary proceeding pointed out by the statute had been adopted, there can be no doubt that the defendant would have been liable to have paid the costs of the ulterior process. It appears by the 42d section of this Act, that “the said respective commissioners, or any two or more of them, in their respective jurisdictions, are hereby authorised and empowered to imprison the person, and seize, &c.”—so that the commissioners are not obliged to proceed in the summary manner pointed out, but are merely authorised and empowered to do so; and therefore they may exercise a discretion, whether they will so proceed [287] or not. It is in case of their neglect to do so, that the amount is recoverable as a debt of record, which gives the power to issue the Extent. Now it is clear that they have neglected, or at least refused to issue their warrant, because it has not been done, and therefore the Extent was properly issued; but if that were an objection at all, it would go to the Extent itself, and then it would have been incumbent on the party making it, as a ground for setting aside the process, to have shewn by affidavit, that the issuing their warrant had not been neglected or refused by the commissioners. As to the question of poundage, although, in general, it cannot be levied by the Crown under an Extent for the recovery of simple contract debts, yet this statute has made an express provision in the case of collectors making default, for levying the arrears, and all the costs and charges attending the same; and that provision empowers the levying of the poundage. The solicitors’ bill, therefore, the poundage, and other expenses, I think, have been properly charged, provided the quantum be correct, and as to that it must be referred to the officer.

RICHARDS, Baron, concurred.

[288] THE KING v. PEARSON AND ANOTHER. Monday, Tuesday, Thursday, 16th, 17th, & 19th December 1816. [Saturday 23d November.]—If an inquisition to find debts executed in vacation be returnable in the following Term, and a writ of scire facias be issued thereon, tested as of the Term preceding the vacation, the Court will set it aside for the repugnancy which must appear on the face of the record: nor will they allow it to be aided by inserting the true dates by means of a memorandum on the record.—Where a writ of scire facias is moved to be set aside, as having been irregularly issued, (not as having been irregularly served,) the motion may be made, after appearance.—The Crown has not an election to proceed against its debtor either by Extent or scire facias, where the debtor is not insolvent.—Scire facias may issue in vacation, but only where the debt which it seeks to recover is actually due before the end of the preceding Term, or it must be tested as of the next subsequent Term.

This was a motion, on behalf of the defendants, to set aside the writ of scire facias, which had been issued against them on the ground of irregularity.

On an Extent issued by the Board of Taxes, tested 2d July last, and returnable on the first day of the present Term, against Bruce and Co. bankers in London:—Cooke and Co. bankers in Sunderland, were found to be largely indebted to them, and local bills, to a considerable amount, in the hands of Cooke and Co. were seized among their other effects, under that Extent, on the 4th of July. On that inquisition, writs of scire facias were issued against the persons indebted to them on those bills, among whom were the present defendants.

The writ *, in this instance, was tested on the 3d of July last, (in Trinity Term)

* The writ reciting the inquisition taken on the 2d July, on which Bruce and Co. were found indebted to the Crown for money had and received by them from the Receiver General of taxes for the county of Southampton; and another inquisition taken the 14th September, whereby the present defendants were found indebted to

and the Sheriff's [289] warrant thereon was dated 24th September following. It appeared, therefore, on the face of the proceedings, that the seire facias was issued before the return of the writ of Extent, on which it was founded; and it was objected, that that was a repugnancy manifest on the record which vitiated the whole proceeding, and was incurable. For until the return of the writ of Extent, there was nothing on which the seire facias could have been founded, as it was that alone which could give the Crown a right to proceed against these defendants. [290] The seire facias bears date as of Trinity Term, yet it recites the fact of an inquisition not found till September following, which is, in itself, an absurdity; and might work an injustice, by depriving the party sued of the time which he would otherwise have, if the writ was not issued till it regularly might,—till after the return of the proceeding on which it was founded.

[On the part of the Crown it was objected, preliminarily, that this application to set aside the process for irregularity, came too late, as the defendants had appeared to the writ, and were therefore precluded from objecting to it on that ground.

To that it was answered, that the appearance which had been entered, if what had been done could be called an appearance, was previous to the writ itself being put on the record, for the writ had not yet been returned;—that what had been done was necessary, in order to obtain a copy of the writ, which the defendants could not have had without; for they had been served only with the Sheriff's summons, on the process which came to his hands, without having which the repugnancy could not have been discovered, or the objection made*.

The Court held the defendants not precluded by having appeared:—

Thomson, Chief Baron, observing,—that this was not the case of an objection taken to the irregular service of a regular writ, but arising out of [291] the service of a writ which was itself alleged to be irregularly sued out.]

Dauncey, Nolan, and Parke, now shewed cause. They submitted,—that the present objection, if tenable, was merely an objection to the form, not to the substance of the proceeding;—that it was the usual course of practice to teste the seire facias as of the last day of the preceding Term, when issued in vacation: that that was a fiction certainly, but as it did not operate, in effect, to deprive the defendant of any time which he would otherwise have had, but, on the contrary, would give him earlier notice of the debt having been found, and the process issued, whereby he would acquire more time to prepare for his defence (for it could not be proceeded on till the next term):—there was, therefore no substantial reason why the writ should be set aside on that ground.

If, on the other hand, the Court should be of opinion that the teste might, in any respect, prejudice the defendant, the remedy, they submitted, was obvious and easy; for a memorandum might be entered on the record, correcting the apparent incon-

Bruce and Co. in the sum for which the seire facias issued, as the drawers of a promissory note, dated 12th March 1816, payable on the 15th July; which said debt and promissory note the sheriff, on the day of taking the said inquisition, had seized into the hands of the Crown, (referring to the writ of extent and inquisition,)—required the bishop of Durham to command the sheriff to give notice to the defendants to appear on the 6th November next, to shew, &c. Tested 3d July.

Sheriff's Warrant thereon.

“(L. S.) William Hutchinson, esquire, sheriff of Durham, to John Knaggs and John Watkins, my bailiffs, greeting: By virtue of his present Majesty's writ, to me directed and delivered, I command you and each of you, that you shall and do forth with summon Joseph Pearson and T. Powell, of Sunderland, that they be and appear before the Barons of his said Majesty's Exchequer at Westminster, on the 6th day of November next, to shew cause why his said Majesty should not have execution against them for the sum of fifty-seven pounds six shillings and one penny, which it is found they are indebted to Patrick Crawford Bruce, George Simson, Thomas Freen, and Harry Mackenzie, debtors to his said Majesty; and have you there then this precept. Given at Durham, under the seal of my office, this 24th day of September, in the year of our Lord 1816.”

* See the Summons, ante note, 289.

sistency, by giving the true day on which the debt had been found, and the writ actually issued.

There is not doubt of the right to issue an Extent in vacation, under the same circumstances: and if so, why not the writ of *scire facias*, which is merely a summons?

[292] [Thomson, Chief Baron. In the case of an Extent, an affidavit of the insolvency of the debtor is made: but if that cannot be done, the *scire facias* is the only course. The Crown has not an election, except in cases of insolvency.]

The present writ would be enrolled as of Michaelmas Term; and so far it would be substantially correct, for the inquisition would then be regularly returned. But the teste is not of the essence of the writ: and it is never considered necessary, in this Court, to wait for the return of the inquisition before the writ is issued. If it were, the Crown might often lose a term, and it would operate to delay the recovery of the Crown's debts. By a calculation of the difference which it would make in point of time, in case of the writ being sued out in Hilary vacation, it was shewn that there might be a delay of half a year caused to the Crown.

As to the first point, of the Crown's right to sue out process in vacation, before the return of the inquisition, the Counsel for the Crown cited the case of *The King against The Estate of Curtis* (Parker, 95), where a *diem clausit extremum* had been issued on the 25th February, on an inquisition taken on the 23d of the same month.

That the teste of the writ was not held to be conclusive, they cited the case of *The Marquis of Tweedale* (1 Anstr. 143), where a writ, dated the 12th June, [293] certifying a fact of the 14th, which was therefore contended to be a mere nullity, was held to be sufficient, and was supported notwithstanding the repugnancy. In that case it was said by Eyre, Chief Baron, in delivering the opinion of the Judges:—"In all cases the teste is not of the essence of the instrument: dates originally were not necessary: they are not necessary to deeds: even in writs, Courts of Law, though they require that they should have a teste, do not require that it should be of the real date: and the technical testes of writs are often false, in fact," p. 155. And further, as to the imputed repugnancy, they cited *The Attorney General v. Bagg* (Hardr. 126), which was thus:—Sir James Bagg died in Aug. 14 Car. and a *diem clausit extremum* issued, bearing date the last day of the preceding Trinity Term, to inquire what lands he had when he became indebted to the King; and the Court were of opinion that the Extent was well executed,—notwithstanding the writ bore teste before Sir James's death, and that it was a good warrant to make inquiry after his death, and according to the common course of such writs, which never bear teste in vacation, but from Term to Term.

In the case of *Cross v. Smith* (2 Raym. 838, & Salk. 148, S. C.), it was held, that a certiorari well removed a plaint levied after the teste of the writ.

In support of the other proposition,—that the [294] teste of the writ did not conclude the defendant from averring any thing inconsistent with the truth of it,—the case of *Johnson v. Smith* (c), was cited; where an averment of the true time, of the writ of *latitat* having been issued, was admitted, (notwithstanding the fictitious date of the teste, for the purpose of letting in a plea of the statute of limitations. And, finally, they submitted that the objection, if tenable, might be cured by amending the record, by indorsing a memorandum of the true day on which the writ issued. That was shewn to have been done in the case of *Dodsworth v. Bowen* (5 T. Rep. 325), although there was there an equal incongruity on the face of the record,—the bill (filed against an attorney, as acceptor of a bill of exchange) appearing to have been filed in Michaelmas Term, whereas the cause of action did not accrue till the 13th of December following.

They further submitted, that this was too important a question to decide, on a motion of this sort, and that the defendants should have demurred.

Richardson, in support of the rule, urged,—that there was no precedent to be found in the practice of the Court, for permitting so manifest a repugnancy and absurdity to appear on the face of the record. For as to the instance of the writ of *diem* [295] *clausit extremum* that does not state the day when the party died*.

(c) Bun 959,—where all the older cases on the point are brought together.

* The form of the writ, as taken from the *Registrum Brevium*, page 291, is,—
"Rex escaetori suo in com' Eborum salutem. Quia I qui de nobis tenuit in capite diem clausit extremum ut accepimus; tibi precipimus quod omnia terras & tenementa,

That in *Bagg's case* there must be some mistake in the report, as the question of the regularity of the writ, was not then, in fact, before the Court: for that case came before them on a bill, filed by the Attorney General against the heir of Sir James Bagg, to avoid a conveyance whereby the heir claimed the estate: and (he observed) that the Court of Exchequer also seemed to be mistaken, in considering writs of *diem clausit extremum* as always necessarily bearing teste in Term, for, in the *Registrum Brevium*, that writ is classed under the head of *Brevia originalia*, and all original writs may be tested at any time. That this case was distinguishable from that of *Bagg's*, in *Hardress*, because there there was no repugnancy apparent on the record, nor is there in cases of *certiorari*, which is said to remove a plaint [296] levied after its teste, because it removes all things done in Court between the teste and return. That the case of *The Marquis of Tweedale*, in *Anstruther*, was in favour of his argument, because the judgment there proceeded on the ground of the teste not being essential in that particular writ, and the repugnancy might be reconciled by the usage of the Court: and the Court said, in the way of distinction, "This is not a writ in a judicial proceeding." Whereas here, the writ is in a judicial proceeding, and would be a nullity without the teste: and there is no such usage in this Court with respect to such a writ.—That the case of *Dad-worth v. Bowen*, where the Court had allowed a special memorandum to be put on the record, was also distinguishable from the present, because that was permitted solely for the purpose of saving the statute of limitations, and on that ground;—and that notwithstanding that case, the Court of Common Pleas had subsequently refused to sanction the filing a bill against the Warden of the Fleet in vacation, in the case of *Crook v. Eyles* (2 Marsh. 49. 6 Taunt. 847); and the same distinction applies to the case of *Johnson v. Smith*.

[To a question put by the Lord Chief Baron, it was said to be the practice, in case of the Crown debtor becoming insolvent, pending the proceeding by *seire facias*, to abandon the suit, and resort to an Extent.]

Dauncey replied.

[297] THOMSON, Chief Baron. There can be no doubt that, as the record at present stands, there is a manifest incongruity on the face of the proceedings to which the record is to give effect. The writ of *seire facias* calls on the debtors of the original defendants, to shew why execution should not issue against them for the debt. It proceeds on the ground of the inquisition having found the debt, by which it made a debt of record. That inquisition issued in vacation, and this *seire facias* is made also to issue in vacation, returnable in Michaelmas Term, and tested in Trinity. So that on the face of the proceedings, the writ appears to have issued before the demand arose on which the defendants were so sued; that is, therefore, an objection to the process, because it ought not to have been issued, for it could not then be supported, in point of fact.

It is then suggested, that an amendment may be made by a memorandum on the record, inserting the true day. But there is no instance to be found in practice, of that having ever been done in this Court. There have been instances, it seems, of such a practice in the other Courts, but those cases all receive this short answer—that it was permitted merely to prevent the loss of the debt, by the lapse of the time fixed for its recovery by the statute of limitations, and therefore a special memorandum was necessary and allowed: but that is not so here. There is no doubt that writs of *seire facias* may be issued in vacation, but the debt which it seeks to recover must be due (of record) before the teste: and, in the present instance, if the Crown had waited [298] till the return of the inquisition, it would have been quite regular: but no

de quibus idem I. fuit seiscitus in dominico suo ut de feodo in balliva, tua die quo obiit, sine dilatione capias in manum nostram, & ea salvo custodiri facias donec aliud inde præceperimus. Et per sacramentum proborum & legalium hominum de eadem balliva tua, per quos rei veritas melius sciri poterit, diligenter inquiras, quantum terrarum & tenementorum prædictus I. tenuit de nobis in capite, tam in dominico quam in servitio in dicta balliva tua dicto die quo obiit, & quantum de aliis, & per quod servitium, & quantum terre & tenementa illa valeant per annum in omnibus exitibus, & quo die idem I. obiit, & quis propinquior heres ejus sit, & ejus ætatis. Et inquisitionem inde distincte & aperte factam nobis in cancellarium nostrum sub sigillo tuo & sigillis eorum per quos facta fuerit sine dilatione mittas & hoc breve. T. &c."

instance occurs of a writ of *scire facias*, founded on an inquisition, being tested before the return of the inquisition.

The question, therefore, seems to lie in a very narrow compass : and it appears to me, that this proceeding, as it stands, cannot be supported : nor do I see that any necessity exists here for altering the due course and practice of the Court, as has been proposed : and it is material, that the practice should be always correct and uniform.

GRAHAM, Baron. I do not consider the question of so great importance to the Crown, as has been suggested. The main point is, whether we are called on, under the circumstances of this case, to correct the apparent repugnancy of this record, affecting the right of the party called on by the writ to answer, which can only be done by a special memorandum. Now, I do not think that this is a case of such moment as to authorize us, by so doing, to establish a new practice : and that want of importance, is most probably the reason why there is no precedent to be found for it. Where the Crown's debt is in danger, and that can be shewn by affidavit, an Extent may be issued : and in cases where the party is in solvent circumstances, there can be no such emergency. And the whole the Crown would gain in expediting its suit, would be in general but a few days, except at one period of the year, when, it is said, (which is the result of a nice calculation) that a delay of a term would be the [299] consequence. In the present case, the *scire facias* being sued out in vacation, does not give the Crown but very little more advantage than if they had waited the 6th of November, when it would have been quite regular. The object of the measure, therefore, is not of sufficient importance to warrant our introducing such new practice.

WOOD, Baron. This is not a case in which we ought to depart from the ancient practice of the Court, which has always been, never to issue a *scire facias* till after the return of the inquisition : and that practice is founded in good reason, for the debt is not of record till then, and it is therefore consistent, both with the rule of law and the facts recited in the *scire facias*. This inquisition was not returnable till Michaelmas Term : and to issue the writ before that time was irregular, for there was nothing to authorize it. The extraordinary prerogative process of Extent may certainly be issued on the actual return of the inquisition, but then only on an affidavit of the insolvency of the Crown debtor, and the debt being therefore in danger. To allow that to be done which is proposed to be done, putting the true day on the record by special memorandum, might cure the defect, and thereby the Crown might be in some instances expedited, certainly : but that is not a principle of right which should induce us to permit it. This is an attempt to put the proceeding by *scire facias* on the same footing with Extents, without there being the same necessity ; for if there were, they might have had an Extent. I am [300] not for suffering any absurdity to appear on the record.

RICHARDS, Baron. There is certainly an incongruity apparent on this record ; and that is sought to be cured by a special memorandum. That would be an anomaly : and in the absence of precedents, I see no reason, in the present instance, for introducing a new practice : and therefore, I entirely concur in what has been already said.

Rule absolute.

BOWYER AND ANOTHER *v.* BRIGHT. Friday, 20th December 1816.—This Court will not (on a bill for specific performance) make an interlocutory order to refer a title, the validity of which is denied by the answer, and depends on facts, to the Deputy Remembrancer, until the cause is brought to a hearing, without consent.

Dauncey, and Wilbraham, moved that the defendant should pay into Court, within ten days, the sum of 1000*l.* (the amount of a deposit, stipulated by the agreement for the purchase of an estate by the defendant, of which the plaintiffs were trustees under a settlement, for the specific performance of which they had filed their bill in this suit, to be paid by him into the hands of certain bankers at Ludlow,) together with 135*l.* for interest thereon, to be laid out by the Deputy Remembrancer in his name, in trust in this cause, subject to further order. And that it might be referred to the Deputy Remembrancer, to inquire and report to the Court whether the plaintiffs could make to the defendant a good [301] title to the premises contracted to be sold by them to him.

Owen opposed it. He submitted, that the deposit ought to be required to be paid into the hands of the bankers, to whom it was stipulated to be paid by the agreement, which the defendant had no objection to, provided it were made productive. But the main point was, whether it should be referred to the Deputy Remembrancer to report the title; and that, he contended, could not be done on an interlocutory order, before the cause had come to a hearing. He admitted, that by modern cases a practice had been introduced in the Court of Chancery of so referring it: but that it was done there only under very special circumstances, and where it was merely matter of law and there was no other question: and that such a practice had not yet obtained in this Court. He cited the case of *Rose v. Calland* (5 Ves. 188), where the then Lord Chancellor refused to send the case to the Master, because, he said, he would not decree the defendant to enter into a law suit; and that would be the case here, for the title would depend on material questions of fact, which could only be ascertained in the regular way. One of these was, that a third person disputed the plaintiff's right to the use of certain water which passed through his lands, without which the property would be of but little value; and that fact would be proved on the hearing.

On the other side it was pressed, that the course proposed would save the expense and delay of a [302] commission, and could not be reasonably objected to; but

The Court said, that whatever might be the practice elsewhere, it was contrary to that which prevailed in this Court to make an interlocutory order for a reference of a title, (which was denied to be good by the answer,) to the Deputy Remembrancer, until the cause was brought to a hearing, unless by consent. The first part of the order they granted, but refused the rest: desiring that the motion might be entered as opposed.

THE ATTORNEY GENERAL v. CASE AND OTHERS. Monday, 23d December 1816.—

The owners of a merchant vessel running foul of and damaging a King's ship lying in the Mersey, by misconduct of the persons on board,—held liable in an information for damages in the nature of an action on the case; although she had on board, at the time of the accident, a pilot duly licensed: because the Liverpool local Pilot Act is not of itself (or by reference to the 52d Geo. III. ch. 39) imperative, compulsory or penal on the captain to take a pilot on board whilst lying at anchor, but merely subjects him to the payment of the pilot's regulated allowance on refusal.—The 30th sec. of the 52d Geo. III. ch. 39, (which is commonly, but improperly, called the General Pilot Act,) discharging masters and owners of vessels having pilots on board, from responsibility for damage occasioned by the neglect of the pilot,—held not to apply to vessels having on board pilots appointed for other places than those expressly named in the preamble or provisions of that act. Where that act does apply, the Crown is equally bound with the subject, although not named.

[Referred to, *The City of Cambridge*, 1874, L. R. 5 P. C. 456; *The Servia*, [1898] P. 47.]

The question in this case arose out of the trial of an information in the nature of an action on the case filed against the defendants, who were owners of the ship "Columbus," for damaging King's ships; which stated,—“That his Majesty, before and until, &c. was lawfully possessed of two ships or vessels, (and their tackle, &c.) called the 'Bittern' and the 'Princess,' which said ships or vessels, before and until and at the time of committing the grievance [303] thereafter next mentioned, were respectively lying and being in the river Mersey, to wit, at, &c.:—that the defendants were the owners of a certain other ship or vessel called the 'Columbus,' also in the said river Mersey, which was then and from thence, until and at the time of committing the grievance thereafter next mentioned, under the care, government, direction, and management of certain servants of the defendants, to wit, at Westminster, &c.:—that the defendants theretofore, and whilst their said ship was so under the care, &c. of their said servants, to wit, on the 8th day of November (1812,) by their said servants so incautiously, carelessly, negligently, inattentively, and unskilfully managed, conducted, and governed their said ship, and took so little and such bad care in the managing, conducting, and governing thereof, that the said ship of the defendants then and there, by and through the mere carelessness, negligence, inattention, and

unskilfulness of the said servants of defendants, and for want of due and proper care in that behalf, drifted with the tide, and then and there with great force and violence ran foul of and struck upon and against the said ship or vessel of his Majesty called the 'Bittern,' and thereby then and there caused and forced the anchors of the said ship or vessel of his Majesty, called the 'Bittern,' and by and with which she was then and there lying at anchor and moored, to drag, and thereby then and there caused the said ship or vessel of his Majesty, called the 'Bittern,' also to drift with the tide; and the said ship or vessel called the 'Bittern,' and the ship or vessel called the 'Columbus,' did thereby then and there drift together with the tide, and did thereby then and [304] there, with great force and violence, run together foul of, and strike upon and against the said other ship or vessel of his Majesty called the 'Princess'; by means of all which premises the said ships or vessels of his Majesty called the 'Bittern' and 'Princess,' and the tackle, &c. were then and there respectively greatly broken, split, fractured, damaged, spoiled and destroyed, and his Majesty was forced and obliged to lay out and spend, and did actually lay out and expend, a large sum of money, to wit, the sum of 500*l.* of like lawful money, in and about the repairing, amending, and replacing the same, to wit, at Westminster, &c."

There were three other nearly similar counts.

The defendants pleaded, that the said ships with, &c. were not greatly broken, &c. and of this, &c.

The cause was tried at the sittings after Trinity Term 1814, before the Lord Chief Baron, when a verdict was found for the Crown (damages 206*l.* :) with liberty for the defendants to move to enter a verdict for them, on the question as to the liability of the owners to answer for damage done by their ship whilst they had a pilot on board.

Searlett having obtained the rule to shew cause, on the ground, —that as the defendants were compellable to take a pilot on board by virtue of two several acts of parliament (the 37th Geo. III. ch. 78, "for the better regulation and encouragement of pilots for the conducting of ships and vessels into and out of the port of Liverpool," and the 52d Geo. III. ch. 39, (the general pilot [305] act) "for the more effectual regulation of pilots, and of the pilotage of ships and vessels on the coast of England,") the owners were thereby discharged from personal responsibility for any damage occasioned by their vessel while under the control of such pilot; the 30th sect. of the latter statute having expressly enacted, "that no owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any ship or vessel, or any cargo on board the same, for or by reason or means of any neglect, default, incompetency, or incapacity of any pilot taken on board of any such ship or vessel under or in pursuance of any of the provisions of this act."

8th November, 1814.—Thomson, Chief Baron, now read his report of the evidence given on the trial, the substance of which was furnished by M'Kenzie, the master of the "Bittern" at the time of the accident, who proved, —That his ship was lying in the Mersey, and upon the 8th of November was moored off Salter's Dock: the "Princess," too, was there, two cables length off. The "Columbus" was riding at single anchor, about three-quarters of a mile off: he had seen the "Columbus" there before the 8th of November: she was at anchor in the river before any accident happened; he had observed her anchor to drag one tide before on the flood: the night this happened he was in his watch, about half-past two; and he found that the "Columbus," in a very thick fog, [306] was driving on the "Bittern." There was no wind: the tide was at ebb; the "Columbus" was about the length of the ship (he supposed about a hundred feet) from the "Bittern," when he first observed her. The quarter-master was on the deck: they hailed the "Columbus" three times, but received no answer: they carried away both their anchors. The "Columbus" and "Bittern" both struck against the other ship soon after the "Columbus" struck the "Bittern." He went on board her immediately on perceiving the shock, and saw a man who called himself the mate: he asked him what was the reason that he did not keep a good look out: and he remarked that it was the carpenter's watch. Witness did not see the carpenter, to his knowledge: he saw four or five seamen down the aft-hatchway: they were not sober. The helm was starboard, and it ought to have been a-port; if it had, it would have avoided them. Witness saw the pilot, and told him his helm was starboard: he said it was a-port: he pointed out to him that it was starboard. They were

cursing and swearing at one another: there was such a tumult they did not appear to know what they were about. The mate said he had eighty fathoms of cable out; he told him he could not have that, or the anchor would not have started off the ground: that was his judgment, and is so now. The mate said they had drunk too much, and had just come off the shore that night: if the helm had been put a-port it would have saved the running against them.

His Lordship observed, that he need not state more of the evidence, because it was extremely [307] clear that the injury which the King's ship sustained was occasioned by the bad management of the defendant's ship, by some persons on board;—that the want of proper caution in putting the helm as it ought to be, occasioned his running on board the King's ship, and doing the mischief complained of,—and that that fact did not seem to be disputed on the trial.

Tuesday, 7th February 1815.—The Solicitor General, Jervis, Dauncey, and Peake, now shewed cause:

They contended, that there could be no doubt raised as to the liability of the owners at common law; and therefore the only question was, whether there were any thing in the statutes on which the rule had been granted, which could be construed as altering their situation, or exonerating them from that liability. They submitted, that the Liverpool Pilot Act in itself contained no such clause as the 30th sec. of the 52d Geo. III. (which had been very improperly termed the general Pilot Act; for that act, extensive as its title might appear, was in fact confined to the pilotage jurisdictions therein mentioned),—exonerating the master and owners from responsibility for damage done through negligence while a pilot was on board. Then the question would be, whether there is any thing in that statute which does, by reference, operate to incorporate that clause in the local Pilot Act: and they argued that, as that act expressly mentions whatever local pilotage jurisdictions it was intended to be applied to, wherever it furnishes any regulation with respect to them; [308] where those local jurisdictions are not mentioned, the act cannot be construed to extend to them: and that each clause of the act relates exclusively to the pilots who are expressed to be the immediate object of it.

The Liverpool Act is not imperative as to the master's taking a pilot on board, and there is no penalty in that act for not doing so, as there is in the 52d Geo. III.: so that, if the master pleases, he may decline the services of a pilot on paying him his regulated allowance: and the true reason of the indemnifying clause in the 52d Geo. III. is, that the taking a pilot on board is compulsory.

This point was decided in the case of *Fletcher v. Braddick* (2 N. R. 186), where the owners of a ship chartered to the commissioners of the navy were held liable for damage done to another ship, notwithstanding there was a commander in the navy, and a King's pilot on board at the time: for the Court said, that the owners were the persons to be responsible, in the first instance, to third persons, leaving the subsequent adjustment to be arranged between the owners and the Crown. The owners are in all cases liable in the first instance: and that, however remote they may be from the immediate damage and cause of action, (*Bush v. Steinman* (1 B. & P. 404)). There is no doubt, therefore, of the defendant's liability, unless this clause exempts them. Then (if it can be for a moment admitted [309] that that section can be applied to the Liverpool pilots) these defendants would still not be within its protection: for the clause was expressly made to indemnify the owners and master from the misconduct of the pilot, and that can only be referred to such misconduct alone as a pilot can be guilty of as such. Here the disaster was caused, not by the neglect, default, incompetence, or incapacity of the pilot, but by the gross misconduct (a word not in the clause, which adverts to acts of omission merely, and not of commission,) of the master and the whole crew: and will it be contended, that the circumstance of a pilot on board is to excuse the whole crew of the ill effects occasioned by their drunkenness and incapacity to assist the pilot? The very act by which it is in evidence the mischief was occasioned, is not one which it was a pilot's duty to avert: it was an act of the other persons on board, whose duty it was to have veered out the cable. And they cited the case of *Boucher v. Noodstrom* (1 Taunt. 568) to the point, that a master is not discharged from liability for a trespass committed by order of his pilot.

It was ultimately urged (but not much insisted on, after the intimation of a contrary opinion from the Bench,) that in all events the Crown's right was not to be affected by the indemnifying clause, without express words, (citing Bacon's Abridg.

Prerogative :) and that although there be no express saving of the King's rights, which is sometimes introduced [310] *ex abundanti cautela*. For these reasons the verdict which the Crown has obtained ought to stand.

Searlett, and Joy, in support of the rule.—Admitting the general doctrine of a master's liability for the acts of his servants, they urged, that inasmuch as the pilot taken on board the "Columbus," under the express provisions of an act of parliament, was not the servant of the master of this vessel, but, as it were, of the Law ;—as he was not appointed or chosen by the master or owners, who, so far from having any choice in the selection of a fit person, were compellable to take the first that should offer ;—and as such pilot was, beside, a person over whom the master had no control, but who was himself, on the contrary, as well as his ship, subject to the guidance and authority of the pilot to whom the legislature had, during his being on board within the limits of his jurisdiction, transferred all command and the whole management of the ship ;—the pilot, so far therefore from being a servant of the master, for whose acts he should be responsible, ought, in fact, rather to be considered (even independently of the indemnifying provision in the 52d Geo. III.) in justice and common sense, as a person to whom the common-law responsibility of both master and owners should, with their common-law free agency, (for it is indisputable that a pilot has the entire and exclusive control and management of the ship while he is on board acting as pilot,) be at once transferred. The pleadings admit that the act which occasioned the mischief must be charge-[311]-able on the servants of the defendants, for their declaration is so framed.*

Where, indeed, the master takes a pilot of his own accord, and for his own accommodation, the case wears a very different complexion ; but the present question arises solely on the ground of this case being out of the principle of the decisions holding masters responsible for the acts of their servants. Where no pilot is taken on board within a pilotage [312] jurisdiction, underwriters have been held to be discharged, *Law v. Hollingworth* (7 T. R. 160) ; but in that case, if an unskilful pilot, duly qualified by license, had been taken on board, by whose incompetency a loss had been sustained, the question would have been much more difficult and important ; for that would not have been a peril of the sea.

As to the cases cited :—In *Bowcher v. Noidstrom* the Court did not decide the point for which it has been cited, and so far the marginal note is not correct. And the case of the action against the captain of the "Russell" man of war, said to be alluded to by Mr. Justice Lawrence in the same report, is shewn, in the case of *Nicholson v. Mounsey* (15 East, 384), to have been decided on the merits, and not on the objection there said to have been taken,—of the lieutenant of the man of war not having been the servant of the captain ;—on the alleged rejection of which the defendant is also stated to have been held liable : for on the contrary it appears, by the same case in East, that in fact

* The reasons for holding the master responsible are, according to Molloy, vol. 1, p. 358, b. ii., cap. iii., § xii. (resting on *Horn v. Smith*, Roll's Abridgement, 533,) which was cited by Joy, "For that the mariners are of his own choosing, and under his direction and government, and know no other superior on shipboard but himself : and if they are faulty, he may correct and punish them, and justify the same by law." No one of which reasons can apply to the pilot : for, as in *Beawes*, 203, "In many parts, where the entrance to harbours, &c. is difficult the taking a pilot is not a voluntary act, but obligatory on the master : otherwise, in case of a loss, he must make it good : and the following laws are now in force concerning them in England : After a pilot is taken on board, the master has no longer any command of the ship : and the pilot is liable to an action for an injury done by his personal misconduct, although a superior officer is on board."

And precisely in this light are the paramount command of a pilot, and the necessity of admitting him, contemplated in the laws of Oleron, and in the French and Dutch ordinances. In those of Wisbuy, (the foundation for so great a part of the Marine Law of Europe,) it is said that a coast pilot shall, under certain circumstances, be taken on board, "though the merchant" (usually in the simplicity of those times, (12th century) in the ship with his cargo,) "oppose it." † So distinct was the pilot from the mere servants of the merchant.

† Ordonances de Wisbuy, Art. xlv.

he succeeded. That same case of *Nicholson v. Mounsey* also is in point to the principle for which these defendants contend; for the result is, that the captain of the ship, although on board at the time, was held not liable for damage done during the time the vessel was under the command of the lieutenant, on the ground of the latter not being a servant of the former. Now here the defendants had even less control over the pilot than captain Mounsey had [313] over his lieutenant: and they cited the case of *Lane v. Cotton* (Raym. 650, and 12 Mod.) The case of *Fletcher v. Braddick*, which appears most to incline against that principle, they submitted, was distinguishable from the case of *Nicholson v. Mounsey* by its very position, which was, that the servants of those to whom the ship had been chartered were in effect (for purposes of responsibility) the servants of those who chartered her; for by the charter-party they had delegated their right to make choice of servants, and were therefore responsible for the choice which should be made. So owners are liable on a bill of lading, although the ship be chartered; and the person shipping goods on board of her might maintain an action on the bill of lading against the owners.

Then arises the question, whether the provision of the 30th section of the statute (52 Geo. III.) does not extend to all places having pilots appointed under the authority of local acts of parliament. The title is most general, "For the pilotage of ships on the coast of England." A part of the preamble* also announces the generality of its object.

[314] In usage, many of the mandatory clauses in that act are adopted and acted on in places having local jurisdiction in pilotage, although not required by the local acts, —as the provision of sec. 44, that the description of pilots shall be indorsed on their license, &c. —and sec. 49, that pilot-boats shall have black sides. Some of the penalties imposed by the act attach generally on all pilots licensed by virtue of that act, or otherwise, (see sec. 51); so also in sections 53 and 59: all plainly shewing that the legislature considered themselves as legislating for all those places; and if in one respect why not in all, wherever the provision is general and unconfined? Sections 57 and 58 also are general, and therefore applicable to local pilots, though not expressly named; and so are sections 71 and 72, and many others. And indeed it would be an anomaly to have a general law, as this is, which should not be applicable as extensively as it is contended on the part of the defendants, that the 52 Geo. III. is. The act is intended to be a beneficial one: and if it be so for the Thames, why should the Mersey be excluded from its advantages? And if there were any doubt as to its extension, it ought [315] for that reason to be as extensively construed as the language of it will admit. It has been urged, that it did not come within the pilot's province to prevent the act complained of; —the answer is, that however the crew might have been blamable in the end, it was the fault of the pilot, in the first instance, that the vessel was improperly moored; and it is in evidence, that when McKenzie went on board, and told the pilot that his helm was starboard, (as the fact was,) he answered that it was a-port, pretty much indicating the state in which he was at the time; yet the master is compelled by the Liverpool act to take a pilot on board, and to take the first that offers; and he has no power of rejection, (even for the grossest cause of dismissal,) or of punishment for misconduct.

As to the argument arising from prerogative of the Crown not being bound by the clause of indemnity without being expressly named, it was submitted, that this was

* "And whereas acts of parliament have been passed for establishing separate and peculiar jurisdictions in relation to pilotage in certain ports, and on different parts of the coast of England, which, by reason of the same being limited, have been found insufficient to answer the good purposes intended thereby, and it is therefore necessary that more effectual regulations should be made in relation to pilotage on the coast of England; and whereas an act was passed in the forty-eighth year of the reign of His present Majesty, intituled, 'An Act for the better Regulation of Pilots, and of the Pilotage of Ships and Vessels navigating the British Seas,' which is now near expiring; and it is expedient that the same should be continued with alterations and amendments, as is hereinafter enacted; and whereas it is necessary for duly enforcing the laws respecting quarantine, on which the health of his Majesty's subjects essentially depends, that the names and places of residence of all pilots in England should be known by those whose duty it is to convey information respecting those laws from time to time to them."

not a case for extending that principle to the protecting provisions of a beneficial act ; —that the King was bound by the navigation laws :—and that in sec. 28, and in that only, there was an express saving of the King's rights, but as that had not been pressed, it was not much argued.

The Solicitor General replied.

The Court said, that as they considered this a question of very great importance, they would take some future opportunity of giving their judgment.

Cur. adv. vult.

[316] THOMSON, Chief Baron, now delivered the opinion of the Court. (Having stated the facts of the case, from which it appeared that there had been great and culpable negligence and mismanagement on board the defendants' ship, arising from the drunkenness of the crew, and that his Majesty's ships had in consequence sustained very considerable damage,) his Lordship proceeded as follows :—

The question is, whether the owners of the "Columbus" are liable to answer to the Crown for the damage so done to his Majesty's ships, the amount of which it has been agreed shall be settled, if we should be of opinion that the Crown is entitled to recover.

On the part of the defendants it has been contended, by way of defence to this information, which is in the nature of an action on the case, that they are exonerated from all responsibility, because they had a pilot on board, at the time of the accident, in command of the vessel, to whom the master was compellable to give up the charge of the ship under the Liverpool Pilot Act : whereby they became entitled to the indemnity provided by the 30th section of the 52 Geo. III. ch. 39, which has been called the general Pilot Act, as I think, improperly : because its main object is, notwithstanding its title, the regulation of the pilotage of the Trinity-house of Deptford Strond, and the fellowship of Dover, Deal, and the Isle of Thanet, of vessels navigating the rivers Thames and Medway. (His Lordship read the preamble.)

[317] The whole question will depend on the words of those two statutes.

On the part of the Crown, on the other hand, it was contended, that the mere circumstance of a pilot being on board the ship at the time when this accident happened, is not sufficient to do away the responsibility of the owners for the damage so done ; for that this pilot was not forced upon the owners under the authority of any act of parliament, and that therefore it was their own act to have taken him on board.

There were several cases quoted in which the master and owners have been held liable, though, in point of fact, there had been a pilot on board : but those were cases prior to the 52d of the King, and none of them appear to apply very closely to the present. There was another point made, (but which does not appear to me to have any thing very material in it,) that, supposing these two acts of parliament, taken together, discharged the owners of the ship from their liability as between subject and subject : yet, that, for an injury done to a ship belonging to the King, they still remained liable, for that it requires express words in any act of parliament which is intended to affect the King : but it does not seem to us that that argument has any solidity in it. If the owner, under the circumstances, is not answerable for the acts done by the pilot, or for the carelessness of the pilot in general, it would make no sort of difference to whom that injury has been done, whether to a ship of the King, or of any of his subjects. It was not much insisted upon : but it was urged, and [318] it therefore becomes necessary that we should give it as our opinion, that there is no foundation for saying that the excuse does not extend to any injury offered to a King's ship, provided it would be well founded in the case of a common person sustaining the same injury.

There is nothing, as I stated, upon this subject in the Liverpool local act of the 37th Geo. III., intituled, "An Act for the better regulation and encouragement of Pilots for the conducting of ships and vessels into and out of the port of Liverpool." That act (after providing certain regulations about their appointment and examination, and the rate of remuneration for piloting ships into and out of the port of Liverpool) contains this clause, which is the only provision that can be conceived to relate to this subject :—"that in case the master or commander of any ship or vessel outward-bound, (with certain exceptions,) who shall proceed to sea, and shall refuse to take on board and employ a pilot so duly licensed, such master or commander shall pay to the pilot, who first, or who only, shall offer his service and shall be so refused, the full pilotage, according to the different rates and prices hereinbefore directed to be paid,

in like manner as if the pilot had been received and employed in conducting or piloting such ship or vessel into or out of the port of Liverpool." In short, this act imposes no penalty on the master even for going to sea without a pilot, but only renders him liable to pay the wages which the pilot would have been entitled to, if he had thought fit to accept his services.

[319] Now there is a penal clause in the 52d Geo. III. the title of which certainly purports, that it is—"An Act for the better regulation of Pilots, and of the pilotage of ships and vessels navigating the British seas." But though that is the title, it professes not to alter any local provisions for pilotage in other ports: this act, as I have stated before, relating only, or principally, to the river Thames, and ships passing to and from Orfordness, and so on. There certainly are some other of the clauses of this act of parliament of the 52d Geo. III. which were intended to be applied to the cases of pilots who are provided in local jurisdictions, but that is uniformly done by express terms: for wherever the act intends that there shall be that extension, it says so expressly.

I have read a clause from the former act, by which the master of an outward bound vessel, who shall proceed to sea, and shall refuse to take on board and employ a pilot who shall offer his services, is rendered liable to pay that pilot the same wages as if he had accepted his services; but the 52d Geo. III. cap. 39, sec. 59, seems to have made a provision in such a case, not only that he should pay the wages due to such person, but a penalty also. That clause enacts,—“That the master of every ship or vessel which shall be piloted or conducted by any other person than a duly licensed pilot, within any limits for which pilots have been or shall be appointed by any lawful authority,”—(which is certainly the case of Liverpool, for that is a place in which pilots are appointed by lawful authority.)—[320] “shall forfeit double the amount of the sum which would have been demandable for the pilotage of such ship or vessel,”—(the other act had only made him pay the single price of the pilotage,)—“and also,”—(and this part certainly does not apply to Liverpool pilotage.)—“an additional penalty of 5*l.* for every fifty tons burthen of such ship or vessel, if the corporation of Trinity-house of Deptford Strand, as to cases in which pilots licensed by or under that corporation shall be concerned, or the Lord Warden for the time being, in all cases in which the Cinque Ports shall be concerned, shall think it proper that the person prosecuting should be at liberty to proceed for the recovery of such additional penalty.” Now that part of the clause certainly does not apply to this case, for it has nothing to do with the jurisdiction of the Trinity house. There are several other particular clauses, not relating to the responsibility of the pilots, but which speak in general terms of their being to be adopted in every case of local pilotage.

(His Lordship then adverted to the 30th section of the 52 Geo. III. which he read, marking the last words, “under or in pursuance of any of the provisions of this act:” and continued:—) Now a pilot taken on board in the port of Liverpool, is not taken on board under and in pursuance of any of the provisions of the 52 Geo. III., but under and in pursuance of the provisions of an act of parliament made long before that period, to regulate the pilotage in the port of Liverpool. And in that Liverpool Act there is no such clause to be found [321] as there is in this, which is called the General Pilotage Act: improperly enough so called, because, as I have stated, it relates to pilotage only in a certain district: except where, by certain clauses, positive enactments are made that it shall extend to places where there is a local jurisdiction independent of this act of parliament.

There is, therefore, no obligation imposed by the 37 Geo. III. upon the master, to take any pilot whatever on board his vessel before she proceeds on her voyage: for the consequence of his refusing to take a pilot on board, on other occasions, is only a liability to pay the same wages as if he had taken such pilot on board. Now, if he was proceeding to sea, having taken such pilot on board: and if, while the ship was duly and properly under the management of that pilot, an accident had happened, it might have been a fair question, whether the owner would then have been answerable: though there have been cases which shew, that though a pilot may be on board, the master is in some instances deemed responsible, notwithstanding. But, I repeat, there is no such penal provision in this act of the Liverpool Pilotage. By the 34th section of that Act, indeed, it is provided, “that if the owner, master or commander, shall require the attendance of a licensed pilot on board any ship or vessel during her riding at anchor, or being at Hoylake,” (which is lower down than Liverpool,) “or in

the river Mersey," (that is, while she is riding at anchor,) "such pilot shall attend such ship or vessel, and be [322] paid for every day he shall so attend, five shillings, and no more." So that there is nothing here compulsory upon the master or owner to take on board a pilot, while he is riding at anchor in this river Mersey. It is optional in him whether he will do it or not; but, if he chooses to do so, he is to pay the pilot at the rate of five shillings for every day he shall attend, and no more. His obligation to take a pilot (even if the act of the 37th is to be taken as connected with the act of the 52d of the king,) is only on his proceeding to sea, and refusing to take on board a pilot so licensed. There is no penalty for not taking on board a pilot, while lying in the river Mersey; but he is enabled, if he thinks fit, (and not otherwise,) to command the services of a pilot while so lying at anchor, paying for him at the rate here specified; and it is for that accommodation that he is to pay the five shillings, if he refuses to take the pilot on board. The master of the king's ship states, that this vessel was outward bound; she had been lying there a considerable time; she was not, at this time, proceeding on her voyage. The master seems to have made his election to have a pilot on board, though she was lying entirely at anchor, and not proceeding upon her voyage. Then, what is there in this case which authorises the Court to say, that the master is not responsible, under the circumstances which have been so detailed? He was not compellable at that time, in any way, either under the penalty of double the wages, or of paying even the single wages, to have any pilot on board. It was his own act to have him; and it can [323] be only in the case of such an officer having been forced upon them, and without his own election, that the responsibility of the owner can possibly be discharged.

I believe I have stated as much as is material. Upon the whole, we are of opinion, that this action is well maintained; and that there is nothing in the evidence to excuse the liability of the owner, to answer for the injury that was done by the defendant's vessel to the King's ship: consequently, that the verdict, which is taken for 206l., ought to stand.

Judgment for the Crown.

THE KING v. ELLIS. Monday, 23d December 1816.—Tithes are a tenement; and are, as such, within the exemption (in 19 Geo. III. ch. 56, s. 14,) from the duty on sales by auction imposed by the 43d Geo. III. ch. 69, schedule A.—A letting by auction of tithes of corn, then standing and growing on the ground to be transferred by way of lease for one year, to commence from before the day of the auction, is a letting by auction of the tenement, and not a sale of the tithes: and that, although no actual lease should be afterwards made of such tithes.

This was a proceeding by *seire facias*, for the penalty of the common bond given by the defendant to the Crown as a country auctioneer. The defendant pleaded a general performance of the condition. The replication set out, —that the defendant, on the 13th of July 1813, made a sale out of the limits of the chief office of Excise, and that he did sell by auction, the tithe of certain corn growing on certain lands, and divers other goods and chattels: [324] but that he did not after the sale, within the proper time, deliver to the person appointed to receive the same, a particular account in writing of the total amount of the money bid at such sale. Another breach was assigned, for a like selling by auction of another parcel of tithes of other lands, on a different day.

To these breaches, so assigned, there was a rejoinder,—that one Mr. Roberts was rector of the parish, and being such rector, and desirous of letting for a term of years certain tithes of corn which belonged to him as rector, the tithes not being then cut, and being tenements, employed the said John Ellis to hold an auction, to let the tithes for a certain term of years, on his, the rector's, account; and thereupon the said John Ellis, as such auctioneer, on the rector's account, on the 13th of July 1813, did, on account of the rector, hold an auction for the letting the said tithes for a term of years to be created by the rector. That the defendant, at such auction, on the rector's account, let the tithes to one William Jones, for a term of years, to be created by the said John Roberts as such rector: and that the supposed sale of the tithes mentioned in the breach, was the letting of these tithes; and that the tithes, that is, the corn and tithes which were so let, were then growing. There was also a rejoinder to the other breach, which was assigned for selling another quantity of tithes, on

another day, arising on other lands; which averred, that this was not a sale, but was a letting of the tithes, and that those tithes were a tenement.

[325] The cause was tried at the Sittings after Trinity Term, when a verdict was taken for the Crown, subject to the decision of the Court on the points reserved; which were afterwards made the ground of a motion, that that verdict might be struck out, and a verdict entered for the defendant.

On that motion being made, the rule was granted accordingly, on the ground that this auction was within the exemption (of the 14th section of the 19th Geo. III. ch. 56 *,) from the duties imposed by the 43d Geo. III. ch. 69, sched. A†.

[326] It appeared by the report to have been given in evidence,—that, antecedent to this sale or letting, the auctioneer had delivered to the proper officer this notice:—“To the officer of Excise at Pwllhelli: Take notice, that I shall let by auction to the highest bidder, at the village of Aberdaron, on Monday, the 26th of July instant, in eight parcels, all those tenements and hereditaments, consisting of the rector's share of the great tithes arising, growing, and becoming due in the parishes of Aberdaron and Llanfaelrhys, for one year, commencing on St. Peter's Day last past. Dated the 9th of July.” There was also added, “A catalogue of the tenements and hereditaments intended to be let by me by auction, at Aberdaron, on the 26th day of July 1813, in eight lots or parcels, the tithes of corn arising, growing, and becoming due in the parishes of Llanfaelrhys and Aberdaron.”

The conditions of the letting, which were produced at the time of sale, were as follows, “The [327] tithe of corn arising, growing, and becoming due in the parishes of Llanfaelrhys, in the county of Carnarvon, with the hereditaments and appurtenances thereto belonging, on the 13th day of July 1813: First, that the highest of three or more bidders shall be the taker or tenant; and if any dispute shall arise as to the biddings, the lot shall be put up again. Secondly, that the tithe of corn shall be put up in ten lots or parcels, and shall be let for one, two, or more years, as shall be agreed upon, on putting up the same. Thirdly, that all the taxes (except the landlord's property tax) shall be paid or borne by the takers or tenants. Fourthly, that the rent or rents at which lot shall be let, shall be payable on the 1st day of July 1811; and the taker or takers shall, if required, find sufficient sureties for the payment of such rent. Fifthly, that the proprietor of the said tithes will, at his own expense, execute a demise or lease of the said corn tithe, to the takers thereof respectively, subject to the foregoing conditions. Sixthly, that the owner or proprietor of the tithes shall be at liberty to bid once for each lot, at such time as he shall think proper.”

* “Provided also, that nothing in this Act contained shall extend to any auction to be held, on the account of the lord or lady of any manor, for the granting any copyhold or customary messuages, lands, or tenements, (except “hereditaments”) for the term of a life or lives, or any number of years; or to any auction to be held for the letting or demise any messuages, lands, or tenements, for the term of a life or lives, or any number of years, to be created by the person or persons on whose account such auction shall be held; or to the sale or sales of any woods, coppices, produce of mines or quarries, or to any contract relating thereto, or to the cutting or working the same, or to the sale of any materials used in the working of such mines or quarries respectively; or to the sale of any cattle, and live or dead stock, or unmanufactured produce of land; so as such sale or sales of woods, coppices, produce of mines or quarries, cattle, corn, stock, or produce of land, be made whilst they continue on the lands producing the same, and by the owner or owners of such lands, or proprietor or proprietors of, or adventurer or adventurers in, such mines or quarries respectively, or by his or their steward or agent, stewards or agents: any thing herein contained to the contrary notwithstanding.”

† “For every twenty shillings of the purchase money arising or payable by virtue of any sale at auction in Great Britain, of any interest in possession or reversion, in any freehold, customary, copyhold, or leasehold lands, tenements, houses, or hereditaments, and any share or shares in the capital or joint stock of any corporation or chartered company, and of any annuities or sums of money charged thereon, and of any ships and vessels, and of any reversionary interest in the public funds, and of any plate or jewels, and so in proportion for any greater or less sum of such purchase-money, to be paid by the auctioneer, agent, factor, or seller by commission.

The like notice was given, and the like conditions declared, as to the letting of the tithes of the other part of the parish, and that the proprietor would, at his own expense, execute a demise or lease of the corn tithe, to the person who should take them.

[328] The Solicitor General, Dauncey, Clarke, and Walton, now shewed cause; and they made these two points:—first, that the tithes so said to be let, were not a tenement within the meaning of the act, and therefore not within the exemption:—and, secondly, if they were, that that which had been called a letting, was, in point of fact, a mere sale by auction; and that the mode which had been adopted for the disposal of the tithes, was so far merely colourable (not fraudulently so,) for the purpose of avoiding the duty. That duty, as imposed by the 43d Geo. III. ch. 69, sched. A. was what was sought to be recovered by the present proceeding, on which the Crown had obtained a verdict which it was entitled to retain, unless the subject of the sale in question could be brought within the exemption of the 19 Geo. III. cap. 56, sec. 14, as being comprehended under any one of the terms used in that excepting clause. Tithes, they admitted, have been from time to time invested with many of the common-law attributes of tenements, by several statutes; but those statutes had not put tithes, which are in fact, at common law, merely incorporeal hereditaments, on the footing of tenements in all respects, or at all changed their nature: nor have any of the statutes which relate to tithes, ever called them a tenement. The 32d Hen. VIII. cap. 7, sec. 7, which rendered tithes, in lay hands, subject to the same modes of conveyance and recovery as lands and tenements, clearly treats tithes as an incorporeal hereditament, and so distinguishes them: for there is nothing which can be properly called a tenement, [329] for which the *præcipe quod reddat* would not lie before that act: and it is only on that statute that an ejectment will lie for them, which had never been heard of before, and was afterwards at first doubtful. The 5th Geo. II. cap. 17, which was passed to remove doubts as to whether tithes might be leased by certain ecclesiastical corporations, enacts, that certain leases for lives, granted of tithes, tolls, or other incorporeal hereditaments, shall be good and valid: treating tithes as an incorporeal hereditament, contradistinguished from tenements. This very exemption on which the question now arises, also, has expressly enumerated messuages, lands and tenements only; purposely, it should seem, excluding hereditaments, which the schedule embraces, and the exemption must be construed by the letter: and, but for the exemption, it is clear that tenements let by auction would be liable to the duty; therefore, if tithes are not a tenement, but a hereditament, they are not exempt.

But if that be not so, the second objection arises, that this was not a letting by auction of the tithes, but a sale by auction of the subject-matter. Now all that was actually sold was a tenth of the crop on the ground. Tithes, as such, are not properly the subject of a lease or demise: they are an incorporeal hereditament, and lie in grant; and they must be conveyed by deed, for they are not capable of livery. And the common cases of letting tithes by parol, as (to instance one) the usual composition between the tithe-owner and the farmer, is not a letting, but a sale, and good as a sale only. And [330] although those compositions generally take place between the tithe-owner and the occupier of the land, it would be just the same thing if the tithes were so sold to a third person. And to that point, the case of *Hawkes v. Brayfield* (Cro. Jac. 137), was cited; where the Court held, that there could be no agreement of retainer of tithes (by parol) “for many years,” (which sounds in nature of a lease) although they said that the law would permit it for a year, “it being given by way of sale;”—and that of *Keddlington v. Bridgman* (Bunb. 2), to the same effect*. As to the case of *Hewitt v. Adams* (c), that was decided merely on the principle that a composition by six months notice only, with reference to leases, ought to prevail in favour of the farmer: but that case does not decide, that there can be a parol demise of tithes, which being an incorporeal hereditament, can only lie in grant. As to what may have been inserted in the conditions of sale, that is neither binding on the parties, or conclusive as to the question of law, of its being a letting of the tithes, or a sale, or of the actual sale being of what was expressed to be intended to be sold, in point of fact. Then, looking to the thing actually sold, that which has been called

* Vide *Keddlington v. Adamson*, 2 Gw. 611.

(c) Rayner's Tithe Cases, 990; and Gw. 1204, there called *Adams v. Waller*.

a lease of tithes, was nothing more or less, in truth, than the tenth part of a crop of corn nearly fit to cut, then standing on the [331] ground, actually sold in the month of July, under colour of a lease to commence from a day passed, from the previous St Peter's Day to the one next following: and a growing crop is considered part of the personal stock of the farmer, and may be taken in execution. These tithes, therefore, were not the subject of a letting, by parol, at all. The letting relied on, was neither more or less than a sale of the subject-matter; and that which has been called a lease, has not the usual characteristic qualifications of a right of entry on one side, or a reversionary interest on the other. The consequences to the revenue, of deciding this sale to be a letting of the tithes by auction, would be an evasion of the stamp duties, as a lease; and of the auction duties, as a sale.

Scarlett, Abbott, Littledale, and Carr, in support of the rule, submitted, that it was most improbable that while the legislature contemplated an exemption from this duty in favour of the landowners, and of persons having an interest in land, they should mean particularly to exclude all the clergy, and the lay impropiators of England, from the benefit of that exemption.

The first question is, whether tithes are a tenement. Tenement is certainly a word of most extensive signification, and embraces, in its etymological sense, every thing which may be holden: but its legal signification extends much further, for in Co. Litt. fo. 19 b. the word tenements is said (speaking of the stat. Will. II. which created estates tail,) to include "not only all corporate inheritances which [332] may be holden, but also all inheritances issuing out of them, or concerning or annexed to, or exercisable within the same, though they lie not in tenure: therefore, all these, without question, may be entailed. As rents, estovers, commons, or other profits whatsoever, granted out of land, or uses, offices, dignities which concerne lands or certaine places, may be entailed, because all these savour of the realtie." It cannot be doubted, then, that tithes come under that description of the meaning of the word tenement. The cases which hold that tithes are considered a tenement, under the acts of parliament relating to parochial settlements, are too numerous to require to be cited: but they quoted a case from *Strange, The King v. Skingle* (1 Strange, 100), where the Court held that tithes were a tenement. In the case of *Sone v. Ashton* (3 Bur. 1288), the office of marshal of the King's Bench was held to be a tenement. And under a grant of lands and tenements, tithes, no doubt, would pass.

But then it is urged, that various acts of parliament have treated them as not being a tenement: and have therefore provided, on that account, many of the advantages in favour of persons entitled to them, peculiarly belonging to that class of property. The first statute which is said to have done so, is that of 32 Hen. VIII. cap. 28. Now that act was passed with a very different object: it was intended to give to lay persons, who could not, before the dissolution of the monasteries, legally hold tithes, nor [333] had, afterwards, any right to sue for them in the ecclesiastical courts, the same remedies as they had at common law for the recovery of their temporal possessions: and that object is to be collected from the preamble of the act. That preamble also furnishes an acknowledgment of a capacity in tithes to be made the subject of entail: for it speaks of lay persons having parsonages, and vicarages, and tithes, to them, and to the heirs of their bodies lawfully begotten. Now tithes could only have been held by a man, to him and the heirs of his body, by virtue of the statute *de donis*, which enables persons to create entails: and that statute only speaks of lands and tenements, and says nothing of hereditaments. It is clear, that tithes are as commonly the subject matter of entail, as any other species of property. That argument is an answer to those which have been drawn from the statutes said to distinguish tithes from tenements, as being, in truth, merely hereditaments, and is itself, at the same time, unanswerable. The argument that before that statute, ejectment did not lie for tithes, may be met by shewing, that ejectment does not at this time lie for many things coming within Lord Coke's description of a tenement: as for rent, and all those things of which the sheriff cannot deliver corporeal possession. But, in point of fact, the word hereditaments is to be found in that statute, and also in 1 Eliz. cap. 19, and 10 Eliz. cap. 10; in which last it is actually classed with tenements. As to the statute of the 5 Geo. III. cap. 17, that was made with a view to remove certain doubts as to what persons were within the enabling statutes

of Elizabeth; but the [334] very existence of moduses, at this day, shew that tithes were long before memory alienable, and might be let in fee at a certain fixed rent: and that also is an answer to the proposition, that tithes are not properly the subject-matter of demise. Tithes are said to lie only in grant. Be it so. A lessee is a grantee, and a lease is nothing different from a grant of an interest in the thing leased. The 5 Geo. III. uses the expression, "leases of tithes"; and therefore recognizes their existence, and their legality. Being capable of being let, they must be capable of being holden: it cannot, therefore, be doubted, that tithes are considered a tenement by usage, and legislative recognition.

Then arises the point as to this being a sale, and not a letting of the tithes. All imputation of fraud must be considered as out of the question. Now as one test by which that question may be determined,—suppose the clergyman had refused to execute a lease on this sale, or any other instrument, would not a Court of Equity have compelled him to do so? or would they have said that this was a mere case of bargain and sale? But if it be either a sale or a letting, the conveyance must be perfected by deed: and on this evidence, as reported, the clergyman would be decreed to grant a lease, with a covenant, that he should pay the landlord's property-tax, and the tenant to pay all other taxes except the land-tax: and to seal it, that they might be enabled to sue the farmer for not setting out the tithes. At the time of the auction the best bidder did not actually purchase a lease at the sale, but the power of compelling [335] one; and with the subsequent result, as to what afterwards took place between the parties, the auctioneer could have nothing to do, so as to become chargeable under this act: his duty is all to be performed at the time of the sale. But in point of fact, it is quite obvious, that the tithes could not be sold *speciatim*, as tithes, till actually set out by the farmer, and reduced into the possession of the tithe-owner.

As to the argument used from the cases cited, to shew that there can be no lease for one year of tithes by parol, that would be equally applicable to a lease contemplated to be made for twenty years, being so sold by auction. And the instance put, of a composition, which six month's notice is required to determine, is very distinguishable, because that is a continuing agreement. Nor are the usual compositions good by reason of their being to be considered as sales, but because they are to be taken as special agreements between the parties, that a pecuniary payment shall be made in lieu of the tithes in kind. Every lease is a sale of an interest in lands, &c. in point of fact. If it were not, a letting or demising would not be within the original enactment imposing the duties. There can be no doubt, that a lease for a year may be made of tithes by parol: and therefore the fact, that there has been in this case no lease in writing, does not make the letting of the tithes for a year less a demise.

The Solicitor General, in reply, insisted, that there was an essential distinction between tithes, [336] and the rectory to which they were appurtenant; the latter is the tenement, the former the profits of it:—the corporeal object of the incorporeal right. So an office, as in the case of *Some v. Ashton*, is a tenement, but the salary or perquisites are not. If a common in gross may be considered to be a tenement, as it is said it may be in *Comyn's Digest*, although that statement is followed by one contradicting it, and there is a doubt referred to, in a case in 2 Rolle's Abr. 57, l. 5, 7;—but tithes disannexed never can, because they are of a corporeal nature. The case cited from *Strange*, of *Some v. Skingle*, was that of a person having a title to tithes by his tenement of the parsonage, who was therefore held liable to be rated to the poor's rates, although tithes were not mentioned in the private statute authorising that rate in Colchester, as they are in the general act of 43 Eliz.; for a private statute could not repeal the provisions of a public act: and the circumstance of tithes being expressly mentioned there, in addition to tenements, is another proof that they were not considered to be tenements by the framer of that act.

The Court, in consideration of the importance of this case, which had been so elaborately discussed, took time to give judgment.

Cur. adv. vult.

THOMSON, Chief Baron, delivered the judgment of the Court. [Having stated the pleadings, the evidence, the notices, and the conditions of sale: observing that the 5th condition was very material.]

[337] The question (continued his Lordship) is, whether this auction was of such a nature as to come within the exception provided by the 19 Geo. III. cap. 56, sec. 14,

of certain subject matters, which would otherwise be liable to the duty imposed on auctions by the 43 Geo. III. cap. 69, sched. A.

And that question depends on the construction of these acts, taken together;—and on the result of our inquiry, whether the circumstances of this case shew that this transaction was a letting of the tithes by auction:—and whether (if it was a letting) it was a letting of a tenement, within the meaning of the exception in the first of these acts of parliament;—or whether it is to be deemed an absolute sale by auction of these tithes.

Now, as to the expression,—“a tenement,” there is no question but that, in common parlance, the word tenement would be taken to comprehend tithes: and I take it, it would do so, in many instances, in the legal acceptation of the meaning of the term. Tithes, as we know, (those that have become lay-fees,) are capable of being entailed, and may be limited to the heirs of the body: and those entails will be preserved by the statute *de donis*. But under what words are they protected? There is no other word used in the statute *de donis* but that of tenement. Every thing, therefore, which is rendered capable of being so limited under that statute,—as manors, messuages, lands, tithes,—every thing which may be entailed,—is included under the word [338] tenement. Therefore it seems to be a very narrow construction to say that tithes are not, upon this occasion, to be deemed a tenement, provided this was a letting, and not a sale of the thing in question: for if it were a sale, undoubtedly the auction-duty would attach.

There are several cases which have decided that tithes are a tenement, independently of the general doctrine arising on the statute *de donis*. *The King v. Skingle*, in 1 Strange (1 Strange, 100), has precisely this point. There the clergyman of the parish of Colchester was rated to the poor-rates, in respect of his tithes, as a tenement, under a private statute made for the provision of the poor of Colchester. The general act (43 Eliz.) had expressly charged lands, tenements, and tithes: but the subsequent private act charged only lands and tenements, (omitting tithes:) yet the Court held the parson liable, as being an occupier of a tenement, for that tithes were a tenement. And many other authorities are there quoted, particularly Co. Litt. 159: where it is said, “that an assize lies for tithes; that the husband would be tenant by the courtesy, and a wife would be endowed.”

It was ingeniously argued, that although commons in gross, and offices, might come under the term tenement, tithes could never fall under that term, because they are corporeal things: but that argument does not appear to us to be at all well founded.

[339] The next question is, whether this was a sale of the tithes. Now that depends upon the nature of the thing which was put up to be sold. The clergyman would no doubt have had a right, at the ensuing harvest, to receive these tithes: but he had no right to take them till after they were reaped, nor till they were set out. At the time of this transaction the corn was standing, and he agreed to let his interest in it: that was the nature of the transaction. He agreed at the auction, according to the terms used in the excepting clause of the act, to let the tithes for a term, to be appointed by himself: and that is clearly within the words of the exception in the 19 Geo. III. He puts them up to a letting, and the best bidder is to take them for one year, (to commence from about a month before the sale; but that makes no difference,) till the return of that period on the first, second, or third year following. The tithes were then growing: and the purchaser, or tenant (if he may be so called,) had no right to these tithes till they were taken and severed. And it seems to me, that was rather a bargaining with the clergyman for such interest as he could convey, than any thing else: that is, that the person who was to take the tithes was to have the clergyman's remedy for the tithes. And how was he to have it? he could not take it by a sale: no property could be transferred in the tithes, so as to enable him to take them when they became due in any way. He could only take them under a lease from the clergyman, (for it is part of the conditions, that the clergyman should grant him a lease,) which would enable him to sue the tenant of the land: and without such a lease he could have no power whatever, when the right to [340] the tithes accrued, of enforcing his agreement with the parson against the farmer. Without a lease, the tenant of the land would not be bound to render the tithes to him, and that is therefore expressly provided for by the conditions of sale under which this auction was held. This transaction, therefore, seems to be a letting of the tithes for one year.

—an agreement, that the rector shall invest the tenant (that is, the person who agrees to take these tithes) with powers to enable him to recover them, which could only be done by making him a demise for that year; without which, he could not, by any means, (if the tenants were adverse,) compel them to pay. He must state himself (which is the common way) to be farmer of those tithes, in his declaration for not setting them out: for he can have no authority to make use of the clergyman's name, and probably the clergyman would not be very willing that he should use his name: but that difficulty would be got rid of by a demise for a year: which would enable him to declare, as farmer of the tithes, against the person who refused to set them out. It appears from the evidence in this case, that the tenants not resisting the claim, the tithes were, in point of fact, taken without a lease being actually granted. But that does not appear to me to make any difference; the question is, what would be the remedy, if the tenants had refused to pay the tithes to the purchaser till he clothed himself with the character of lessee of the clergyman. That appears to us the essence of the whole of this case. And we think that this auction comes within the exception of the act of parliament: and that it is not to be deemed a sale of these tithes; but a letting of a tenement by auction, within the [341] words of that exception. And therefore we are of opinion, that the judgment in this case ought to be, that the verdict taken for the King should be entered for the defendant.

Judgment for the defendant.

THE KING v. BATES. Monday, 23d December 1816.—The several instruments (called bonds) given for securing, on the parish rates, the payment of 100l. each (and interest) to the holder, by parishes enabled to borrow money by such means under the local Paving Acts;—held not to be a mere chattel, but a charge on the owners of houses, &c. in respect of such houses, &c.: and therefore, when sold at auction, are not liable to the higher auction duty imposed on the sale of chattels by the 43d Geo. III. ch. 69: but to the lower duty, as being a sale of an interest in lands, &c.—And such instruments would come within the statutes of mortmain.

This was a proceeding by *seire facias* against the defendant, who was an auctioneer, for the penalty of his bond to the Crown, for not having accounted for the duties on a sale by auction of certain securities issued by the parish of St. Mary-le-bone; under the 35th Geo. III. ch. 73, and 53d Geo. III. ch. 163.

The cause came on to be tried before the Lord Chief Baron, at the Sittings after Michaelmas Term 1814. On the pleadings being opened, it was agreed by the Counsel that a verdict should be taken for the Crown, subject to the opinion of the Court upon the following case:

“That the defendant, being a licensed auctioneer, gave a printed notice and catalogue at the chief [342] office of Excise, for holding an auction-sale of sixty-five bonds for 510l. each, granted by the parish of St. Mary-le-bone under the act passed in the 35th year of the King, ch. 73. Those bonds are in the following form: We, the vestrymen of the parish of St. Mary-le-bone, in the county of Middlesex, by virtue of an act of parliament made in the 35th year, &c. intituled, ‘An Act for repealing several Acts made in the 8th, 10th, 13th, and 15th years of the reign of his present Majesty, for regulating the nightly watch and beables, and for paving, repairing, cleansing, and lighting the parish of St. Mary-le-bone, in the county of Middlesex; and for the better relief and maintenance of the poor thereof; and for divers other purposes therein mentioned, and for making more effectual provision for those purposes:’ and of an Act of the 46th Geo. III. intituled, ‘An Act for altering and amending an Act made in the 35th year of his present Majesty, for watching, paving, cleansing, and lighting the parish of St. Mary-le-bone, and for the better relief and maintenance of the poor thereof:’ and also of another Act of Parliament, made in the 53d of the King, intituled, ‘An Act for altering and amending two several Acts of the 35th and 46th years of the reign of his present Majesty, for paving and improving the parish of Mary-le-bone:’ And whereas it is enacted by this last act, that it should be lawful for the vestrymen to grant to their treasurer for the time being any bond or bonds under the hands and seals of the said vestrymen, or any seven or more of them, for the sum of 100l. on each bond, with interest for the same after the rate of five per cent.

[343] per annum, upon the credit of the rates or assessments authorised to be collected by virtue of the before-mentioned recited acts, for paving the squares, streets, passages, and other places in the said parish; and also that it should be lawful for the treasurer, by direction of the vestrymen, from time to time to make sale and dispose of all and every of such bond or bonds so to be granted, unto any person or persons, for the best price or prices in money that could reasonably be had or obtained for the same: Now these presents witness, that in consideration of the sum of five shillings, paid to us by Thomas Birch and Abraham Chambers, of, &c. esquires, the joint treasurers appointed under the said first recited act do assign unto the said T. B. and A. C. their executors, administrators or assigns, the rate or assessment made and to be made for new paving the squares, streets, &c. within the limits of the first recited act, of the said parish, To hold unto T. B. and A. C. their executors, administrators, or assigns, until the sum of 100l., together with the interest at the rate of five per cent. per annum, such interest to commence or to be calculated from the . . . day of . . . shall be fully paid and satisfied. In witness whereof we have hereunto set our hands and seals, the day, &c." That on the 20th July 1813, the defendant held an auction-sale pursuant to his notice; and at that sale sold by auction the sixty-five bonds mentioned in that notice, at the several prices mentioned in the catalogue delivered in by him. That Thomas Bates the younger, being the defendant's clerk, (and who as such, attended the sale,) went to the chief office [344] of Excise in London, on the 20th of August 1813, for the purpose of settling and paying the duty on the sale; and then and there produced to the proper officer, at the said chief office, a printed catalogue, as follows:—"Particulars and conditions of sale of sixty-five bonds, of 100l. each, bearing an interest of five per cent. per annum, payable at the Court-house of the parish of St. Mary-le-bone, half-yearly, and secured under an act of parliament, directing and authorising the vestrymen of the parish of St. Mary-le-bone to raise money on bonds, for the purpose of paving the squares, streets, &c. within the limits of the said act; subject to redemption by way of a sinking fund, as directed and authorised by the act; which will be sold by auction by Mr. Bates, at the Auction Mart, &c. on July 20th, 1813, in sixty-five lots." (The particulars set forth were these bonds in sixty five separate lots, the total amount of the sale prices being 5261l. and underneath was written, by the auctioneer's clerk, -Duty on that sum, at seven-pence, 153l. 8s 11d.; but the auction duties were not paid, being refused to be received at that rate.)

The auction duties at the time of the sale, under the 43 Geo. III. sec. 69, sched. A., and the 45 Geo. III. cap. 30, were these:—"For every twenty shillings of the purchase money arising or payable by virtue of any sale at auction, in Great Britain, of any interest in possession or reversion in any freehold, customary, copyhold, or leasehold lands, tenements, houses, and heredita [345] ments, or any share or shares in the capital or joint stock of any corporation or chartered company, and of any annuities or sums of money charged thereon, and of any ships and vessels, and of any reversionary interest in the public funds, and of any plate or jewels, and so in proportion for any greater or less sum of such purchase money, to be paid by the auctioneer, agent, factor, or seller by commission, sixpence." "For every twenty shillings of the purchase money arising or payable by virtue of any sale at auction, in Great Britain, of furniture, fixtures, pictures, books, horses and carriages, and all other goods and chattels whatsoever, and so in proportion for any greater or less sum of such purchase money, to be paid by the auctioneers, agent, factor, or sellers by commission, ten pence*." That the proper officers of Excise objecting to the defendant's above calculation of duty, at 7d in the pound, and insisting that the sale was liable to the higher duty of one shilling in the pound, demanded the duty at such higher rate. The defendant's son, however, refusing to pay such higher duty, offered to pay the lower duty of sevenpence in the pound, and the officer refusing to take less than one shilling in the pound, the sale still remained wholly unaccounted for: and no duty whatever had been paid for the sale. The question was, which duty was to be paid: if the higher, the verdict to stand; if the lower, the verdict to be entered as satisfied.

[346] The cause was this day argued, by
Walton, for the Crown: and

The 45th Geo. III. ch. 30, imposed an additional duty of 1d. in 20s. on articles mentioned in the first member of the schedule, and 2d. in 20s. on those of the second.

Adolphus for the defendant : when the Court requiring a second argument, it was re-argued, by

22d June 1816.—Clarke, for the Crown : and
Harrison, contra.

The statutes, the arguments, and the cases, are all so fully gone into by the Lord Chief Baron, in delivering his very elaborate and comprehensive judgment, that it will not be necessary here to give more than an outline of the arguments used on either side.

For the Crown it was submitted, that these bonds were merely transferrable chattels, and created only personal liability, and could in no sense be considered as a charge on or giving an interest in land. They are not, therefore, within the first branch of the schedule, but the latter, as coming under the general words, "all goods and chattels." They are transmissible to personal representatives. The rates themselves create no charge on, or interest in the houses : still less can an instrument purporting to be an assignment of them do so, and that by way of this sort of bond. It gives the holder no right to distrain or enter, or any means of recovering the money, but by personal proceedings. Bonds, post obit and other, are daily the subject-matter of sale, as chat [347]-tels. If then these bonds vest no interest in the land, but are merely personal obligations, and are transferrable like exchequer bills, their sale by auction is liable to the higher duty, as being the sale of a chattel.

On the other hand it was contended, that these instruments, although they had been given the name of bonds, were, in fact, no such thing : they are in effect assignments of a charge on the houses, &c. in respect of which the rates are assessed. That "all other goods and chattels," mentioned in the second member of the schedule, immediately after furniture, fixtures, pictures, &c. must be construed to mean things of somewhat the same nature, and could not be extended to include these bonds : and that if, therefore, they did not come within the first member of the schedule, they were out of the act altogether. It is not the occupier of the house that is rated, it is the house itself. The occupier must pay, it is true, but the house is liable, even while unoccupied. The instrument itself is liable to a stamp-duty, on its being transferred : and that is a reason why there should not be the higher duty imposed on its sale, as is the case with the other acknowledged and favoured cases of a transfer of an interest in lands, &c. And two cases were cited, *Knap v. Williams* (4 Ves. 430), and *Finch v. Squires* (ib. vol. 10, p. 41), which are fully stated and commented on in the delivery of the judgment of the Court by the Lord Chief Baron. The whole [348] tending to establish, that the instrument in question was more in nature of an assignable mortgage on the credit of the land, &c. in respect of which the rates were imposed, and out of the produce of which they were ultimately to be discharged : than of a personal chattel recoverable from any person who was responsible, in the character of an obligor, for the satisfaction of them ; and therefore the sale by auction of such an instrument, was subject only to the lower duty.

With respect to the cases cited, the Counsel for the Crown endeavoured to distinguish the first of those from the present, by attributing that decision to the object of giving effect to the statutes of mortmain ; and that, because tolls, as an hereditament, were expressly within those acts. And as to the other, they submitted, that as there could be no doubt that the poor and county rates (which were the subject of consideration in that case,) were an encumbrance on land, a decision to that effect could not apply to the present question on this particular and anomalous bond.

Cur. adv. vult.

THOMSON, Chief Baron, now delivered judgment. [Having stated the case.] It was intended (observed his Lordship) that it should be made a question of law, which of these duties, whether the higher or the lower duty, should be paid by the auctioneer : and certainly he must pay the higher duty unless he can bring himself within that clause which imposes the lower duty on selling any [349] interest in possession or reversion in any freehold, customary, copyhold, or leasehold lands, tenements, houses, or hereditaments. The question therefore will be, looking into these acts of parliament which are referred to, whether that which has been sold, that is this bond, and the assignment of the rate that has been laid upon this property, is an interest in possession or reversion in any freehold, customary, copyhold, or leasehold lands, tenements, houses, or hereditaments : for if it is, then the lower duty is to be paid : if it comes under the description of other property in general, then the higher duty is to be paid.

The first and principal of the acts of parliament which are mentioned in the case, is the 35 Geo. III. cap. 73 *. That act repeals the former acts of parliament, which were made, (among other things,) for the paving of this parish of Mary-le-bone, and for the further and better provision for the relief of the poor. Then there is a clause, which enables the commissioners to make rates, (sect. 179,) enacting, that they are to make rates (for a variety of purposes, the poor rate, the highway rate, the water rate, and a rate for paving, repairing, and cleansing the streets: describing how much that assessment shall be, under the different circumstances.) "upon all and every person or persons who do or shall inhabit, hold, use, occupy, possess or enjoy any land, ground, house, shop, warehouse, coach house, stables, cellar, vault, tenement, hereditament, or other building, within [350] the said parish or limits aforesaid, according to the yearly rent or value thereof;" which rates, so to be made and assessed by virtue of that act, shall be entered in a book or books to be provided for that purpose," and so on. That rate, therefore, is to be made on all persons who shall inhabit or hold property within the parish.

The 187th section,—reciting, that there are many houses, buildings, and so on, within these limits, which are taken on leases for years or otherwise, and by the lessees or tenants, and also by landlords or owners thereof, are let out in parts, or separate apartments, to under-tenants, and other houses and premises are let ready-furnished,—enacts, "that the several lessors, lessees, landlords, owners or proprietors of all such houses, buildings," &c. "so let, or which shall hereafter be let, shall respectively be deemed and taken as the occupier thereof, and shall be liable and subject to the payment of the rates or assessments directed by this act to be made, &c." Then the next clause enacts, "that the tenant of each separate apartment shall be liable, and that the respective occupiers who shall pay such rates shall deduct the same in paying their landlords their rent."

Then comes a clause, which I think appears to be very material upon the present case. The former six persons, in respect of their occupation of the premises: this seems to go farther. By the 192d section it is enacted, "That where any of the lands, houses," &c. "shall, at the time of making any of the said rates or assessments, be empty, [351] untenanted or unoccupied, then, and in every such case, it shall be lawful for the vestrymen to rate and assess such premises respectively at one half of such rates or assessments, during the time only that such premises shall be empty, untenanted or unoccupied; and in case the premises shall become after such rate or assessment, empty, untenanted or unoccupied, one-half only of such rate or assessment shall be charged on such premises respectively during so long a time as the same shall continue empty, &c.: and then, that in any of the said cases, "the said rate or rates, assessment or assessments, and all arrears due thereon, shall be paid by the owner or owners, proprietor or proprietors, lessee or lessees, or by the first or any other tenant, or the occupier thereof." So that in such cases the premises themselves, in the event of their being unlet, are to be charged, and the succeeding tenant is to pay that charge so laid upon the premises: in which last case such tenant shall be allowed to deduct it out of his rent.

There are further provisions relating to public buildings, vacant spaces of ground, and dead walls; and as to these, if there is no person subject in respect of their occupation, for the same, they are to be assessed at a rate not exceeding sixpence a square yard of the pavement paved or repaired under the direction of the vestrymen, and situate in any square, street or place belonging to such public buildings, (parish churches, parochial or other chapels, meeting houses, &c.): and then this rate or assessment to be made and paid for such parish churches, churchyards, and [352] parochial chapels, shall be paid by the church-wardens, out of any monies payable to and received by the churchwardens or chapelwardens, either for seats in the church or chapels, or for burial fees; and the rate or assessment to be made and paid for any other chapel or meeting house, school, market, warehouse, dead wall or void space, shall be paid by the respective owner or owners, proprietor or proprietors thereof; and shall be charged and chargeable upon the premises, and be recovered and applied in such manner as other rates and assessments are directed to be recovered and applied by this act."

In the same way, in section 194, unfinished houses are to be charged with the rate,

* These acts are not printed.

"and if the owner shall refuse the same, they shall be levied on the goods and chattels of the person so required to pay the same, in manner thereafter directed; and in case the owner shall not be known, or cannot be found, or shall be under commission of bankruptcy, then the rate or assessment made thereon shall be charged and chargeable on the premises, until the owner, proprietor, or lessee can be found;" (making it a charge upon the premises, with which some person shall thereafter be affected; but the premises are to be charged;)—"or until assignees, in case of bankruptcy, are appointed: when the same, and all arrears due thereon, shall be levied on the goods and chattels of such owner or owners, proprietor or proprietors, lessee or lessees, or upon the goods and chattels of such bankrupt, in the possession or custody of such assignee or assignees, who [353] is and are hereby made liable to pay the same out of the goods and chattels of such bankrupt or bankrupts, or upon the said premises, in like manner as other rates made by virtue of this act are made recoverable."

Then there is a clause (195) which is somewhat analogous to the payment of the landlord's rent, under the statute of Anne, That when any goods are taken in execution by any sheriff or other officer, before such rate or rates, assessment or assessments, shall have been paid, then the sheriff, upon demand made by the collector or collectors for the time being to the said vestrymen, shall and he is thereby directed and required, to pay such collector or collectors such rate or rates, assessment or assessments, so made as aforesaid, and which shall not have been paid by such person, and all arrears due thereon: but so as not to charge the sheriff with the payment of more than one year's rate. And in the next section it is enacted, that in case the owners, occupiers, and so on, of any land, ground, house, shop, &c. refuse or neglect to pay the rate, it is to be recovered by distress and sale of the goods of the party neglecting or refusing, which shall be found either in the county of Middlesex, or city and liberty of Westminster, or any other county, city or liberty: such warrant being first backed or countersigned by some magistrate for the county, city or liberty where the distress is to be made, the goods are to be appraised and sold.

[354] Then it is provided, (sec. 199,) that it shall be lawful for the vestrymen, and they are empowered to borrow and take up at interest, according to the regulations and restrictions thereafter mentioned, such sum and sums of money as any person or persons is or are willing to lend and advance upon the credit of any of the rates or assessments: and by any writing upon vellum or parchment, signed by the vestrymen, to assign such rate or assessment, upon the credit of which any money shall be advanced and lent, to any person or persons who shall advance and lend such money thereon, as a security for the several sums so borrowed, with interest, which interest shall be payable and paid half-yearly by the treasurer.

I am not aware that there is any thing more in this act of parliament, which calls for particular observation. The subsequent act of parliament makes no material alteration in the provisions of it. The bonds are to be given to the treasurer, and he may put them up and sell them by auction. That has now been done: therefore the question is, what duty the auctioneer has incurred by this sale? and that depends on the question, whether there is an interest in any land created by these bonds. Certainly, in the first place, the assessment is laid upon the person of the occupier of the land; but it is in respect of that land which he so occupies, and of his occupation. In the case of a vacant possession, it is expressly provided, that the assessment shall be made upon the land itself: and so in the case of dead walls, and other places that are men [355] tioned, which are to be assessed, and when there comes any occupier he is to pay the rate. In the case of a vacant possession, and in the case of churchyards and dead walls, they are to be paid by the parish in the way that has been mentioned. The mode of levying against the person liable to pay who makes default, appears to be by distress, and that distress is a pretty ample one: for it is not confined to goods and chattels within the place within which the duty has accrued, but it is extended to any county, upon the backing of the warrant by a magistrate having jurisdiction there. And here I would state, while it occurs to me, that the provision for the poor's rate is directed by the first statute, (the statute of Elizabeth,) to be levied in that way, by distress; but the statute of the 17 Geo. II. has provided in the same way as this has done, that if it cannot be levied in the place where it is due, it may be levied any where else, by the same sort of endorsement of the warrant: so that the mode of recovering the poor's rate, and the mode of recovering this rate, appears to be pretty nearly the same.

Then the question which arises is, whether this which has been put up to be sold is not an interest in land? that is, whether such an interest as the assignment of these rates creates—(which arises, in one case, in respect of the occupation of land: and in the other, in the case of vacant possession of land, in which latter the land and premises so vacant are assessed, and the person afterwards occupying them is liable;)—can be said to be other than a degree of interest in land: for if it be any interest [356] whatever in land, then it is subject to the lowest duty that is imposed, which would be the seven-pence.

There seems to me to have been a good deal of light thrown upon this subject by the arguments, and especially by the last which we heard. The second argument assisted us much, by comparing this case to some others, under what may be called similar circumstances, in which it has been decided that dues of different descriptions, as tolls and poor-rates, and money borrowed on the security of poor-rates, are an interest in land; and so much so, that where a thing of such a description has been devised to a charitable use, it has been held to be within the statutes of mortmain, which it could not be, unless it were an interest in land. Bonds given by parishes to charge the poor's rates, and bonds for building a county gaol, payable out of the rates, have both of them been decided in the Courts of Equity to be such an interest as cannot be devised for charitable purposes.

The first case was that of *Knapp v. Williams*, in a note to *Corbyn v. French*, in 4 Vesey, 430, which appears to me to be a very strong decision; and that is afterwards followed up by another. The defendants in that case were governors of a charity for the relief of the poor widows and children of clergymen, and they claimed a mortgage for 500l. upon the tolls arising under acts of parliament, (3 Geo. I. 10 Geo. I. cap. 6, 11 Geo. II. cap. 6), for the repair of the Brentford turnpike road: the security was taken upon the tolls simply, not including the toll-houses and gates; so that, in fact, there was no [357] tangible property there. The question—whether that was within the statute 9 Geo. II. cap. 26, came on, upon exceptions to the Master's report. That point was said to have been decided in the case of *Buckeridge v. Ingram*, (2 Ves. 652,) where shares in the navigation of the river Avon were held to be real estate, and subject to dower; but that case does not seem to apply to this question, for it merely decided those shares to be real estate, just as the New River shares were. The Lord Chancellor said, "It occurred to me, that it had been determined that a mortgage of turnpike tolls is within the statute. The mortgagee would have a right to come into this Court to have an account, and a receiver appointed; he would have a right, by the aid of the Court, to have the tolls specifically applied to his mortgage. Consider what the point of law is from the nature of the interest; it is not at all within the mischief: but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the act, these tolls granted in perpetuity are certainly a hereditament; it is in its nature an interest affecting land; he might bring an assize for these tolls, I should think. There is another species of tolls which gives no right at all in the land, that is, a toll thorough. I think it falls within the general words of the statute."

Afterwards, in *House v. Chapman*, p. 542 of the same book, it was decided, "that the bequest for the improvement of the city of Bath was a charitable bequest, and that the mortgages, the five [358] bonds of the commissioners for the improvement of the city, and the four bonds of the commissioners of the turnpike, did not pass thereby, but were undisposed of by the will, and belonged to the next of kin of the testator." That was the effect of that case, so determined.

There was a strong case too cited, (*Finch v. Squire*, which is in 10 Vesey, p. 41, where money secured by assignment of the poor rates and county rates, was held to be within the statute 9 Geo. II. cap. 36, and therefore could not pass under a bequest to a charity. The Master of the Rolls said in that case,—“So all that is paid in respect of the land is got from the land, as much as rent arises out of the land itself. It is more properly to be said to arise out of the land, because it is more in respect of the occupation, than the tolls for the mere privilege of passing. As to that part of the poor-rates that is raised out of the personal property, it cannot be distinguished. I cannot divide and apportion the security, that so much is to be imputed to the produce of the land, and so much is from personal property. I must take the whole; they are so blended that it is impossible to distinguish them. If the consequence of their holding this security would be that something real would go to the charity,

it must fail altogether." That, therefore, was certainly considering those bonds for the payment of money chargeable on the poor's rate, to be an interest in land, as much as a rent arising out of the land itself. His Honour was therefore clearly of opinion, that so much as was charged [359] to the poor's rates in respect of the occupation of land, was an interest in land, within the meaning of the Mortmain Act, and therefore could not pass.

I cannot distinguish the present case from those that have been alluded to; they have been decided by very high authority, and I think it would be extremely wrong to suggest any doubt of the propriety of their decision. They appear to me entirely to govern this case, independently of the construction which, without them, possibly might still have been put upon these clauses in the act of parliament, which has so charged real property with the liability to this payment; (although the person who is to answer it is to be compelled to pay, in the first instance, by personal distress,) inasmuch as it is in respect of the occupation of that real property that he stands so charged. It appears therefore to be an interest in land. According to those cases, these bonds would not have passed by a devise in mortmain: the consequence is, that being an interest in land, the whole that could be demanded upon the sale of these bonds is the lower duty, which is the seven-pence. And that is the opinion of the Court.

Judgment for the Defendant.

[360] THE ATTORNEY GENERAL v. BRANDON. Tuesday, 14th January 1817.—The scenes of the theatres, and all other canvas so painted, are liable to the duties of excise as painted linen.—Canvas is linen, within the statutes.—But where the canvas has been previously primed, it is not liable to any further duty for being afterwards painted, the primer having paid a duty in the first instance, in respect of the colour necessarily laid on in that preparatory operation.

This was a motion for a rule (a verdict having been given for the Crown, on an information filed against the defendant for the recovery of duties, to the payment of which he was charged to have become liable under the statutes 10 Anne, c. 19, 24 Geo. III. c. 41, 25 Geo. III. c. 72, 43 Geo. III. c. 69, imposing a duty on "linen, printed, painted, stained, or dyed," in respect of scenery painted by him for the use of the theatre,)—calling on the Attorney General to shew cause why that verdict should not be set aside and entered for the defendant, on certain points of objection made at the trial, and reserved by the Lord Chief Baron.

[Friday, 10th November 1815.]—Holt obtained the rule, on two grounds, 1st, that the statutes imposing the duty on painted linen had not included canvas, which is made not of flax but of hemp: 2dly, that if they did, the defendant, who was not a manufacturer of such things as goods, wares, and merchandise, was not within the words, intention, or policy of those statutes. He submitted to the Court:—that the leading term printing, employed in the acts, controlling all the subsequent words, was sufficiently explicit of the object of the legislature, in subjecting such things to duty, merely as an article of trade and commerce;—and that it had not been the intention of the legislature to impose any such duty on the mere productions of a painter,—a person exercising a fine art, at all times fostered by [361] national encouragement:—but that it was to be restricted to the produce of machinery, or to that wholesale and facile production of slight manual operation, which was nearly allied to it, and would satisfy the words used in the Act, following the generic term printing.

21st May 1816.—It appeared from the report to be in evidence, —that the canvas, on which the scenery, as well as all paintings in oil were executed, was first primed before the artist could use it: that is, that it was previously prepared by laying on, a whitish body of paint, which fitted it to receive the colours: —that there were persons whose business it was to perform that operation as a trade, and who took out an annual license and paid the duty,—but that in the present case that was done by the painter himself. And it was also proved, that the extensive manufacture of the article of floor-cloth, was subject to, and paid a duty, in the same manner.

The Solicitor General, Dauncey, Clarke, and Walton, now shewed cause. They met the first objection by shewing,—that in other acts of parliament, canvas was spoken of and considered as linen, particularly the 43 Geo. III. c. 68, in the schedule of which, canvas of various denominations is classed under the head "linen."

As to the general liability of painters on canvas to the excise duty, they instanced

the usage with respect to the manufactures of floor-cloth, which (they submitted) was in substance precisely the same [362] thing; and that as there was no exception in any one of the acts, in favour of this species of painting, the duty was therefore chargeable;—that the inconvenience adverted to, in the case of artists and others, was easily obviated, by the accommodation of procuring the canvas ready primed, on which a duty having been received, none was payable: but that if they did not choose to do so, they were liable to the duty, and must pay it. They then went into all the statutes on the subject, and contended that it was clear, both from their object and language, that the duty was payable for the article which had given rise to the present proceeding; and that if it should be held to be really exempt from duty, so must be also floor-cloth, which had been constantly charged, and which could then no longer be demanded.

Pell, Serjt., Holt, and Lamb, endeavoured to support the rule: contending, in addition to the arguments used on obtaining the rule,—that it could not have been the intention of the legislature to impose a duty on this species of painting in oil:—that for more than 100 years since the first act on the subject passed, no duty had ever been demanded for such articles as were the object of this information; but that the statutes had in view merely linen, properly so called, which had received additional beauty and value from the well-known process of being figured and coloured by the public manufacturer as an article for sale in the market, and exciseable as such:—that printing was the nomen generalissimum, and the following words were used, *ex abundanti cautela*, and to prevent evasion.

[363] They then proceeded to shew, from various sections and clauses of the several acts, particularly of the 25 Geo. III. c. 72, that they became absurd or futile, when attempted to be applied to the article in question. Was it to be imagined, for instance, that the painters of the Royal Academy were to enter their rooms and give notice to the Excise, which some of the provisions required of painters of linen, before they could begin a picture? for as to their purchasing their canvas ready primed (although it was not admitted that that would absolve the painter from further duty, if the arguments of the Crown were right,) painters set too much value on their labours to entrust to another so essential an operation as the substratum of their productions, which might be destroyed by a defect in that particular. But it is on the painter of the linen that the duty is imposed, not on the primer; or if on the primer in respect of what he does to it, the painter would also be liable. It was also among those provisions, that the linen should, before it was painted, be measured and marked at both ends, and a penalty is imposed on defacing such marks; and several other requisitions were adverted to with the same object. Those provisions (they submitted) could not have been intended to apply to a painting; or no one could, in future, paint a landscape on paper, if the construction contended for by the Crown were right, without being liable to a duty.

As to floor-cloth, that, they submitted, was chargeable as a manufactured article of extensive commercial importance, and produced by machinery [364] which stamped it with blocks; and that assisted the distinction taken in favour of the defendant.

In schedule F. foreign pictures are charged with a duty, *eo nomine*; and it would be absurd to say that pictures painted in oil on canvas, come under any classification of painted linens. The object of the acts could only apply to linens as such, and meant to be afterwards used as such, and to be applied to the purposes to which linen is usually applicable, as dresses, furniture, &c. And one of the terms used in these acts by way of description of the article, is *piece goods*; but they could never have had in contemplation this sort of operation on it, which, when performed, totally destroyed its quality as linen, and left no vestige of that article apparent. In an indictment for stealing a picture, a description of it by the term “painted linen,” would be insufficient to support such a charge.

The Solicitor General, in reply, urged—that as all the terms used in the act, printing, painting, staining and dying, were entirely distinct in themselves, and were performed by distinct modes and processes, it was obvious that each was intended to be distinctly charged with the duty, and they could not, therefore, be considered only as different modifications of the same operation; that linen had been clearly shewn to be a term which would include canvas, and there was no doubt that the canvas in this case was painted. Then the sole question would be, whether it came within the statutes imposing a duty on linen painted? With respect to [365] all arguments

ab inconvenienti, the inconveniences must be taken to be balanced by the conveniences ; but that, in all events, the only inquiry at present was, whether the duty attached.

THOMSON, Chief Baron, now gave judgment. This was an information for duties, which the defendant was supposed to owe to the Crown, in respect of having painted certain linens. The duty was first imposed by the statute of the 10th of Queen Anne, and has been continued by a variety of acts of parliament, with different modifications and additional provisions, down to the present time. It is imposed on calicoes and linens printed, painted, stained or dyed. The article in question consisted of canvas, which it seems is (strictly speaking) made of hemp, and not of flax ; and it was for a while contended, that an article of that description, the fabric of which is canvas, does not fall within the description of linen. But, however, we never entertained a doubt on that subject : (and I believe the counsel for the defendants were themselves, in fact, satisfied of that at last, and appeared to give up that point :) because, in the language of many acts of parliament, canvas itself is denominated linen, and is put under the head of linen in various instances.

That being so it comes to the question whether, under the circumstances of this case, this duty must be held to attach ? Mr. Brandon, it seems, is variously employed about the theatre of Covent Garden : and, amongst other things, he was em-[366]-ployed in making the scenery, and in painting himself the scenery for the use of that house, in doing which he makes use of canvas, (which is the article in question,) and upon which his scenery is delineated ; and the way in which that is done is most certainly by painting it. The word painted is found in connection with other words, namely, printing, staining and dyeing, which refer to other modes of ornamenting linen besides that of painting it ; but it really results to the question, whether these scenes are not painted linen within this statute, for whatever purpose it may be afterwards applied.

It was in evidence, that there are certain persons whose business it is to do the first thing to the canvas, preparatory to its being painted on, and receiving what may be called a picture : the denomination of that previous operation is priming, which will be found explained in any of the dictionaries of arts and sciences. I looked particularly into Chambers's, and it is there explained to be that process by which the first colour is put upon the canvas. It is necessary that that should be done with linen, before any oil paint can be laid on it : for, otherwise, it would all run through and never form a picture : and to prevent that, it is that they use this basis called priming. But it is, of itself painting : it is paint put on the canvas, and necessarily so put on it. The scenery appears here to have been part of it cut out in different shapes, — frequently in the shape of trees ; but that makes no difference in the consideration of this question, of whether it is linen, and liable to duty when painted on.

[367] It was in evidence that the persons whose employment it is so to paint (prime) this linen, and prepare it for the painters, regularly pay a duty, as is required by the act of parliament to be paid by painters, stainers and dyers of linen. In point of fact, they take out an annual license for so doing : and those articles, when so painted on, receive an impression, importing that it is charged with duty ; and that is the way they have always gone on down to the present time. It does not appear that any painter of pictures has been thought of, in order to have the duty demanded of him : but if he does that, which if done by another person would subject the article to a charge of the duty, there is no reason why he should be exempt. It has been always, in fact, paid by the primers ; and the officers gave evidence, that they enter their rooms in which these things are done. That was not required in the present instance ; and it was stated that it was merely meant to try the question, whether they are liable to pay the duty ?

The matter lies in a small compass ; and I do not know whether it will be made clearer, by endeavouring more to amplify it. These scenes are, in fact, linen painted ; and therefore incur the duty, as being one of the articles enumerated in the statutes. Nor is that, after all, more than has been constantly done with regard to floor-cloths, which regularly pay a duty under the same act, and for the same reasons. They are commonly in use ; and it is perfectly well known they pay the duty : but that is in no other respect than as being linen [368] painted. Many of them have figures on them, done with stamps and blocks, which may be denominated printing ; but with regard to painting, the mere daubing them with a single colour would answer the description, and when so daubed, they must pay a duty as painted linen : and having

done so, they receive an impression as the act directs, denoting that the duty has been charged. On the whole, we are of opinion, that the duty demanded by this information has been proved to have been incurred; and, therefore, the judgment must be for the Crown.

Judgment for the Crown.

THE ATTORNEY GENERAL v. JONES & BARTLETT. [Same day]. —If a man give, by deed, his leasehold and personal property to trustees, for the use of himself for life, and of several persons therein named at his death, with a power of revocation reserved,—never having parted with the deed or with any part of the property during his life,—and confirming, in most respects, such disposition of it by will at his death; those two instruments will be considered as to be taken and construed together as testamentary instruments, and the property passing under them will pass as legacies, and be subject to duty.—Wood, B. dissentiente.

[Questioned, *Tompson v. Browne*, 1835, 3 My. & K. 35; *Brown v. Advocate-General*, 1852, 1 Macq. H. L. 85; *Jeffries v. Alexander*, 1860, 8 H. L. C. 594. See *In the Goods of Robinson*, 1867, L. R. 1 P. & D. 387.]

This was an information filed for the recovery of the sum of 800l. for legacy duties, under the 48 Geo. III. ch. 149: charged to be payable on a legacy of 8000l. bequeathed to Ellen Franklin, a stranger in blood to the testator. A verdict was taken for the Crown on the trial, subject to the opinion of the Court on the following facts found by a special verdict.

By a certain indenture, bearing date the 25th day of March, in the year of our Lord 1813, and made between William Franklin, Esq. of the one part, [369] and the said Thomas Jones and Patrick Bartlett, the present defendants, of the other part, it was witnessed, that in consideration of 10s. to him paid, he the said William Franklin did bargain, sell, assign, transfer and set over unto the defendants, their executors, administrators and assigns, all that messuage or tenement of him the said William Franklin, situate in Norton street, in which he then resided, with the garden and appurtenances, to hold the said messuage or tenement, with the appurtenances, unto the defendants, their executors, administrators and assigns, for the residue of the term he had therein, upon the trusts, and to and for the ends, intents and purposes, and subject to the provisos thereafter declared concerning the same; and for the considerations of the said William Franklin, did bargain, sell, assign, transfer and set over unto the defendants, their executors, administrators, and assigns, all the 7500l. government stock, in the five per cent. annuities, and all other stocks or funds standing in the name of the said William Franklin, or belonging to him, in the books of the governor and company of the Bank of England, and also all the dividends which might be due thereon at the time of his decease, and all arrears of any pension or pensions which might be then due to the said William Franklin, payable to him by the Government of Great Britain or otherwise, and all books, plate, household furniture, linen, china, glass, and pictures, and all other personal estate whatsoever then belonging to him the said William Franklin, or which should belong to him at the time of his decease, to hold unto the [370] defendants, and the survivor of them, his executors, administrators, and assigns; nevertheless, upon the trusts, and subject to the proviso or provisos, and for the intent and purposes thereafter expressed and declared of and concerning the same; and it was thereby declared, by and between the said parties to the said indenture, that the said defendants, and the survivor of them, and the executors, administrators, and assigns of such survivor, should stand possessed of all the before-mentioned leasehold premises, and the said 7500l. five per cent. annuities, and all the other stocks or funds in the name or on the account of the said William Franklin, in the books of the governor and company of the Bank of England, and also of all the other personal estate whatsoever of the said William Franklin, upon the trusts thereafter declared concerning the same; (that is to say,) upon trust for the use, benefit, and advantage of the said William Franklin, for and during the term of his natural life; and from and immediately after his decease, upon trust, that the defendants, or the survivor of them, should receive the rent and proceeds of the said messuage, or tenement, and premises, and the interest, dividends, and profits of the said stocks or funds, and apply the same, or so much thereof as they in their discretion should

think necessary, for the maintenance and education of Helena, commonly called Ellen Franklin, who was born on or about the 7th day of April, in the year of our Lord 1798, until she should have attained the age of 21 years, or be married with the consent in writing of the defendants, or one of them; and from and [371] immediately after the said Helena, otherwise Ellen Franklin, should attain her said age of 21 years, or be married as aforesaid, then upon trust, that they the defendants, and the survivor of them, should assign the said leasehold premises, and transfer the said stocks and funds, unto her the said Helena, otherwise Ellen Franklin, or stand possessed thereof, and of the said books, plate, household furniture, linen, china, glass and pictures, and all other the personal estate of the said William Franklin, of what nature or kind soever, or wheresoever, in trust, for her the said Helena, otherwise Ellen Franklin, her executors, administrators and assigns, for her and their own use and benefit: and upon further trust, that the said defendants, and the survivor of them, and the executors, administrators and assigns of such survivor, should from time to time lay out and invest the surplus of the interest, dividends, or produce, arising from the messuage and respective funds aforesaid, and from the residue of the said personal estate of the said William Franklin, after applying a sufficient part for the maintenance, education, and support of the said Helena, otherwise Ellen Franklin, as aforesaid, on government or real security, to accumulate for the benefit of the said Helena, otherwise Ellen Franklin: such accumulations to be liable to the like contingencies, and as was before directed respecting the said messuage, stocks, funds or premises, out of which the said accumulations would arise. And the said indenture contained a proviso, that it should be lawful for the said William Franklin, at any time or times during his life, by any deed or writ-[372]-ing under his hand and seal, or by his last will and testament in writing, or by any codicil or codicils to such will, to be duly executed, to revoke or make void, alter or change, all or any of the respective trust or trusts in and by the said indenture limited or appointed of the said messuage or tenement, with the appurtenances, stocks or funds, dividends, arrears of pension, books, plate, household furniture, linen, china, glass, and pictures, and all other personal estate whatsoever, so assigned by the said William Franklin as aforesaid. And the said indenture contained powers for the said defendants to appoint other trustees, in case they should refuse or decline to act, and to reimburse themselves their expenses: and also a clause of indemnity against such other acts. After the execution of the above-mentioned indenture, the said William Franklin, by his will, bearing date the 15th day of April, in the year of our Lord 1813, and duly executed, reciting the before-mentioned indenture, and the power therein contained for revoking or altering the same, did, by his said will, confirm the said deed in all respects, except where the same was altered by that his will: and he thereby directed that his funeral expenses, the expense of proving his will, and all his just debts, should be defrayed and paid out of the money which should belong to him, and be in his possession, in his dwelling-house, or in the hands of his banker, or the dividends due from the public funds, or the arrears of his pension or allowance from government, at the time of his decease: but in case such money should not prove sufficient for the said purposes, then his executors [373] were to discharge the same by sale or transfer of three per cent. consols. or three per cent. reduced, belonging to him in the public funds, or such parts thereof as might be necessary for the before-named purposes, and for discharging the legacies thereafter by him bequeathed. The said William Franklin did then, by his said will, give several legacies in stock and money, to the amount of some hundred pounds, and appointed the defendants his executors, with the usual powers and indemnities. The said William Franklin died on or about the 18th day of November 1813, without altering or revoking his said will: and the said defendants proved the said will of the said William Franklin, in the Prerogative Court of the Archbishop of Canterbury, on the 15th April 1814, and have taken upon themselves the burthen of the execution thereof. At the time of the death of the said William Franklin, the said leasehold messuage or tenement, with the appurtenances, in the said indenture and will mentioned, remained in the possession of the said William Franklin, together with all the books, plate, household furniture, china, glass, pictures, and effects, mentioned and comprised in the said indenture: and the sum of 7400*l.* five per cent. annuities, stated in the said indenture to be 7500*l.* were, at the time of the death of the said William Franklin, standing in the name of him the said William Franklin, in the books of the Governor and Company

of the Bank of England, and had not been, nor were at the time of the death of the said William Franklin, transferred to the said defendants, the trustees named in the said inden-^[374]-ture, or either of them; but the said William Franklin received the half-yearly dividends accruing due thereon during his life, and retained the entire possession, management, and control over the said leasehold premises, and all other the property in the said deed mentioned, and also the custody thereof, from its execution until the time of his death. The clear residue of the personal estate and effects of the said William Franklin, after payment of all his debts, funeral and testamentary expenses, and pecuniary legacies, amounts to the sum of 8000l, which the said defendants have retained for the benefit of the said Helena, otherwise called Ellen Franklin; and the legacy-duty, if any is payable thereon to his said Majesty, amounts to the sum of 800l. the said Helena, otherwise Ellen Franklin, named in the said indenture, and for whose benefit the same is so retained, being a stranger in blood to the said William Franklin.

This case was twice argued: first by
Nolan, for the Crown, and
The Common Serjeant, for the defendant; and afterwards by
Dauncey, for the Crown, and
Scarlett, *contra*.

On the part of the Crown, it was argued, that this mode of transferring the property in question, was ^[375]intended to operate as a mere device for evading the legacy duty, but that these instruments were within the legacy acts, (particularly the 36 Geo. III. ch. 52, sec. 7*, from the language of which the principal arguments were taken,) which had reached them by the words "testamentary instrument" being super-added therein to the word "will"; obviously with a view to meet this kind of instrument:—that such a deed being purely voluntary and without consideration, and revocable at will, would be wholly void, as against creditors. The testator had neither parted with the possession or control of the property till his death; and, at his death he had a power of disposing of the whole in the words of the act: nor can these defendants now dispose of this property, otherwise than as executors. There was not even an inchoate right in the grantee, till the testator's death. And this is a much stronger case than that of a donation *causâ* ^[376]*mortis*, made in a last illness, in expectation of death; which would revert, or rather, not take effect, if the donor should recover: yet that is within the statute, although it does not vest by will.

For the defendants, it was contended that the instrument in question was not a will;—and that the law of England knows no such thing as a testamentary instrument, and that those words in the section were meant to apply to Scotch wills, which are called by that name. If no will had been made, the administrator could have had no right to the leasehold property disposed of under this deed; and the act of parliament was not intended to alter the effect of any adopted mode of conveyance in use.

As to the question of fraud, besides that it was not found by the case, there was really no such thing in the transaction. A man has a right to avoid a duty, but not to evade it. He may pay money in the presence of a third person, for the sake of saving the duty on receipts, and there were many other cases of the same sort.

Suppose this will had not been signed, as required by the statute, still this property would have passed by the deed, and the trustees might have maintained an ejectment against the heir; and it cannot be considered a will for some purposes, and a deed for others. If this deed contained no power of revocation, there could be no doubt of its

* And be it further enacted, That any gift by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will or testamentary instrument have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall effect as a donation *mortis causâ* shall also be deemed a legacy within the intent and meaning of this act.

being good : for all the property would have passed by it, and the [377] grantor could not have altered its limitations by will. But the power of revocation does not destroy the nature and effect of the deed : there are many such known to conveyancers, wherein there is both a power of revocation and a suspension of its taking effect. It becomes irrevocable by the death of the party in whom that power is placed. Such, for instance, would be the case of a settlement, on the marriage of two persons, of an estate on themselves for life, with remainder to children, in the usual manner : if, by that deed, there was a power reserved to the survivor, to revoke the uses and alter the disposition of the limitations to the children, during the life of such survivor. Now, such a person would have a power of revocation during his life, and might alter the prior disposition of the property by his will : but it would not be, on that account, less a deed, and would take effect as a deed after his decease. Unless the testator or grantor had in his life-time revoked the assignment of the leasehold property executed by this deed, by another deed, it must have passed to the grantee : nor, if he had died without a will, could the next of kin have claimed it against the grantee. The power of revocation, therefore, can, in effect, make no difference, till it is executed : and, if he had died without exercising it, the trustees need not have proved this deed as if it were a will. If he had been dispossessed of his house, in his life-time, an ejectment could not have been brought (existing this deed) but in the name of the trustees.

As to there having been no actual transfer of the stock to trustees, that could make no difference in [378] this case, as long as it was not otherwise transferred : and he dying without so transferring it, it must go to them.

[It was admitted that this instrument would have been void, as against all persons having legal claims : and that property acquired after the execution of the deed, would not pass by it.]

Then, as to the household furniture, plate, linen, &c. being limited over, Courts of Equity have been liberal in giving effect to such limitations, where the personals have been such as would improve the value of a house or other property, to accompany the transfer of which, such personals have been conveyed : but if that latter species of property be incapable of any such limitation, still that would not destroy the operation of this deed, as a deed, on that property on which it might from its nature operate.

In the replies it was admitted that a man might dispose of his property in his life-time as he pleased, without its being liable to any duty : but it was urged, that in this case the property had not been in fact disposed of till the death of the party, and that then it came within the words and description of a legacy, "given out of such personal estate as the person dying had power to dispose of at his death." As to the case of a settlement, with power to make an appointment by will, that is expressly excepted out of the act, by the 45 Geo. III. ch. 28, sec. 4 : and that exception is a legislative declaration, that [379] such an appointment would otherwise have been liable to the duty : and this is certainly a much stronger case. The whole case was ultimately put as one of mere construction of the terms and object of these acts of parliament.

Cur. adv. vult.

The Court, this day, delivered their opinions *seriatim*.

RICHARDS, Baron.—[Having read the case.]—Now the question seems to me to be, whether this deed of the 25th of March 1813 be to be considered as a will, or other testamentary instrument, of Mr. Franklin? As to the other paper stated in the verdict, that is beyond all doubt a will, and in the regular form of a will. These two instruments are now brought before the Court : and the inquiry will also be extended, —if there should be any doubt about the first instrument being a testamentary instrument,—to the consideration, whether the two instruments, connected together as they are, are not to be regarded as a testamentary instrument, under which this provision is made in the nature of a legacy, as it is stated. I am of opinion that this deed itself is now to be considered as a testamentary instrument. The Court is driven to the necessity of deciding that point, though it is not usually in the habit of entertaining questions of that kind, the Spiritual Court being the proper forum for that purpose : but as it appears in a great number of cases throughout the books, other Courts must sometimes necessarily decide that question, when it [380] comes before them, and say whether papers are testamentary or not, which we, who have no power to drive the parties to the Spiritual Court, must decide according to the best of our judgment.

Now this indenture is made without what we may truly call any fair consideration,

for it is obviously merely nominal; and the Court is bound to notice the distinction between a real and a nominal consideration. It is a voluntary deed: for the consideration not being valuable, does not make it otherwise. On that subject it is impossible to form any doubt, and therefore it must be taken to be perfectly voluntary. The maker of the deed keeps it in his own possession. It is stated in the verdict, it is true, that the deed was sealed and delivered; but it is clear what the meaning of that is,—that it was sealed and delivered for the purpose, merely, of making it a deed: not delivered to the parties in whose favour, for the benefit of the infant, the deed seems to have been made; for it is stated by the jury, that the grantor had kept the deed in his own possession down to the time of his death; he never transferred the stock, and took no measures to clothe the trustees with any control or authority over it, or to invest them with any part of the property. He received the dividends: he might have sold the stock whenever he should have thought fit. The deed was in his custody: the trustees do not even seem to have known any thing of it, and it appears to have been purely a deed made in effect only between him and himself. He therefore continued, in point of law, as the jury find in point of fact, in complete possession management, and [381] control of all the property which is mentioned in this instrument; and nothing was to take it from him but his death, if he chose to die without disposing of it in the way in which he had still a right to dispose of it. It was therefore, in all respects, testamentary, so far as the complete possession of it during his life-time, and that possession being to be transferred after his death, goes. It seems to me to be as completely testamentary as if he had made a will to be ambulatory till his death, and then to vest his property in the way intended by this instrument. The instrument is right in point of form, and trustees are interposed; but there is no doubt that the Court is bound to look, not merely to the form of the thing, but the substance. Then is not this an instrument, in point of substance, which reserves to this party the total command and control of the property down to the time of his death; and does it not begin then, and then only, to operate, just as a will would operate? It seems, therefore, to carry with it every mark of being testamentary; and is so in effect, as much as any testament, in my opinion, would have been.

There is a case decided by Sir John Nicholl, which may be found in Dr. Phillimore's Reports, just published, which it may be useful to refer to on this question. It is the case of *Thorold v. Thorold* (vol. i. p. 1), where an instrument, in the form of a deed of gift, was admitted to probate. I do not cite it as an authority entirely in point, but as fixing the principle throughout on which this case should be decided. I will not therefore trouble the Court [382] with more of that case, but shall only refer to it. There are, besides, many cases where deeds are considered testamentary, and have been acted on accordingly, and probate granted of them when application was made to the Ecclesiastical Court. There is this distinction in the case which I have just cited, that there were no trustees named; but the learned judge, in his decision, stated, and indeed common sense so dictates, that when you look into transactions of this sort, you must look to the substance, and not the mere form. Now if it is once admitted that, if there were no trustees here, the act would be testamentary, as those cases decide, surely you will not suffer a person to escape the law, and that by his own act, by the formality of introducing trustees who are of no use during his life, while he keeps all the property, and retains the control of it, and the trustees know nothing of it; at least nothing of the sort is found by the verdict.

After this he makes his will, and he incorporates with it this deed, as it seems to me. He refers to the deed in it: he there states, that he has a power to revoke the deed; he confirms it, however, except so far as he revokes it: he alters it, by giving some legacies, and he confirms the rest. If he then gave the legacy anew to this lady, it would have passed under the will. It is ultimately under the terms of the will that he confers a testamentary benefit on her: and therefore it seems to me, that these two instruments may be fairly considered together. But I think the true question arises upon the deed itself. Now I admit, if a will had not been made, the tenor of the deed must have been attended to; and the property [383] must have gone accordingly; but as it is, it must go in the nature of a testamentary disposition made by Mr. Franklin. That being the opinion I had at first entertained, I am, after a good deal of consideration upon the subject, of the same opinion, and think that this paper is to be considered a testamentary paper: or that, in all events, the two together are testamentary; and therefore, that the duty claimed has attached: and

I take no shame to myself in confessing that I have altered my former opinion upon the subject.

WOOD, Baron. I am sorry I cannot agree in the opinion already delivered. I think the question is, as has been properly stated, Whether the indenture set out in the verdict can be deemed a will or testamentary instrument, within the meaning of those Acts which impose the duty on legacies? Then we must inquire what is the meaning of "will or testamentary instrument" there, and why those latter terms are used in this clause of the act. Now it appears to me they have been used for the purpose of including in its provisions any informal instrument which might still be in effect a will: for a will, properly speaking, is not complete, unless there be executors appointed: but yet there may be instruments which do not appoint executors, which may notwithstanding still be considered testamentary instruments. It may also have relation to Scotland, where the term "testamentary instrument" is used instead of will. I agree that there are many irregular instruments which have been deemed testamentary, [384] although they have been, in point of form, something like deeds: but I believe there is no instance to be found, where an instrument properly made, in due technical form, and which can take effect as a deed, has been considered as testamentary. I believe the cases on this subject, which have been published in Dr. Phillimore's late Reports, are all upon papers which could not operate as deeds. You will find many instances where the instrument has been in the nature of a bill of sale, but there have been no parties to it, wherefore that never could operate as a deed; and therefore, rather than it should have no effect at all, it has been considered a testamentary instrument. But is that the case here? This is the case of a deed regularly and duly executed. It has all the requisites to constitute a deed. It is an indenture, and a will is never an indenture. It is between parties; there is the grantor, or the bargainor, on the one part, and the trustees, or bargainees, on the other part. There is a pecuniary consideration, which is necessary, perhaps, to give it effect, for although it is merely nominal, yet it is so far substantial that it is necessary to give effect to the deed: and it does give effect to it as a deed. There are the words "grant, bargain, sell, transfer, and set over;" those are not words used in a will. Then there is a grant of leasehold property, and it is "to hold for and during the term of the lease." There is a grant afterwards of all the goods, chattels, and personal estate, not only which he has then, but which he shall have at the time of his death. I agree that this deed cannot operate with respect to any thing but that which he was possessed of when [385] he made it; for if he afterwards acquired property, it would not pass: but would that make any difference in the denomination to be put on the instrument itself? Many deeds may operate in one respect, and not in another. This is one of those; but it is a deed, and will have operation as to that which the grantor was possessed of at the time he made the deed.

Then some stress has been laid on this, that one of the trusts is,—that it is given to the trustees for the use of the grantor during the term of his life; and that there is also a proviso of revocation, with a power of appointing new trustees. But all these things make no difference with respect to its being, or not being, a deed: if it had not had that power of revocation, it would have been absolute: but having it, it is equally a deed, only it has a power of revocation, which is an extremely common thing in instruments of this sort.

It is then said that it must be a will, because, in a subsequent will which the testator makes, he takes notice of it, and confirms it. But can such a confirmation make any difference? Can that alter the nature of it? It gives no additional force to it whatever. And how the confirmation by will of a deed can convert the deed itself into a will, I cannot conceive.

Now let me suppose that there was no power of revocation: would it not have been a good and valid deed? Would any man contend that that could be a will or testamentary instrument which is, in point of form and substance, a deed, and which must [386] operate as a deed? It could not be proved in the Ecclesiastical Courts, because it would not be a subject within their jurisdiction. Then let me suppose, that after this deed (there being no power of revocation in it, or to make alterations of the uses of the deed) the party had made a will, disposing of the property

* His Lordship, on this case being laid before him when at the bar, had inclined to the contrary opinion.

differently : that will would not avail against the deed : but the deed, notwithstanding the alteration by will, if he had not reserved the power, would prevail against the will. That shews, pretty clearly, that it is a deed and not a will. If, on the other hand, he had made a will, and then had made another will, the second would have been a revocation of the first will ; but here, if he had made a second deed, contrary to the first deed, the first deed would prevail against the second, if he had reserved no power to alter the trusts of the deed by a subsequent instrument.

In this case, there is no doubt that the legal estate passed from him in his lifetime. Now is there any case where a legal estate passed by a will in the life-time of the testator ? This was a deed which passed the legal interest in the personal chattels which he was then possessed of ; it would not pass choses in action, in law, but it would pass the leasehold property. There are also pictures, furniture and plate, and the legal interest in those must have passed. If an ejectment were to be brought to recover the possession of the leasehold premises, it must be in the name of the trustees : for the legal interest was vested in them. It happens in this case that he has appointed his trustees to be his executors : and therefore they have two characters : but, I take it, if they were to bring an ejectment, it must be in the character of trustees, and [387] not as executors ; because the interest is in them in that original character, and they take nothing by the will in the leasehold estate. And if the will had appointed other persons executors, still every thing that passed by the deed must have been recovered in ejectment by the trustees : it is therefore a complete deed, and has nothing in it testamentary.

Then some stress has been laid upon the 7th section of this statute, which has these words in it : "That any gift, by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will or testamentary instrument have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy." That was introduced for the purpose of meeting the kind of case which frequently occurs, where a person may have an absolute power of disposing of property, which cannot be called his personal estate. He may have a power given him to dispose of property which is not his own, by will or deed ; and if he has a power to dispose of it as he pleases, it is still his property for that purpose.

Now, it is true, that in this deed or instrument he has reserved to himself a power of altering any of the trusts contained in the deed ; and so far as he has done that by his will, he certainly falls within this clause of the act of parliament. The deed most undoubtedly gives him a power of doing it ; and so far as he has done it the legacy-duty [388] will attach upon it. I have no doubt upon that. And it is stated by this verdict, "that the said William Franklin did then by his will, give several legacies in stock and money to the amount of some hundred pounds, and appointed the said Thomas Jones and Patrick Bartlett his executors." Therefore, such legacies as he has given in stock or money, most undoubtedly, I apprehend, will be subject to the legacy-duty : and they will be subject to the legacy-duty under the 7th section of the act, because they are given out of a fund which he had a power to dispose of. But with respect to that which is only affected by the deed itself, I apprehend no such duty can attach.

Now, supposing that, instead of making this new appointment or giving these legacies by will, he had done it by deed ; for he may alter the deed by a deed, in his life-time, or by any will to be by him made : suppose he had in his life-time made this alteration, —had done in his life-time by deed, what he has done by his will, —could it be contended that there would be any thing testamentary in that ? Yet the whole would then have reference to a deed. Then how does the will make a difference in the deed ? It makes this difference merely, —that it operates as a will upon that which he has so disposed of ; and therefore the legacies which he has given by it will be liable to the duty.

It was argued that this was a fraud, because it was done with an intent to avoid the legacy duty. And probably it was done with that view ; but that was no fraud, that I know of. There are two ways [389] of doing it : a man may, by deed in his life-time, dispose of his property, reserving the use of it to himself for life, and after his death direct it to go to his children, or such persons as he may think proper : or he may do the same thing by making a will : but he is not obliged to prefer either

mode to the other; he may choose which mode he pleases, the law leaves it to his option. He may say, I will not do it by will, I will do it by deed: I will do it by deed, because I shall only have the stamp to pay for; and not by will, because it will be subject to a large legacy-duty which will attach upon it, and which my legatee will be bound to pay. He has a right to do so; he has a right to make his election. If you can shew any law which says, that where there are two ways of doing a thing, the person shall do it in the most beneficial way to the revenue, you will effect something. But there is no law that so fetters any man as to his property; he may dispose of it by deed, confessedly to avoid the legacy-duty, which, if it were done by will, it would be subject to, but that is no fraud. If it is a defect in the law, it must be remedied by the legislature: but we must decide upon the law as it stands. When the tax was laid on hair-powder, the people ceased to wear it. Could you say that that was a fraud, and that therefore they must pay the tax whether they will wear powder or not? It would be monstrous: it goes to such an extent that there would be no end to it. It was no fraud in this testator to take the course most beneficial to himself, though less so to the revenue; it was a matter of prudence in him, but it was no fraud. Therefore I do not think myself warranted in making a forced and strained construe-[390]-tion, contrary to the real meaning and import of the words, to extend this act to a disposition of property effected by deed, when the act speaks only of a will or testamentary instrument. As to one part of the claim, I think some portion of the property bequeathed is liable to legacy-duty; but as this is an entire verdict, the judgment ought to be given for the defendant, unless there be a *venire facias* awarded, to ascertain how much of that which he had a power to dispose of is liable to the duty.

GRAHAM, Baron. I take it, the short question in this case is, Whether the instrument, which is the subject of this special verdict, is or is not, a testamentary instrument? I had thought, in the course of the argument, that the clause my learned brother Wood has referred to furnished a strong argument in favour of the demand of the Crown, from the manner in which it is penned; but I shall not occupy the time of the Court in observing on the ambiguity of that language, because I concur with my learned brother Wood, perfectly, in thinking that the disposition there spoken of out of personal estate over which the party has a disposing power, is confined to a disposition by will or testamentary instrument; and therefore the question recurs to that which I have ventured to state it to be.

Now, therefore, in order to judge whether this is a testamentary instrument, we are obliged to borrow the knowledge on the subject which belongs to another jurisdiction; but where an act uses expressions of this sort, and the Court have no power of directing the parties to resort to the proper [391] jurisdiction, it becomes a necessary part of our duty to construe the act as it is framed by the legislature; and we therefore must say whether this is, or is not, a testamentary instrument.

Now, in the first place, without occupying a great deal of the time of the Court, I think the proper way of considering this is to consider what is a testament,—what is the nature of that instrument which the law calls a testament or will; and then to see the nature of this instrument before us, and what is the operation of both. It is perfectly well known that the Ecclesiastical Courts have taken their ideas on testaments from the civil law; and there is one principle which pervades all the doctrines on the subject. A will is described by the Digest in this way; it is “*voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit.*” Blackstone, in his second Commentary, cap. 32, in explaining these words, describes them to mean—“the legal declaration of a man’s intentions, which he wills to be performed after his death. It is called *sententia*,” he says, “to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator’s intention: it is *justa sententia*, that is, drawn, attested, and published, with all due solemnities and forms of law; it is *de eo quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.” Thus, therefore, we see that in order to constitute the essence of a will, it must be an instrument which a man voluntarily makes; it is an expression [392] of his will, and it is an expression of his will touching the disposition of his property at the time of his death, and only at the time of his death. Now when we consider the instrument before us, does it, or does it not fall in, in substance, with this definition of what is a will? I do not want to have recourse to the

authority of *Thorold v. Thorold* to establish that you are to look to the substance, and not to the form; for no man in preparing such an instrument, by calling it a deed, can give it the effect of a deed, if effectively and substantively it is not so in its operation.

Now, what is the disposition which this gentleman makes on the 25th of March 1813? It is immaterial to go into his intention, because I do not found my idea on his intention to avoid the duty; the question is, whether he has done it in this way. He sets about this instrument, to give it that effect which he has, by a formal will, confirmed on a subsequent occasion; and the special verdict states the will to have been signed by him short of a month afterwards. Now what does this instrument do? I most perfectly and entirely agree with my learned brother Wood, that if this instrument really did effectively dispose of any part of his property during his life, it has the operation of a deed; but I say that any man looking at, and reading this instrument, must be perfectly convinced, not only that he had no intention of parting with his property during his life, but that he has guarded against any possible interruption of his own enjoyment. Then he is in the situation of a man who has made his will. When it is urged that it would [393] be good without a power of revocation, I agree to it, because that would take away the character of a will: but having a power of revocation, he reserves to himself a power to annihilate it by a slip of paper, to which he may sign his name, and he may do it without a witness. I say, therefore, under these circumstances, he has left himself absolute and complete owner of the estate.

But it is argued,—and that is an argument arising on the face of the instrument,—that he has put the legal estate out of himself, because there are trustees, and he has assigned it to them: and he certainly has nominally assigned 7500*l.* stock to them. He has assigned it in one sense, but has he effectively done it? So little has he done it, he had not transferred the stock; he had not acquainted the trustees that he had executed such an instrument; he had not, in an absolute way, executed it by delivering it, for he had not given it to the parties. I do not wish to borrow any thing weak in point of argument, but let me suppose that he had sealed and delivered the deed in his own closet, and kept it in his pocket, without communicating it to the parties. Now, though I do not mean to contend that that might not operate as a delivery: for if there were no circumstances to shew that it was delivered conditionally, it might be a delivery: yet what would be the effective purpose of it as it regards the grantor? The legal estate would be in the trustees; an ejectment might be brought by the trustees; but could it be endured that the trustees should bring an ejectment against the *cestui que trust*? They are still, in fact, to hold it for his benefit, and he is to receive the dividends, and [394] rents, and profits: how could he be turned out then? He is therefore substantially the owner of the estate up to the last moment of his life.

Look, in another respect, to the intention of the party. Does he mean to part with his leasehold estate during his life? Does he mean, that if he has any intention to sell it, or to sell the 7500*l.*, as it should be thought fit, that he shall not have power to do it? On the contrary, he reserves to himself the power of doing it with a single word, as I have stated, and I cannot put it stronger. He has a power to do it, not only by will, but by a codicil: he has nothing to do but to endorse on the deed, —“I revoke this deed,”—and sign his name, and there is an end to the deed; and no impediment is put in the way of his so disposing of this property. But it is clear that he never meant effectively to dispose of the property; when, *uno flatu*, he has given to the trustees the stock and leasehold estate, and he has given them that which he could not give without a will; he has given his plate, his books, his furniture, and his pictures, and all other his personal estate whatsoever, and wheresoever, which he may be possessed of at the time of his death, by a deed of gift. That cannot be in point of law; therefore it is clear he was not about any serious present disposition of his property. If he meant it to be a transaction *inter vivos*, he must have selected the articles at the time, and specify all the articles: therefore it is plain he did not mean to convey any thing to them at that time, or to part with a single iota of the property till his death. Then how is it to be contended that he did not remain in possession of, or had the power of dis-[395]posing of that property, which he purports, in form and shew, to convey by this deed: and what has he done more than this,—I voluntarily do as I would by my will; I declare this to be my will, that is, that the property should go so and so. That is a will: and therefore I do not feel much the difficulty of the departure of the legal estate. At this day, to be sure, if he had never revoked it, it

might operate as a deed, because that would have changed its complexion. He would have given it a new character by not exercising the power of revocation; but when he has revoked it, he sees the necessity there is to make a more particular determination with regard to the property disposed of, when he has annexed a will to it. The legal estate continues in the trustees; but does it continue in them by virtue of the deed as a deed, or by virtue of this instrument as a testamentary instrument? I say, it is a testamentary instrument; and at this day, taking it to be a testamentary instrument, they are possessed of the legal estate (independently of their character of trustees) as executors. Therefore I think it is clear that this is essentially and substantially the will of the party. And I was much influenced by that part of the argument of my learned brother Richards,—that the confirmatory part of the testamentary paper has a strong operation to cast the character of a will over every part of the deed; because we know that a confirmation of a deed is of itself a substantive conveyance: it passes the estate out of the person confirming the prior instrument, and that may be done as well by a will as a deed, and that is a mode of conveyance of land. That being the case, when he finds it necessary to confirm this [396] by his will, (which was necessary, as a part of his property was fluctuating,) when he confirms that, I do not think it is straining the argument to say, that he confirmed the whole of this instrument, and gave it a final operation by that will. But I do not wish to rely so much upon that part of the case. The main point is, that it is in substance a will, and in form and name only a deed. Upon these grounds I think that the sum of money so given is subject to the legacy-duty.

THOMSON, Chief Baron. I shall be very short, because I do not think much longer time is necessary than has been already spent in discussing this question; and if it were, it would require more strength than I at present possess. The true question is, certainly, whether this instrument is to be taken as a deed, or as a testamentary act. If it is to be taken as a testamentary instrument, it is clear that the legacy-duty has attached upon this property, so far as it is given to this lady; and it has attached to the whole estate for which it is claimed, namely, the sum of 8000*l.* for that is the residue retained for her after payment of all the testator's debts and legacies. So that it does not seem to be entangled with what, without doubt, it might have been,—how much is claimed as to legacies given by the will, or how much in respect of the money this lady is entitled to by the deed,—because the short and only question is, under what right she takes the whole of this money.

Now here is first an instrument which purports, by the form of it, to be a deed: it bears the name of an indenture, and is made by a person who may be called testator or grantor. For the present, we will [397] call him grantor, while we talk of this instrument. He conveys, for a nominal consideration, to two trustees, who are parties to the deed, in general terms, first, a leasehold estate, of which he is possessed; and, after that, he assigns to them his government stock, which he specifies, and all the dividends which shall be due from it at the time of his death, and in short all his property, whatsoever, enumerating specifically certain things, as plate, linen, furniture, glass, and pictures, and all the moveable property, which in its nature was fluctuating during his lifetime, and must be so. He assigns to these two persons all that sort of property which would belong to him at the time of his death, to hold to them upon certain trusts; and those trusts are, that they should be possessed of it “for the use, benefit, and advantage of William Franklin, for and during the term of his natural life:” leaving him in the possession of the corpus of the gift, or legacy, during his life, with full power of disposing of it, at his will and pleasure; for, it is not till after his death, that any other of the trusts are to arise. It is not in trust for him during his life, to receive the dividends merely, but the whole property is his, as long as he lives, implying a power in him to dispose of it, and spend it as he shall think proper: then, on his death only, are the other trusts to arise, and then the trustees are to act only on such property as is found—“all the property he is possessed of at the time of his death:”—and then it is to be applied to this lady, in the way mentioned. And he has reserved a power by any deed or writing, to revoke or alter [398] all or any of the trusts limited in the indenture of all that has been so assigned. He then makes a will, and I think it not immaterial, as has been observed, that that will expressly refers to the deed. By that he confirms the deed: he incorporates therefore the deed into the will, or I should rather say, he makes it a part of the testamentary act which he is then executing, and therefore they ought to be taken and construed together, as

being of the same effect. The deed has no operation during his life ; he remains master of the property till after his death, and then the deed can only take effect in the nature of a will, to be proved by the executors.

It would be very strange to suppose that that should be thought a gift, which leaves it in the power of the donor, whether there shall be 5000*l.* or 5*l.* at his death ; he may dispose of it or squander it, or do what he pleases. It seems to me, then, that there is no way of dealing with this instrument, but by giving it the effect of a testamentary paper ; and I should have no difficulty in supposing the Ecclesiastical Court would grant probate of it, and I think they would in granting probate of it, designate the trustees as executors. In fact, the testator has made these very persons his executors, and they have obtained probate of the will : which will does refer in terms, and does confirm, excepting in the gift of a few legacies, the general provisions of that former instrument, which I call testamentary, in favour of this lady. The consequence of this is, as two of my learned brothers concur with me in thinking, [399] that this is to be taken to be a testamentary act, and that the property in question is therefore subject to the legacy duty, and that there ought to be judgment for the Crown to the amount of this 800*l.*

Judgment for the Crown.

IN THE COURT OF CHANCERY.

HILL v. ATKINSON *. ATKINSON v. HILL. Tuesday, 10th December 1816.—Payment into the Bank by trustees, (who were also executors of the will of the testator) of money bequeathed to them in trust to pay legacies, under a decree of the Court of Chancery, ordering that the money should be so paid in and laid out in the purchase of stock, in the name of the Accountant General, which was accordingly done before the 10th of October 1808, held to be a retaining, &c. of the legacy by the executors, within the words of the 48th Geo. III. cap. 149, sect. 3, and therefore exempt from the legacy duty imposed by that Act, (although it was not actually paid over to the persons beneficially entitled to the legacies till after that time) because the money was taken out of the hands of the executors, by their obedience to the order ; and, as far as they were concerned, was thereby appropriated to the trusts of the will at that time.

[S. C. 2 Mer. 45. Distinguished, *Attorney-General v. Wood*, 1828, 2 Y. & J. 301. Applied, *Coombe v. Trist*, 1835, 1 My. & Cr. 77. Not applied, *Attorney-General v. Giles*, 1860, 5 H. & N. 273. Referred to, *Attorney-General v. Loscombe*, 1860, 5 H. & N. 581.]

In this case James Smith had given by will, dated 25th March 1775, the sum of 3000*l.* to his executors Hill and Thompson, in trust, to invest it in Government securities, as soon as conveniently they [400] might after his decease, and pay the interest to Ann Atkinson for her life, and after her decease to pay it over to the child with which she was then supposed to be enient ; but if such child should not attain the age of twenty one, then to Tabitha Leake. On the 21st of July 1776 the testator died. By a decree of the Master of the Rolls, pronounced on the 9th March 1779, his Honour declared that Ann Atkinson was entitled to the interest of the 3000*l.* at four per cent. during her life ; and that, subject to her interest, Tabitha Leake was entitled to the principal, which was ordered in the mean time to be paid into the Bank, and laid out in the name of the Accountant General, in the purchase of Bank annuities in trust in the above causes ; the interest to be paid to Ann Atkinson for life, and the principal, at her decease, to be transferred to Tabitha Leake, who was then an infant. In the same year (1779) the 3000*l.* was paid in, and laid out according to the exigency of that decree, and the interest was afterwards regularly paid to Ann Atkinson during her life. Tabitha Leake afterwards married with one Ward, and her interest was, by a settlement on that marriage, transferred to

* This case is introduced here, because it is one in which the decision of this Court in the case of *The Attorney-General v. Lady Louisa Manners*, (vol. i p 411,) was brought under the consideration of the Lord Chancellor.

trustees in trust, amongst other things, to pay John Leake 1200*l.* borrowed by them at that time. In 1794 she died: in 1806 her husband became bankrupt; and in 1807 Ann Atkinson died. In 1808 the 1200*l.* due to John Leake was paid off, under an order of court to sell so much of the stock for that purpose. In 1809 Ward's assignees having sold his interest in the residue of the stock, the purchaser objected [401] to the title, that the legacy duty had not been paid which accrued due under the 48th George III. cap. 149, sched. 3, whereby a duty had been imposed on legacies given by the wills of persons dying before 1805, and not paid, delivered, retained, satisfied or discharged, till after the 10th Oct. 1808.

On a petition being presented on the part of the purchaser, and notice thereof given to the Attorney General and Commissioners of Stamps, an order was made directing the interest of the residue to be paid to the petitioner, without any deduction in respect of the duty. Ward, the bankrupt, died in 1816, when John Leake became entitled, under the settlement, to the residue of the stock standing in the name of the Accountant General in trust in these causes, and he obtained an order, on petition, for a transfer of it to him. That order was not obeyed by the Accountant General, on the ground of there being no receipt produced for the duty on the original legacy: when, by the direction of the Lord Chancellor, a petition was presented on the part of the Attorney General and the Commissioners of Stamps, claiming the duty under the statute.

Wetherell, and Heald, in support of the petition, contended that what had been done by the executors in this case brought the legacy within the terms of the act: because the legacy had not been paid, delivered, retained, satisfied, or discharged, till after the 11th of Oct. 1808: inasmuch [402] as the principal had not been paid over till after that time, nor was, in fact, transferred at the time of this discussion: and they cited the case of *The Attorney General v. Lady Louisa Manners* (ante, vol. 1, p. 411), where the Court of Exchequer held, that a legacy could not be said to be retained for the benefit of legatees, so as to exempt it from the duty, till the persons who should be ultimately entitled to any interest in it had received it.

Sir Arthur Pigott, and Parker, distinguished that case from the present, by the circumstance of the uncertainty which existed there, of the person to be ultimately entitled to the legacy, till after the death of an intermediate legatee, which did not happen till 1812: but that in this case there was no such uncertainty, and the payment into the Bank, and the investment of the money in the funds under a decree of this Court, which put it completely out of the power of the execution, and, as it were, appropriated at once the legacies, was sufficient to satisfy the words of the act. In the case cited, too, the money had been constantly, up to the year 1812, retained in the funds by the executors for the purposes of the will, in their own names: whereas in the present case it has, since the year 1779, stood in the name of the Accountant General in trust in these causes.

THE LORD CHANCELLOR now gave judgment: when, after having fully stated all the facts of the [403] case, observing, that he regarded all the claimants on this legacy as against Tabitha Leake, whether under the marriage settlements or by the assignments, as persons standing in the same situation as she herself would have been in if she had received the money as the legatee under the will:—that the difficulty which brought the case originally before the Master of the Rolls, arose out of the question, whether, as Ann Atkinson had never been with child, as the testator had believed when he made this will in her favor, the bequests did not, as depending on the life of such child, entirely fail: but the Master of the Rolls was of opinion that the right was in Tabitha Leake, and decreed accordingly, before any legacy act had passed, that the money should be paid into the bank, as had been done, with liberty for Ann Atkinson to apply for a transfer when she should arrive at the age of 21. His lordship then stated the question to be, whether under the circumstances of this case the legacy duty was payable as imposed by any of the acts of parliament from the 20th to the 48th Geo. III.*: and he took a minute and anxious view of all those statutes, particularly the 52d chap. of the 36th Geo. III., observing, that that was confined to the duties thereby imposed, to the exclusion of the former acts: and particularly noticing the clause which constitutes the executor, or other person taking

* 20th Geo. III., cap. 28; 23d, cap. 58; 29th, cap. 51; 36th, cap. 52; 44th, cap. 98; 45th, cap. 28; 48th, cap. 149.

on himself the burthen of the execution of a will, a Crown debtor, from the time when the [404] legacy is paid, if the duty be not then deducted and accounted for; and declaring it to be his opinion, that Courts, into which money bequeathed in trust to pay legacies, should be paid, as in the present instance, were bound to consider whether it would be liable to any duty, if still in the hands of the executor; and that question (continued his Lordship) will depend on whether that which has been done by the executor in the present case, amounts to such an appropriation as would operate as a satisfaction and discharge, according to the meaning of the several statutes.

I shall make but few observations upon the case which has been cited from the Court of Exchequer. I think that case is an authority, as far as it goes—I say only as far as it goes, because, as it is not direct upon the point, it is only a negative authority; but it decides, that if the legacy, which was the subject of it, had been appropriated, it would not then have been liable to the duty; and, it appears to me, that the judgment of the Court in that case, proceeded upon this, (without prejudice to the question in the present case), that that legacy had not been, in fact, appropriated; for if it had been appropriated in such a manner, that you could say who were the individuals, who could come to the Court and ask for it, it would have been quite another thing: but inasmuch as that remained uncertain up to the last moment, the Court seem to have thought that, therefore, there had not been, in fact, an appropriation. Whether there was or not, in that case, I shall not take upon myself to say, nor shall I say [405] one word further upon the question of appropriation, but this, (which I say, lest taking no notice of it should shake what I take to have been the doctrine of this Court for ages)—that if executors, being also trustees, shift the property from their hands as executors, into their hands as trustees, and if there is evidence that they have done so, and that they have paid the interest upon the fund so shifted from hand to hand, for twenty years together, that is undoubtedly an appropriation. If the Court of Exchequer are of opinion, that that is not an appropriation, all I can say is, that that is an opinion to which I cannot accede. But when I come to consider the present case, and to trace it through all that has happened, supposing the question were to be put upon the Act of the 48th of the King only, which I think is not the proper way, it appears to me to be out of all right to say, that where a legacy has been given to two executors upon trust, that they should pay the interest to one for life, and afterwards should pay the principal to another,—where that legacy has been brought into Court, and the trusts of it have been declared, whereby it is wholly taken out of the hands of the executors,—and where it never can be paid out of this Court again, without considering whether it is liable to the legacy duty (although it has been out of the executor's hands for half a century), without making him a crown debtor from the moment that it is payable: that appears to me to be a proposition going beyond anything I recollect ever to have been made a question in this Court.

[406] But this case is not to be decided upon that act. I think it depends on the construction of the 44th of the King, as an arrear due, if due at all, under the 48th; and upon the effect of the 44th, considered with a due regard to all the provisions of the act of the 36th of Geo. III., as if those provisions formed a part of the act of the 44th, so far as in their nature they can possibly be applied to legacies given by that act: and then the question would be, whether, (regard being had to the 25th clause, with reference to what the Court are required to do, and with reference to the payment—the time of payment—and the responsibility of the persons who receive and the persons who pay the legacy, without having first paid the duty—and the other provisions which have been observed upon) it can be said that this was a fund, out of which the legislature, by the 44th of Geo. III., adopting the provisions of the 36th, meant to say, that the legacy duty should be paid by the Accountant General, when carried to the account of the persons described and designated as intended to take it by virtue of this will. My opinion is that that is not the true construction of those acts, when construed in conformity to all I have ever understood to be the effect of the act of 1796.

I have ever considered that, after legacies were once paid, discharged, satisfied, or (which I consider as amounting to the same thing) appropriated in such a way as that the property was completely out of the hands of the executor, and he had no [407] thing more to do with it, it was not intended that these duties should attach.

If that opinion should happen to be in its consequences more extensive than I conceive it is, it is still my duty to state it as that which I take to be the best construction of this act. I cannot look to consequences on the one side or the other, I must take the rule the legislature has laid down as I understand it, for the rule of my conduct; and I cannot bring myself to believe, that within the meaning of these laws, or within the meaning of the Court of Exchequer, this legacy was not appropriated so long ago as 1779, so as to be altogether without the reach and effect of the acts imposing a duty on legacies as legacies. This is my judgment, upon the best consideration I can give the case; and I am afraid that no further consideration will enable me to alter that opinion.

[408] COKBURNE v. HUGHES AND OTHERS. Friday, 16th January 1817. Serjeant's Inn. Monday, Tuesday, Thursday, and Friday, 19th, 20th, 22d, and 23d Dec. 1814. Gray's Inn Hall. Monday, Monday, 6th and 27th February 1815. Customs of Tithing.—A custom that the farmer shall haddock his wheat, and that in consideration of his doing so, he is to pay the eleventh part or shock, or haddock, is good: and it is sufficiently well laid in the alternative.—The disproportion of the diminution of the tithe to the value of the additional labour employed on the corn, is no objection to such a custom; all that is required to support it being a consideration, though it be very far short of an equivalent.—A custom that barley and oats shall, if so haddocked, pay the eleventh part or shock or haddock, for the tithe; or, if only set out in cocks, (the common mode) the tenth part, &c. is good, notwithstanding its apparent uncertainty, duplicity, or want of mutuality.—And issues will be granted to try the existence of such customs.—A hay modus of 2d. for a day's math of grass is good, the quantum being matter of evidence.—See also as to certain other moduses.

To this bill, filed by the Rector of the parish of Norton in Hales, (Salop,) for an account and payment of various tithes, the defendants pleaded the following customs as to the corn—and various moduses:—denying the plaintiff's right to receive the tithes in any other manner:—

“That all the defendant's farms and lands are situate in, and form part of the parish of Norton, in Hales; and that by ancient and immemorial usage, custom, and prescription within the said parish (which extends to all lands within the same, except certain lands therein mentioned to belong to Sir John Chetwode, baronet, for which a modus of 9s. 8d. is payable), the tenants and occupiers of all the lands within the said parish, and the titheable places thereof (except as before excepted) from time whereof the memory of man is not to the contrary, have been used and accustomed yearly and every year, when their said lands have been sown [409] with wheat, muncorn, rye, or beans, or other corn usually bound up in sheaves, after the reaping, mowing, or cutting thereof, to set up in shocks or haddocks, all such corn produced upon their said farms and lands, after the same has been so bound up in sheaves, before setting out any tithe thereof; and after such corn has been so bound and set up in shocks or haddocks, to set out the eleventh part thereof from the other ten parts thereof; and there now is, and during all the time aforesaid, hath been in each and every such year due and paid and payable to the rector of the said rectory for the time being, such eleventh part or sheaf or haddock of such corn so bound and set up, and no more, as and for a customary tithing and full compensation for and in lieu and satisfaction of all and all manner of tithes of such corn.”

“That by the custom within the said parish, all wheat, muncorn, rye, and beans, produced upon the lands within the said parish, are bound and set up in manner aforesaid, after the same have been mowed, cut or reaped: and that all barley and oats, and all other corn produced upon the said lands, or any part thereof, are so bound and set up, or are collected together in loose cocks at the option and discretion of the tenant or occupier of the lands producing the same; and that such tenants and occupiers have from time immemorial been used and accustomed yearly and every year, when such barley and oats, or any other corn or grain has been so bound and set up by them, to set out the eleventh part from the other ten parts thereof; and [410] that there now is, and during all the time aforesaid hath been, in each and every such year due and paid and payable to the rector of the said rectory for the time being, such eleventh part of such barley and oats, and of all other corn and grain

so bound and set up, and no more, as and for a customary tithing and full compensation for and in lieu and satisfaction of all and all manner of tithes of such barley, oats, or other corn or grain; but the rector of the said rectory has always been entitled to, and has always received the tenth part or cock of all barley and oats, and all other corn and grain produced upon the said lands, when the same has been got in loose, and not so bound and set up, or of such part thereof as has not been so bound and set up."

And the answer further stated, that the setting up and taking care of the tithes of the said wheat and other corn usually bound in sheaves, and the binding, setting up, and taking care of the tithes of the said barley and oats, and other corn, not usually so bound, is attended with considerable extra labour and expense to the occupier or occupiers of the said lands, and is productive of great additional profit, security, and advantage to the rector of the said parish.

That the defendants did severally in the year, in the bill mentioned, duly set out the eleventh part, shock, hattock, or sheaf, of all the wheat and other corn produced upon their said lands, which were so bound and set up in shocks or hattocks; and the tenth part or cock of all corn and grain which was [411] not so bound and set up, produced upon their said farms and lands, and gave regular notice to the plaintiff that the same had been so set out.

That no tithes are due for the produce of the several gardens occupied by the defendants, for that they are ancient gardens, and are all situate within the said parish of Norton, in Hales; and that from time immemorial there hath been paid and payable by the tenants and occupiers of such several gardens to the rector of the said rectory for the time being, at Easter, or as soon after as the same should be demanded in each and every year, the sum of 1d., called a garden penny, for each and every such garden, as a modus, in lieu and full satisfaction of all herbs, roots, garden stuff, and fruit yearly arising, growing, and renewing upon such gardens.

And the defendants denied that the plaintiff was entitled to any tithes in kind of any clover, rye, grass, or other grass which may have been produced upon their farms and lands, and which have been converted and made into hay, or of any milk or calves which may have been yielded or produced by any cows, or of any colts which have been produced by any mares, which have been kept, fed, and depastured upon their said farms and lands, or for the agistment of any dry barren cow, or of any calves of the first year, or of any young cattle of the second or third year, reared and kept upon any lands in the said parish, for the plough or pail, and not sold out of the said parish before they have been brought to those uses, or of any cattle fed on after-math, or to [412] any other compensation in lieu of such tithes of hay, milk, calves, colts, and agistment, than hereinafter mentioned; for defendants say, that by ancient and immemorial usage, custom, and prescription within the said parish (and which extends to all the lands within the parish, unless it be to the lands before mentioned to belong to Sir John Chetwode), all the lands within the said parish (unless as before mentioned), from time immemorial have been and now are exempt from the payment of tithes in kind for all hay, milk, calves, and colts produced thereon, and for the agistment of all dry barren cows, or any satisfaction for the same, except the moduses hereinafter mentioned; and that there now is, and from time whereof the memory of man is not to the contrary, hath been paid and payable to the rector of the said parish for the time being, at Easter, or so soon after as afore said, in each and every year, the sum of 2d. by the occupier or occupiers for the time being of all the farms and lands within the said parish (except as before mentioned), for each and every day math or acre of their said lands, upon which any sort of grass has, during the year, been produced and converted into hay, and so in proportion for a greater or less quantity than an acre or day math, as a modus for and in lieu and in satisfaction of the tithes of such hay and grass.

And the sum of 4d. for every colt produced by any mare.

And the sum of 1½d. for each and every cow producing calf, and yielding milk, kept and depas [413] tured upon any of their said farms and lands during the year, that is to say, 1d. for the milk, and one halfpenny for the calf of such cow.

And the sum of 1d. for every cow yielding milk, but producing no calf, as and for the tithe of such milk.

And the sum of 1d. for the agistment of every dry, barren cow, kept and depas tured upon their said farms and lands, during each year, as moduses for and in lieu of

and in full satisfaction for all tithes of hay, grass, milk, colts, and calves, and of the agistment of such dry, barren cows.

And the answer stated, that a daymath is uniformly and universally, within the said parish, acknowledged and known to be co-extensive with, and to mean the same as a statute acre.

Clarke, Copley, Serjt., and Wetherell, on the part of the plaintiffs, contended; 1st, That the customs, as laid in the answer, were not so pleaded as that the Court could take notice of that defence; for that the custom, as to the wheat, was so stated, as to be obviously vicious: because from what appeared on the face of it, as laid, it must be considered a bad and illegal custom. For it is stated, "that the wheat is to be set up in shocks or hattocks:" and after it is so bound and set up, the custom is to set out the eleventh part thereof, "and that there is payable to the rector, such eleventh part, or shock, or hattock, and no more, as and for a customary [414] tithing." Such a custom is bad for uncertainty, because it is not stated at whose election the corn is to be set out in either of those forms, or whether that is to be determined by the parson or the land occupier. Nor is it carried far enough: for it is not stated what is to be done with the odd sheaves, if the corn should be set up in shocks or hattocks. It is impossible that the parson can collect from this statement of the custom, with any degree of certainty, what he is to receive, or how he is to receive it: for the corn may be either set out in hattocks, or (if they are taken to pieces again, as the farmer may do consistently with this custom) in sheaves, and in either case he is to have only the eleventh. Then it is not stated, in laying this custom, when the corn is to be considered titheable, which is uniformly enquired as a necessary part of the statement of a custom, and is to be found in all pleadings where a custom is set up. It is stated, certainly, that the corn is titheable after it is set up in hattocks, but not how soon after. Nor again is it stated of what number of sheaves the hattocks consist, and for any thing that appears, different hattocks may consist of a different number of sheaves, which would render a fair tithing impossible from the consequent inequality. And that objection is sanctioned by the authority of this Court, in *Tennant v. Stubbing* (3 Anstr. 643).

A further objection was taken to the custom as laid with respect to the tithing the barley and oats, -[415] that it was left to the option of the farmer either to set out the tithe according to the common-law mode of tithing by the tenth cock, or to adopt the alleged custom of hattocking, and pay an eleventh part: whereas it is indispensably necessary to a good custom, that it should be single and entire, and mutually binding upon both the parties: but this is compulsory on one party only, and is adoptible wholly at the caprice or convenience of the other. That election renders this custom (which is in effect a *modus*) desultory, which is a fatal objection, and so it was held in the case of *Webber v. Taylor* (b), where a *modus* was laid for the payment of a sum of money, while the land was in the hands of the proprietor: but if in the hands of any other person, the tithe was to be paid in kind, or the money at the election of the parson: and it was held by the Chancellor to be clearly ill, "because a *modus* cannot be desultory," (Bl. Com. vol. i. p. 78). This is liable to precisely the same objection, for it is laid here in the alternative. That which might have been originally good as an agreement, is not always good as a custom, for an agreement may be binding at the time, although not so much as to be suffered to ripen into a custom. Then as these customs are laid, they are both bad, that which regards the wheat for uncertainty, and that, as to the barley and oats, is still more so, from the additional objections of want of mutuality, and duplicity. A custom of tithing is, in effect, a *modus*, and requires [416] to be laid, in pleading, with all the strictness and certainty of a *modus*, and is not to be loosely laid, leaving its defects to be cured by the evidence to be adduced. It must appear on the record what the mode of tithing is, and how it is to be effected: that has not been done in the present instance, and therefore the defendant is not entitled to avail himself of a defence so ill pleaded.

If, however, the Court should be of opinion that the objections taken to the laying of these customs, in point of form, are not such as are fatal, they will then have to consider the more serious defects in point of substance, which, it is contended, vitiate this defence.

The principal objection is, that according to these customs, there is no fair con-

(b) Sel. Cas. in Ch. 52, and Gw. 656. — *Startup v. Doddridge*, 2 Gw. 587.

sideration moving to the clergyman for the diminution of his tithe. It is not meant to be contended that the consideration should be actually an equivalent: but it must be reasonable, or at least plausible, otherwise it is impossible that the customs can be sustained; because, if they are unreasonable they are void. The additional labour given to the corn by the farmer, will be said to be the consideration for diminishing the common-law right of the rector in this case, by allotting him the eleventh instead of the tenth part of the titheable article; but that will not be sufficient, if it be not shewn to have been given to it for the benefit of the parson, or, if not wholly so, at least in part, and that it redounds in some way proportionally to his benefit.

[417] They then adverted to the evidence, from which it appeared that according to a calculation founded on the depositions of the witnesses, that the setting up the corn in hattocks, if done by the parson himself, would amount to but a mere trifle (a penny an acre), and that it was an operation which the farmer was obliged to perform for the sake of his own corn, and which, as he could not do it before the tithe was set out without permission of the clergyman, (who would be entitled to take his tithes while the wheat was in sheaf, or the other corn in cock,) that permission alone would be a most ample equivalent, if any were due, for what was so done for the benefit of the farmer.

To shew how palpably inadequate the compensation, as set up by the custom, was in proportion to the diminution of the tithe (and that without measuring it scrupulously) from the calculation founded on the facts so furnished by the witnesses, it was made to appear that the expense of putting the corn into hattocks, to the farmer, was one shilling an acre; so that the clergyman must submit to a deduction of an eleventh part of his income arising from the corn tithe, because the farmer, for his own sake, put his wheat into hattocks*, in consideration of an expense amounting (as far as concerned the tithe) to about a penny an acre: whereas, at an ordinary rate of the price of wheat, the tithe of the same quantity for which the hattocking was to be the compensation (the tenth of the average produce [418] of an acre) would be worth about two shillings, and the rector would also be deprived of his common-law right to the advantage of comparing the sheaves, which he would have while the corn was titheable when in that state, (and they cited for that, the case of *Shallcross v. Jowle*,) (13 East, 261)—which was a commutation, that it was so absurd to suppose that they who formerly had the care of the interests of the church should have acceded to, as to be unreasonable on the face of it, and could not therefore be suffered to go to an issue when so obvious an objection was apparent on the record in Court, and which could not but be noticed.

To establish the principle for which they contended, that although actual equivalence of consideration was not necessary to the validity of such a custom, yet that it must be capable of being shewn to be founded on some ground of at least reasonable consideration on the behalf of the church; they cited several cases. But to remove, in the first place, any impression against such a proposition, which might be raised by certain cases, which would probably be cited for the defendants, they submitted that in the case of *Ledyar v. Langley* (1 Sid. 283), the consideration was merely for discharge from a very inconsiderable tithe,—that of rakings; for which any compensation almost might perhaps have been equivalent, or at least reasonable. There is also an *Anonymous case* in Lach (page 226), that a custom to put up the sheaves in shocks, discharged the parishioners of the tithe for odd sheaves which would not make [419] a shock, was held good. In that case also the same observation applies; but there was now considerable doubt if that decision were law. When an attempt was made to carry that doctrine further, which was done in *Trewin v. Bond* (1 Wood, 398. 2 Gw. 565), the Court there declared, that a custom to set up wheat in sticks (six sheaves against six), or in stitches (five sheaves against five), under which, if there were any odd stick or stitch not amounting to a stick or stitch, no tithe was payable, was void, completely overthrowing the case in Lach. The decision in *Trewin v. Bond* was adopted in the subsequent case of *Snow v. Hewitt*, and is to be found in many others (f); and the ground of all those decisions must have been, that the com-

* The witnesses stated that a hattock consisted of eight sheaves.

(f) *Ib.* 368. *Yard v. Stobell*, 1 *ib.* 312. *Bendish v. Kemble*, 2 *ib.* 345. *Townley v. Tomlinson*, 3 *ib.* *Taylor v. Beaumont*, 3 *ib.* 401. *Bishop of Exeter v. Skinner*, *ib.* 485. *Gregor v. Nicholas*, 2 *ib.* 536; and *Robinson v. Barrold*, 1 *ib.* 100. See also most of these cases in Gwillim *passim*.

pensation was inadequate. Adverting to the case of *Smith v. Sandbrook* (1 M. & S. 66), then recently decided in the Court of King's Bench, as one which would probably be much relied on for the defendants, they endeavoured to distinguish it from the present, by the ground on which the judgment of the Court proceeded,—that there was in that case an adequate consideration for the custom,—because, (as the Court held) the additional trouble taken on such a course of husbandry, in the re-opening of the shocks in wet weather for the purpose of ventilation, whereby the corn was advanced one stage in its progress, was considered to be such an adequate consideration as [420] would support that custom. As far, therefore, as that case bore on the present, they contended that it furnished the very principle on which the plaintiff's case rested, and confirmed the doctrine of the necessity of every custom being shewn to be founded on some reasonable consideration to be entitled to the attention of the Court. They made the same observations on the dictum of Lord Kenyon, in the case of *Knight v. Halsey* (7 T. R. 93); and they urged the effect of all those cases to be found in the books, wherein it appeared that the labour of hattocking had not been compensated at all, the farmer still paying the tenth.

The plaintiff's counsel finally objected, that the custom was not well established by the evidence, and principally, because it did not appear to have been noticed in any one of the terriers, which usually mentioned customs of tithing; the common modus of a money payment (which is, in fact, merely a custom of tithing) being generally recorded in such documents, wherever they affected the common-law right of the church.

The same arguments were urged against the custom as to the barley and oats, with the additional objections arising from the duplicity of the custom already pressed in the arguments against the mode of laying it in the pleadings.

The pay modus of 2d. for a day's mow. They objected, 1st, that that was uncertain as to the quantity, both in itself and as attempted to be [421] proved, for the witnesses had described it (inter esse) as consisting of different quantities; and some had stated that it was a measurement corresponding with a statute acre, whereas the acre was not defined by statute till the reign of Edward I., long after legal memory; and 2dly, that (if that objection were not destructive of it) as it was restricted in the earliest terriers to the ancient meadowing, the extent of that species of land in this parish ought to be clearly set out*.

As to the milk modus, that also they submitted was confined, by the evidence of terriers, to the cow and calf kept by the parishioners for their own use, which did not therefore support the general modus for cow and calf as laid in the answer.

Fonblanque, Dauncey, and Pepys, for the defendants, contended, in answer to what they considered the main ground of the plaintiff's case,—the want of a competent consideration for the custom,—that it never had been considered necessary to the establishment of such an agreement as that on which the custom pleaded was founded, that the additional labour, in consideration of which the tithe was diminished, should be either an adequate or equivalent compensation; and all that had ever been required by the Court was, that there should be some consideration. It is clear from all the cases, that corn may be legally set out in hattocks, by [422] agreement between the parties; and though in some instances the tenth may still be paid to the rector, yet if he should, in consideration of the additional labour, agree to take an eleventh, such an agreement would be binding, and might ripen into a custom: and that is an answer to the argument founded on the facilities said to be afforded to the occupier for defrauding the tithe owner by this mode of setting out the tithes. The principle of the case in *Lach* remains untouched by any other decision, and was expressly recognized by Lord Kenyon, (who was personally acquainted with the course of husbandry in this part of the country,) in the case of *Knight v. Halsey*. But the recent case of *Smith v. Sandbrook* is quite decisive on the point. There the Court of King's Bench expressly held, after much argument and consideration, that such a custom was good; and in that case this custom was questioned for the first time, after a lapse of centuries, which was improbable, if it really had been an illegal custom founded on no consideration. The ground of that decision was, that the consideration, though

* Vide *Foxcroft v. Paris*, 4 Gw. 1529:—where it is said that an objection to the description of the lands for which the exemption is claimed, should be taken by way of exceptions to the answer; and that it is too late at the hearing.

not equivalent, was sufficient; and it is in that, and many other respects, completely decisive of this case, which in most of its circumstances it very nearly approaches.

In answer to the objections made to the laying the custom in the defendant's answer, they contended, 1st, that there was no uncertainty in it, as laid, as to the wheat; and submitted that it was sufficient in an answer, so to lay a custom as that it may be certain to a common intent, if it furnished enough to apprise the plaintiff of the substance of [423] the defence, and that it was allowable to assist it by evidence of the facts by which it was ultimately to be supported. The principal objection then arises on the custom as to the barley and oats. It is said that that is defective on other grounds, because an option is given to the farmer, to adopt one of two modes of tithing,—one excluding, the other admitting the custom, adding duplicity to uncertainty, and rendering it obligatory on one party only; and the case of *Webber v. Taylor* has been cited to shew that such a custom cannot be established. Now, besides the distinction that that was a case of a bill filed to establish a modus, the doctrine in the case of *Chapman v. The Bishop of Lincoln* (Gw. 679), upholds this custom against any objection to it founded on that decision. The substance of this custom is, that if the farmer gathers in his barley, &c. in the usual manner in cocks, without sheafing it, it pays the tenth in the ordinary course; but that whenever the season requires that the farmer should set up the barley, &c. as he does the wheat, it then pays an eleventh: that is, when the additional labour is not bestowed on it, it pays the common law tithe; but when it is, it pays the customary tithe. That is a modus in the alternative certainly, but it is nevertheless certain; and if there were any doubt about its validity, what is said by the judges in the case of *Chapman v. The Bishop of Lincoln*, would remove it; for that case furnishes a general principle for judging of the validity of these moduses. The language of [424] Mr. Justice Fortescue, in speaking of that modus, is peculiarly applicable in behalf of this custom: "But" (says he, in answer to an objection for uncertainty) "can any case happen in which the parson would not either have this modus or the tithes?" The same may be said here. Mr. Justice Reynolds also says, "This modus is not uncertain, because the parson is now to have a modus, and now to be paid tithes;" and both their Lordships, as well as the Lord Chancellor, say, that the case of *Bowdly v. Bushell* (1 Lev. 116, & 1 Kel. 692), cited for the defendant in that case, is not law; and the result of that discussion was, that as a contract might have been made between the parties on what terms they pleased, the Court held itself bound to respect a long established custom, the original reasonableness of which could not, at so great a distance of time, be discovered. The doctrine of that case was recognized and adopted in that of *Hardcastle v. Smithson* (3 Atk. 245), on the principle proceeded on in all Courts, of great reluctance, *quieta movere*.

As to the custom not having been noticed in the ancient terriers, they submitted that it was not necessarily the province of a terrier to notice moduses of any kind, although they certainly often do in modern times.

With regard to the hay modus, they contended that it was sufficient to state it as a payment for a day's mow, leaving it to the witnesses to shew of [425] what quantity of land that measure consisted: and as to some of them having described it with reference to a statute acre, that was merely as a now well known standard of quantity, and not as being the foundation of the term, and so destructive of its necessary antiquity: and both its quantity and its restriction to ancient meadow, or extension to all grass, should be the subject of an issue, when the plaintiff would have an opportunity of shewing, if he could, that tithes in kind had been at any time paid for any grass in the parish, in contradiction to the terriers.

The same observations were made in answer to the objections taken to the modus for milk.

Clarke replied.

THOMSON, Chief Baron, now delivered the judgment of the Court.

This case of *Cokburne v. Hughes*, is one that took up a very considerable time in the argument, which occupied several days, and was a good deal entangled by a reference to a variety of cases, which though certainly not altogether not bearing on the subject, were yet cases that did not at all seem to decide it.

The demand was for certain tithes of land within the parish of Norton in Hales, in Shropshire. There were great tithes and small tithes. The plaintiff is rector of that parish. The defence was entirely prescription and modus.

[426] With respect to the corn tithes, the defence was, that it was duly set out, although the eleventh part only was set out, being the eleventh hattock, because by the custom of the parish, with the exception only of one small estate, which was covered by a modus, all the lands producing corn are exempt from paying more than the eleventh hattock, and that in consideration of their setting out the corn in the hattock, instead of the sheaf. This is one custom, and it is an imperative custom on the occupier so to set out his tithe, and gives him no election, he is therefore bound to set it out in hattocks, and pay the eleventh hattock. This applies to wheat, and muncorn, and rye.

The other question is with respect to barley and oats. The prescription there set out is, that they shall pay the eleventh part of the corn when set out in hattocks, that is the eleventh hattock, if it is so set out : but that it is in the option of the tenant, either to set it out in the hattock, and pay the eleventh hattock, or to pay the tithes which would be the tenth of the barley in the cock ; so that with regard to the barley, provided the tenant chooses to do more than the law requires of him, he is put in the same situation as if it was the hard corn, for all that the law requires, with regard to the hard corn, is to set it out in the sheaf ; but he does more, he sets it out in the hattocks, and pays the eleventh, and so with regard to the barley, he is to pay but the eleventh, when he so sets it out.

There were a great many cases mentioned on this [427] occasion, and referred to. There was one in particular, the case of *Smith v. Sambrook*, which seems to be very material, on this occasion, for the guiding our judgment : it is 1 Maul. & Selwyn, 66. That was an action for not setting out tithes of different descriptions, namely, wheat and barley, together, I think, with peas and vetches. The prescription there was with regard to the wheat, to set it out in the hattock, and in consideration of so doing, and also in consideration of opening and airing it, if occasion required, then that they should pay only the eleventh part of it. With regard to the hard corn, the wheat, and corn of that description, the Court was of opinion that it was a good custom : and so unquestionably it was, because the farmer had done more than the law compelled him to do, and he had done that which was for the benefit and advantage of the tithe-owner, for he had brought the article into a further state of progress to its being ultimately disposed, namely, by having put it up in hattocks, a more easy way for conveying and unlading it, and he had, if occasion required, opened the sheaves to dry them.

But with regard to the eleventh part of the barley the Court thought there was no consideration for so tithing it : for the farmer was bound to set it out in the cock, which is the usual mode, when the tenth would be paid of course : and when set out in the cock or the heap, and not in sheaves, the farmer bestowed no extraordinary labour upon it. It was really, therefore, the common way in which barley is titheable : it was merely raked and got [428] together in the cock. There seemed to be no reason why he should not pay the tenth of that barley : and though it was stated that he occasionally opened it, yet that was before the tithe was set out, and before it was ascertained what the parson was entitled to : so that the airing of it was for his own benefit solely, and not for the benefit of the parson. There were other cases referred to, which do not, as we think, bear so strongly upon this case as to require minute attention.

On the part of the plaintiff, in the present case, they entered into a long examination, with a good deal of speculation belonging to it, and the witnesses say how much it would cost the farmer to make this alteration of putting up the corn in hattocks instead of cocks ; and that was used to shew that the eleventh hattock was too favourable a bargain for the tenant, and greatly to the disadvantage of the parson. There was a good deal of speculation upon that : but it is not required that there should be always an exact quid pro quo in these compensations : it is enough to shew that there is a consideration for the deduction. And we see that the farmer has done more in fact than the law compelled him to do ; for instead of setting out in the wheat in the sheaf, and the barley and oats in the cock, he brought both into a further stage of husbandry : and whether there was a little more advantage on one side or on the other, in doing so, that is not for us to decide : nor is it necessary for us to enquire whether, when this compact was originally made, the parties proceeded on any such nice calculations. That is the case of the wheat : [429] and the same thing applies with regard to the barley, taking it with the distinction I have stated, that sometimes there was

nothing done with that beyond putting it into the cock, which was the common way of tithing it, except that if it was wet, it was opened. In this case, if the farmer leaves it in that state, that is, in the cock, he must then pay the tenth of those cocks: but if he puts himself to further trouble and expense, then the law gives him the privilege of paying so much less, namely, the eleventh; and it does not go to confine the parson to nothing beyond the eleventh, because he would be entitled to the tithe of the odd sheaves, if there should be any. It seems to me, therefore, that there is no objection to this custom as laid, provided it is established; and with regard to the evidence before us, it certainly does seem to be made out, for there are terriers that recognize that mode of tithing; but it is for the jury to decide on that. I think there should be an issue in the terms of this custom as laid, to ascertain how the fact stands.

With regard to hay, there is a modus set up of 2d. for every day's math of hay; that is also an ancient payment recognized by the old terriers more than an hundred years ago, and there is no evidence of tithe having been ever otherwise set out than by this payment of 2d. But the expression is, for every day's math of hay: and it was argued, that it is so uncertain what a day's math is, that you cannot possibly take notice of it. We certainly have had many cases in which the term has occurred: and in general it is understood to be an acre, [430] and issues have been directed upon it. There was an issue directed in *Markam v. Hurley*, 4 Gw. 1499, and there, a day's math was held good. The witnesses here say it is the quantity of an acre: the terrier in 1635 or 1735, I am not sure which, specifies, that "for every acre or day's math," (putting it as the same thing,) this modus of 2d. was payable; and one witness says, he always understood that to be an acre of hay or hay grass: that is the case of this modus, and if the clergyman desires it, he may have an issue to try it.

With regard to milk, there are specified in the terriers payments which purport to be a modus for that,—“so much for cow and calf,” which imports in lieu milk: the terriers call it so. There seems to be no objection to a modus of that description being a good one. There is one thing however which I do not understand: one of the defendants admits he has had a barren cow: does that mean a cow that has not produced a calf in the parish? because that would make no difference if she produces milk, for the modus applies to the milk. There is no specific modus for agistment; nor is there any agistment made out, but what is admitted in the way I have spoken of. There is a modus for gardens, to which there can be no sort of objection: it is only 1d. for every ancient garden. There is also a modus for colts, and other trivial moduses not worth attending to. If the clergyman desires issues on these, he is entitled to them; as he is on the more material ones for corn and barley, and hay. It is in evidence that several of these defendants occupy [431] what the witnesses understand to be ancient meadows: the jury may indorse on the postea whether the meadows and lands from which they have had the hay are ancient meadows or not, and they may indorse whether the modus applies to ancient meadows only, or to all; and if it applies to ancient meadows only, whether the defendants are in possession, of those ancient meadows, or any of them; and that I think will be the most correct way.

THE ATTORNEY-GENERAL v. WILSON, Claiming the Ship “Jane.” 1817.—(Construction of statutes.) A ship of foreign built (American) belonging wholly to a British subject, and manned with foreign seamen, is not as within the 43d Geo. III., c. 153, entitled to import flax-seed from Russia.—A privilege given by Act of Parliament to ships belonging to any state in amity with his Majesty, and manned with foreigners, to import merchandize otherwise prohibited, does not extend to foreign built ships belonging to British subjects, it being a privilege to be construed strictissimi juris. Sed vide Campb. N. P. Rep. vol. 4, p. 364.—If a ship so importing, also bring into a British port other foreign articles, not importable as merchandize as damage, it is a question for the jury, to say whether such goods were fairly brought over as such. Such vessels having an English mate on board considered, notwithstanding, as being manned with foreigners, within the meaning of the Act.

This was an information for the condemnation of a ship called the “Jane,” and her cargo, on the ground of an illicit importation of flax seed, mats, oars, dead ends, and handspikes, from Russia.

[432] The information consisted of eight counts. The seventh count, on which the present questions chiefly arose, was as follows:—"For that the said several parcels of flax-seed, the said several parcels of mats, the said several parcels of oars, the said several parcels of deal-ends, and the said several parcels of handspikes, being goods or commodities of the growth, production or manufacture of Muscovy, or some of the countries, dominions or territories to the Great Duke or Emperor of Muscovy or Russia belonging, were within the time aforesaid imported in the said ship or vessel called the 'Jane,' by certain persons, to the said Attorney General at present unknown, from parts beyond the seas into Great Britain, to wit, to Ratchiff, &c. within the port of London aforesaid by way of merchandize: the said ship or vessel, at the time of the importation of the said goods and merchandize, not being a ship or vessel British built, whereof the master and three-fourth of the mariners at least were British: nor being a ship or vessel of the built of that country or place of which the said goods and commodities were the growth, production, or manufacture, nor of the built of such port where the said goods and commodities can only be, or most usually are, first shipped for transportation, and whereof the master and three-fourths, of the mariners at least were of the said country, place or places: nor a ship or vessel belonging to any kingdom or state in amity with his Majesty navigated by foreign seamen: contrary to the form of the statute in that case made and provided, whereby the said ship or vessel, with [433] her guns, furniture, ammunition, tackle, and apparel, became forfeited."

It appeared on the trial that the vessel in question had been American property;—that she had been purchased by the claimant, Mr. Wilson, a British subject, in the year 1809, and from that period had made several voyages to this country; some in the character of an American, and others under other flags; but she had not received, nor was she entitled (being foreign built) to receive, the character of a British ship, by being registered as such. The report of her, on the occasion of the present importation, was: "In the ship 'Jane,'—no register—foreign built—property all British—burthen about 400 tons, with sixteen men, being all foreign men, besides Wm. Myers, a British man, master for this present voyage from Archangel." The report of her cargo was of—"a quantity of bags of flax-seed, and a quantity of mats, oars, &c. (as enumerated in the information) for dunnage."

The points raised were, whether the vessel was entitled, under the 43d Geo. 3, cap. 153, § 4 *, to [434] import flax-seed into this country—and whether, if she were, she might also import the articles brought here and reported to have been put on board for dunnage, being of the value of nearly 200l. and being therefore articles (as the Crown contended) rather of the quality of merchandize than dunnage.

The first question was reserved by the Lord Chief Baron as a pure point of law; and on the other, the jury found on the evidence, that the mats, oars, handspikes, and deal-ends, brought bona fide as dunnage, were proper for that purpose, as some of the witnesses had stated that such articles would pack the cargo better than rough wood. There was also a third point made, which was, whether the ship could be considered as navigated by foreign seamen, the mate being an Englishman, which was also reserved.

Subject to the questions of law, the jury found a general verdict for the Crown, at the same time negating all imputation of fraud on the part of the defendant.

* "IV. And be it further enacted, That from and after the passing of this Act, and during the continuance of hostilities, and until six months after the ratification of a definitive treaty of peace, it shall and may be lawful for any person or persons to import into the United Kingdom any sort of flax or flax-seed, in any ship or vessel belonging to any kingdom or state in amity with his majesty, his heirs or successors, navigated by foreign seamen, from any port or place whatsoever, upon the same terms and conditions, and subject to the same duties, rules, regulations, and restrictions, in any respect as such flax and flax-seed would, by any law in force in the United Kingdom, or in Great Britain or Ireland respectively, have been subject and liable to, if the same had been imported in foreign ships or vessels of the built of the country or place of which such flax or flax-seed was the growth, production, or manufacture; any thing in the said recited Act of the twelfth year of the reign of king Charles the Second, or any other Act or Acts of parliament, in force in the United Kingdom, or in Great Britain or Ireland respectively, to the contrary notwithstanding."

[435] 4th May.—Carr now obtained a rule on the points reserved, to shew cause why that verdict should not be set aside and a new trial granted, or a verdict entered for the defendant; submitting, that although the vessel in question was confessedly a foreign ship, and not entitled as such to a British register, (*Long v. Duff* (2 Bos. & Pul. 209)); yet inasmuch as she was the property of a British subject, a merchant residing in England, she was to be considered (if not within the letter, within the policy of the statute) as belonging to a state in amity with his Majesty. And a case was mentioned (not then in print) of *Peauce v. Cowie* (b), wherein Gibbs, C. J. was stated to have held, that a foreign built ship, the property of a British merchant, belonged to a state in amity with his Majesty within the meaning of this statute; and it was said that that decision had been followed up by a similar one of Lord Ellenborough, in a subsequent case. And he pressed the improbability of its being the intention of the Legislature to afford a commercial advantage to a neutral state, which it denied to its own; and that if it were matter of construction, it ought to be construed liberally.

The other minor question, it was contended, would depend on the fate of the preceding objection; for the word “foreigners” in the act, related to the country of the ship, and in the present case Englishmen would come within the description of foreigners [436] on that construction, even if the act should be held to mean that the whole crew must be composed entirely of foreigners.

25th May.—Shepherd, Solicitor General, Dauncey, Clarke, and Walton, now shewed cause. They objected to the authority of the case of *Peauce v. Cowie*, that it was merely a hasty dictum thrown out at nisi prius, without having undergone discussion, as it afterwards went off on another ground.

Then they contended that, as the present was a mere question of right between the Crown and the defendant, it must depend wholly on the words of the act, which, being passed to relax the provisions of an existing law, should be construed strictly. That would depend entirely on the question, whether a privilege conferred on a state in amity with another must necessarily be extended to the state itself. To shew that the legislature had on many occasions observed a material distinction between the state itself and any other state in amity with it, (independently of the obvious and natural difference of the terms,) they adverted to the various sections of the statute of the 12 Chas. II. cap. 18, and of the present act, wherein that distinction was recognized, particularly in the 5th section of the latter, which gives a privilege to import in ships built in or belonging to Great Britain; or, belonging to any state, &c. in amity with his Majesty.

As to any supposed absence of policy or legislative [437] intention, or any existing hardship in so confining the operation of the act to the letter, they submitted that that was a matter which this Court could not take into their consideration, in deciding what was the true construction of it, as it affected this case. To take the words in their common acceptation, they contended that a state in amity with his Majesty, could not by any construction be made to mean any part of his Majesty's dominions; nor can a subject of his Majesty be the subject of a state in amity with his Majesty. The distinction is sufficiently marked by the criterion of the duty of allegiance; but a still more forcible test would be found in this, — that one might commerce with an enemy of the other state without being guilty of any breach of his duty to the sovereign. A distinction equally marked (they submitted) existed in terms between a state, — a state in amity, — and a state in hostility; and in a question of designation, a state was as distinct from a state in amity with it, as from a state in hostility; and as well might both the others be included in the terms of a positive enactment by a statute relating to one of them expressly, as either. Therefore it cannot be contended that an act, speaking of a state in amity with Great Britain, may be said to include Great Britain itself.

The other question, they admitted, was much less important; but they insisted, that if it were cause of forfeiture that all the seamen on board this ship were not foreigners, this vessel was clearly [438] forfeited on the evidence*: for Myers was

(b) Since reported in Campb. vol. 4, p. 364; and Holt, page 69.

* It was proved that a man of the name of Bowes (an American) had had the command of the vessel from Archangel till she came to Woolwich; he, it was said, was then superseded, which turned out to mean that Myers, who had acted as mate during the voyage, was sent, as the captain of the ship, to report her.

not, in fact, the master of the ship, as reported, but the mate, and as such nothing more than one of the mariners: for in commercial law there is no distinction recognized between the crew on board, but that of master and mariner, therefore Myers, a British man, being a mariner on board the commercial ship, she was not manned by foreigners, as required by the act; and therefore the importation was on that ground also illegal. It was the object of the act of parliament to prevent British seamen from being so engaged when wanted for the service of Britain; it was therefore the defection of British seamen that the act contemplated, and it ought to be strictly enforced. But if on the other hand this vessel has made the importation as a British ship, it is enacted, that in such case the master and three-fourths of the crew shall be British, and that unquestionably is not the fact. If the construction contended for by the defendant were the true one, the consequence would be that a foreign-built ship, British-owned, would be entitled to greater advantages as a trader, than a vessel belonging to and of the built of this country. On the whole, they submitted, that this Act of the 43d of the King could not be construed so largely as to extend the privilege to a British-owned ship: for if it could, it must necessarily include such vessels [439] even when of the built of a hostile state and navigated by enemies: and that therefore it could not have been the intention, any more than it was the language of the legislature, that such a construction should be put upon the words of the statute.

Carr and Spankie, for the claimant, having adverted to the testimony borne by the jury to the fairness of his conduct in the transaction, submitted the following arguments, on the point of law as to the construction of the clause of the Act in question, which, they contended, enabled the defendant to effect the importation which gave rise to this proceeding:—That the legislature having thought it expedient to relax, in particular instances, the prohibitory enactment of the general navigation law in favour of the trading subjects of alien neutral states, it was impossible to conceive that it was their intention to exclude from those valuable privileges the numerous class of British ships belonging to British merchants, of which this vessel was one; and that every fair and ostensible object of the statute could not but be noticed by the Court in coming to a conclusion on the construction of it, as regarding the important question before them.

They submitted that the case of *Loug v. Duff* (2 B. & P. 209) had established, that a British-owned vessel of alien built, which is neither required or entitled to register as a British ship, is entitled to trade in as ample a manner as any alien ship admitted to specific privi-[440]leges by act of parliament. The language of Lord Eldon on that point is, “I though it was highly politic to confine the privileges of English ships to such as should be registered, there seems to be no reason why English owners should not be entitled to carry on foreign trade under the same advantages as foreigners, and liable to the same duties;” and, in the conclusion of his judgment, his Lordship says,—(having cleared the proposition from any doubt as to ships not registered being lawfully navigated or owned by British subjects,)—“a British owner of a foreign-built ship may engage in neutral trade, and will be liable to the alien duties, but it was not the policy of the legislature to prevent British subjects from employing foreign ships in neutral trade, in as ample a manner as they can be employed by aliens.” And they denied the existence of any statute wherein higher privileges were given to the foreign trader than to this class of ships, except in the single instance, where the nature and necessity of the thing required it, which is to be found in the navigation act, of the power given to foreign merchants, to import the produce of their own state in ships of the built of that country, and navigated by subject seamen. There could be no doubt, (they submitted,) that if the claimant had employed a ship belonging to a neutral state to have imported this cargo, it would have been legal. Then the question is, whether the description in the statute, “of a state in amity with Great Britain,” may not be extended to mean a state not at war,—any state but an enemy,—and if not as being comprehended in the words, at least on the reasoning principle of a fortiori. The true [441] distinction appears to be, that these, ships are not entitled to the privileges of British registered ships,—they are not entitled to the colonial trade,—or to drawbacks, in certain instances—and they are liable in many instances to a higher rate of duties on their cargo, as is the case with alien friends; but while they are subject to the same disabilities as alien neutrals are, are they not to be admitted to the same advantages?

They then recurred to the case of *Pearce v. Corrie*, where this same question of whether a subject of this country was a subject of a state in amity with his Majesty — was raised, in an action on a policy of insurance. There the Chief Justice of the Common Pleas said, he should consider this sort of ship as belonging to an alien friend within this Act; and that decision, they stated, had been followed by a recognition of that construction by Lord Ellenborough, who, on a subsequent similar question on the same policy, (*Pearce v. Glover*, sittings K. B. M. 15 G. 3, not reported,) said, on the point being raised, "It will be difficult to make me believe that a British subject is not a subject of a state in amity with his Majesty;" and the objection was overruled. That at least shews what was the first impression of those two very learned Judges. In the case of *Sewell v. The Royal Exchange Assurance Company (a)*, the Court of Common Pleas held, that a ship of the built of a hostile country, purchased with license by a British owner, [442] was to be considered as an alien ship so as to legalize an importation permitted to be made in ships belonging to a country in amity with his Majesty. The judgment given in that case, in favour of the plaintiff, must have proceeded on that ground entirely, for the other points of the case are against him; and he could not have succeeded, unless his ship had been held to be a ship belonging to a subject of a state in amity with his Majesty, for by that description alone could she have been capable of receiving a license to legalize the voyage.

They submitted, therefore, that in a case of construction of a beneficial statute, passed in relaxation of a more rigorous law, for the purpose of granting privileges of commercial advantage to neutral ships, not for the benefit of the neutral but of the British nation, the Court would, in a case of doubt, decide in favour of the British trader,—that an alien's ship, belonging to a British owner, would be entitled to any privilege conferred by such a statute on subjects of states in amity with Britain.

On the other point they submitted, generally, that a provision requiring a ship to be navigated by foreigners, would be satisfied if the body of the crew, or even the greatest proportion, were foreign seamen; and that it would be most hard if the circumstance of Myers being on board the ship, even admitting that he was not the captain, but one of the seamen, should cause the ship to be forfeited. And they cited the case of *Scott v. Schwartz*: (Com. Rep. 677), [443] to shew that great latitude of construction was permitted in deciding on those penal statutes, which subjected to forfeiture ships not navigated by foreigners within the letter.

27th May. The Solicitor General was heard in reply. He insisted that the case of *Sewell v. The Royal Exchange Assurance Company*, was a decision altogether diverso intuitu, and proceeded wholly on the words of an act (49 Geo. III.) which permitted such importations, under certain circumstances, "in any British ship or vessel, or in any ship or vessel belonging to any country in amity with his Majesty, in any manner navigated;" and the question there was merely, whether a British owned ship, purchased under a license, from an enemy, was protected within that statute. He contended, that the description of a state in amity with his Majesty could not be applied to any state which might not at some time by possibility become hostile, and that alone must exclude the notion of such terms being applicable to the state itself. He also put the case of a ship warranted neutral as to Britain, in a policy of insurance, turning out to belong to a British subject, and that he submitted would vacate the policy. A neutral may trade with a belligerent, whereas a subject may not. The main object of the distinction taken between a British registered ship, and a ship of foreign built British owned, is the encouragement of the former, to the disadvantage of the latter, according to the policy of the state; and that was recognized in the case of *Long v. Duff*. This very act makes that clear: for the 16th section enables [444] ships belonging to states in amity with, to import merchandize into, this country, under an order in council, from any ports belonging to states not in amity with his Majesty: which evidently was not meant to extend to ships belonging to this country.

Cur. adv. vult.

THOMSON, Chief Baron, now gave judgment.

This case of the *Attorney General v. Wilson*, has been a matter of great importance, and has received, as it well deserved, the full consideration of the Court. (Here his Lordship stated the information, and the questions arising out of it.)

(a) 4 Taunt. 856,—noticed at length infra in the judgment.

The cargo, in the present instance, was a quantity of flax-seed, and also, as the information alleged, a quantity of mats, oars, deal-ends and handspikes: but upon the merits, the question must be taken upon the importation of flax-seed only, that being now to be considered as the only cargo thus imported, because, upon reference to the jury, with respect to the nature of the other articles alleged to have been imported, they found that those articles were fairly and bona fide what were properly denominated dunnage, that is, that they were things fit and necessary and usually taken on board for the protection and safety of a cargo of flax-seed when brought home in bulk. (His Lordship then stated the circumstances of the case)

Now it is plain that this is not a ship so owned [445] and navigated, as to be entitled to make such an importation under the regulations of the acts of navigation. If, therefore, she was authorized to do so, it must be under the statute of the 43 Geo. III. c. 153, s. 4. (His Lordship read the section.) That section is supposed to convey a right to this ship to make the importation, which she has done in the present instance, that is, as a ship belonging to a kingdom or state in amity with his Majesty, navigated with foreign seamen, notwithstanding the Navigation Act, or any subsequent statute made upon this subject. So that if this statute authorizes the ship in question to make the importation, it can only be by construing that ship to be one coming within the description of "a ship belonging to a kingdom or state in amity with his Majesty:" and the ground of the argument upon that is, that it is a ship belonging to a kingdom or state in amity with his Majesty, because it belongs to a person who is a subject of his Majesty. But do not the terms "ship or vessel belonging to a kingdom or state in amity with his Majesty," in their plain acceptance, necessarily refer to some kingdom or state while in a friendly relation to this country, and such a state as may hereafter become hostile to this kingdom, and not to the ships of individuals who compose part of the body of the subjects of this kingdom?

The title of this act of the 43 Geo. III. seems to me not immaterial to be attended to: that title is, An Act to permit the importation in neutral vessels from states in amity with his Majesty, of certain mer-[446]-chandize: and to permit the importation in neutral vessels from states not in amity with his Majesty, of certain merchandize.

The provision in the 4th section, with regard to flax-seed, it must be admitted, does not confine the place from whence the importation is to be made, to states in amity with his Majesty, but, on the contrary, allows it from any place whatsoever; still, however, with regard to the vessels allowed to be employed in that importation, the description of them is this, namely, that they must belong to a kingdom or state in amity with his Majesty. If these terms were doubtful, they might fairly receive elucidation from the title of the act, which declares the purpose of it to be, to permit the importation in neutral vessels: explaining, therefore, what they mean by neutral vessels, namely, vessels belonging to a neutral kingdom.

The 5th section of the same statute, with regard to the Turkey Trade, plainly marks the distinction between ships belonging to Great Britain, and ships belonging to a state in amity with Great Britain, by allowing the Turkey Company "to import goods, heretofore imported by them from the Levant, in any ship or vessel built in or belonging to Great Britain or Ireland, navigated according to law," that is, of course, on board of which you are to have a certain proportion of sailors of this country: "or in any ship belonging to any kingdom or state in amity with his Majesty:" thus marking a clear dis-[447]-tinction between ships belonging to Great Britain or Ireland, or ships belonging to a kingdom or state in amity with his Majesty.

The Court was much pressed with the hardship of a British subject, who is possessed of a ship, his own property, not being permitted to employ it in importing the articles in question, under the same regulations, with respect to the navigation of such ships, as foreign ships are laid under, when employed by him, as they lawfully may be, in the same importation: and it must be admitted, it does bear some appearance of hardship: but at the same time, if we find it a matter of positive and precise regulation, I do not know how the Court can prevent the operation of that regulation. Many regulations on these subjects of revenue, not merely relating to the customs, but to the excise, and others, may proceed from considerations of state policy, of which we do not, perhaps, see the reason: but if they are positively laid down and marked out, the Court cannot say that they shall not take place on the ground of hardship.

I cannot find any case which has yet decided in favour of the construction of these statutes, which the defendant contends for; and when I say decided, I do not find any case in which the question has come in judgment before the Court. It was certainly stated, that some expressions had fallen from very high authority, tending that way. There was a case cited of *Pearse v. Cowie*, tried before Mr. Justice Gibbs, which was relied on for the sake [448] of something which he let fall to that effect, upon the trial of that cause: it happens that that case has since appeared in print, but I do not find that the report of it warrants the purpose for which it was cited*.

That case is in Mr. Holt's Reports, p. 69. It was an action on a policy of insurance on a Portuguese vessel, owned by a British subject, at and from Amelia Island to Liverpool. The vessel took in her cargo at Amelia Island, which, with the exception of some small quantity of rice on board, consisted of cotton. The ship, on account of bad weather, was obliged to put back to Amelia Island, where she was found to have sustained so much damage, that it became necessary to sell her. The plaintiffs claimed a total loss. The objection there was to the legality of the voyage, because the 43 Geo. III. cap. 153, sec. 13, only authorized the importation into Great Britain of all sorts of wool; and it proceeds to give a liberty to import into Ireland all sorts of barilla, and wool, and cotton wool,—so that there was an obvious distinction made by the legislature. The bulk of that cargo was cotton wool, and not the wool which the act of parliament permits to be imported into Great Britain; and it was urged, that wool standing alone, means wool from the backs of sheep, and not cotton wool. The Lord Chief Justice Gibbs was of opinion, that cotton wool was not included in the term wool, in the act of the 43 Geo. III.; and, therefore, there being a dis-[449]-tinction between wool with regard to Ireland, and all sorts of wool with regard to England, he held that the words of the act did not authorize the importation of cotton wool into England. Now that case seems not to bear on the present question; for the question was not there, whether a foreign-built ship, owned by a British subject, could be said to belong to a subject in amity with his Majesty, for if the ship had belonged to a neutral subject, she could not have imported cotton-wool, but wool only so called; therefore, it seems to me, for the reason I have mentioned, that this point was not considered (f).

There was a case much relied upon, too, on the part of the defendant, of *Swell v. The Royal Exchange Assurance Company*; and certainly there does seem to have fallen, according to the report, from Lord Chief Justice Mansfield, something that appears to bear upon this question; but still, that was not the point in judgment there. There was a policy of insurance upon a ship and her freight, at and from St. Michael's to London, and the declaration set out a charterparty, whereby the agent for the plaintiffs chartered the ship to Browning, for a voyage from London to St. Michael's and back again, upon the terms that the master should proceed direct to St. Michael's, and on her arrival receive there from the factors of the freighter a full cargo of fruit, and proceed therewith direct for London. The loss averred was by a forcible seizure and [450] capture by persons unknown. The cause was tried at the sittings after Trinity Term 1812, before Mr. Justice Gibbs, and then it appeared that the ship was Norwegian built, and had been purchased by the plaintiffs of the master, who was a subject of Denmark, a country then hostile, under a license from his Majesty to purchase of an enemy; the Captain and crew were Danes; that was the state and situation of that ship. On her arrival at St. Michael's the governor refused to let her enter the port, or receive a cargo there, and ordered the master to proceed to Terceira, where the Portuguese governor general resided, to obtain permission to land at St. Michael's; this the master refused to do, assigning as his reason, that it would be a violation of his charterparty; and he intended to lie in the harbour during the stipulated time for his taking in a cargo, but was soon after arrested by the governor, and detained four months a prisoner, and a Portuguese pilot, master, and crew, were put on board his ship, who took her to Terceira. In point of fact, they then laid hold of his property, and in substance, confiscated his ship. The action was brought upon the policy, and it was contended, that the plaintiff could not recover on the homeward policy; because, under the Navigation Act, requiring three fourths of the crew to be British subjects, it was illegal to import a cargo of fruit

* His Lordship appears not to have seen Mr. Campbell's Report of that case.

(f) Vide the dictum in the report of that case, in 4 Campb. p. 363.

from St. Michael's into England with a Danish master and crew. It seems she had not proceeded at all upon her homeward bound voyage, for she was interrupted and intercepted in that by the act of the foreign governor, and the objection taken was, that since the charterparty, which was in evidence, proved [451] that the voyage from London to St. Michael's and thence back to London was one and entire, the illegality vitiated as well the policy on the outward voyage as the other; that was the great line of objection then taken upon the trial. There was a motion then for a new trial; and Mr. Justice Gibbs laid it down, that he had no doubt that the homeward voyage did not contaminate the outward voyage;—the great stress of the argument was to make this one entire voyage,—that is, both the voyage out and the voyage home;—and that if the voyage had been completed under those circumstances, it would have been an illegal voyage. Upon the conclusion of the argument, Lord Chief Justice Mansfield said, "We think that the ground taken by the defendant fails, and that the homeward voyage is not necessarily an illegal voyage; the vessel is clearly not entitled to the privileges of a British ship, but is to be considered as an alien ship,"—(it had been argued that if she was not entitled to the privileges of a British ship, she was to be considered as an alien ship,)—"and as such she could not come to England with the cargo in question, were it not that by the 49th Geo. III. the king had power to license ships to trade directly contrary to the Act of Navigation, that is, to authorize alien ships to bring home this sort of cargo." That was Lord Chief Justice Mansfield's opinion of the operation of that act, but the question in that case turned entirely on the authority of licensing alien ships; nothing, however, of that sort appears in the present case: this is not a question of license. The opinion of the Chief Justice proceeded thus, "Non constat that this [452] captain would have performed this voyage without obtaining such a license. If there were any officer in the Azores authorized to grant it, the master might obtain it there, if not he might wait till such a license was sent to him from England." The Chief Justice was of opinion, that by the 49th of the King, and subsequent to that act, on which this arises, it was in the power of the King to license ships to trade directly contrary to the Act of Navigation; and he says, "it was not necessary to obtain the license till just before the act of importation; it does not refer to the act of sailing over, but to the bringing in the goods:" therefore they were of opinion that the rule ought to be discharged; dividing therefore those two voyages, non constat that the ship would have come home without a license; the Chief Justice being of opinion it might be obtained. It seems to me, therefore, that regard being had to the points before the Court in that case, that decision is not applicable, in point of determination, to the question now before us.

There was another ground taken on the part of the Crown for the forfeiture of this ship, and when I say taken, I do not mean that it was strongly insisted upon, but it was urged—that this ship was not properly navigated:—for, supposing she could, under the description of a ship belonging to a kingdom or state in amity with his Majesty, be entitled to import, still she must be navigated by foreigners. That is a qualification necessarily imposed; and there was a little confusion created by some attempt upon the entering of the ship here, by the person, who [453] really was the captain, to make the mate appear as if he was the captain: I do not impute that to the owners, it was the act of the captain, who made the mate report himself as being the captain, which was not the case: but, independent of that, there was not the least evidence to shew that there was not a sufficient number of foreigners on board, in order to make out the requisite of her being navigated by foreign seamen; certainly, one English sailor on board her would not vitiate the voyage, provided the majority were foreigners, as the statute requires: indeed, in candour, I think the Solicitor General did not insist on that objection, but wished to have the opinion of the Court upon the dry question, whether this ship, allowing her to be well navigated, was entitled to protection under the 43d Geo. III. Now, upon the best consideration we can give the statute, we think it is a question certainly, strictissimi juris, and therefore we think that she does not come within the protection of the statute, as belonging to a kingdom or state in amity with his Majesty. At the same time I feel, and I may state it to be the feeling of the rest of the Court, that it is a case of extreme hardship on the defendant; for there does not appear to have been any thing dishonest or fraudulent in the transaction on his part; and it is clear that he might legally have hired any other vessel for the purpose of this importation, and if she had been manned

by foreigners, as required, she would certainly have been protected from forfeiture ; but that, however, has not been done.

We wish the case had not proceeded to that ex-[454]-tremity, which called for the judgment of the Court on the point ; we cannot help thinking it worth the attention of the Crown officers on this subject, how far they will think proper to pursue further the consequences of that judgment, which we feel it our duty to give, for the forfeiture of the ship, under the counts on which this verdict has been obtained.

THE KING v. BICKLEY AND OTHERS. 16th January 1817.—The inquisition to find debts, &c. on an extent, is not wholly an ex parte proceeding ; and a claimant of property in the goods enquired of, may assert his claim before the Sheriff, and put material questions to witnesses examined by him on the part of the prosecutor, in the way of cross examination, to shew that the goods belong to him. And if the Sheriff refuse to permit such interrogatories to be put, the Court will set aside the extent and inquisition.—*Quere*, Whether a claimant is entitled to bring forward other evidence in support of his claim.

This was a motion to set aside an extent, as to certain property which had been seized under it, on the ground that the Sheriff, on taking the inquisition to find what goods, &c. the defendants were possessed of at the time of the Extent, had in the schedule thereto returned the property in question as of the goods of the defendants ; and had refused to receive, on the occasion of that enquiry, certain evidence offered, to shew that they were not their property but belonged to the claimants on whose behalf the motion was made ; and that he had refused to put to the defendants, on their examinations, certain questions proposed on part of the claimants with the same view.

[455] The Extent was issued against the defendants, who were merchants at Bristol, at the instance of Brown and Co., bankers at Bath : and by the Inquisition taken thereon, the jury had found that the defendants were possessed of 226 hogs-heads of sugar, which were then seized by the Sheriff. On that inquisition the claimants, Maze and Co., merchants at Bristol, attended by counsel, for the purpose of shewing that the sugars were in fact their property, setting up a title under the bills of lading, which were endorsed to them, against the *prima facie* right of the defendants, who were the consignees. But the Sheriff refused to permit the bills of lading to be laid before the jury, or any questions to be put to the defendants as to the property.

Copley, Serjeant, obtained a rule last term, calling on the prosecutors of the Extent, and the Sheriff of Bristol, to shew cause why the writ of Extent and Inquisition should not be set aside as to the seizure of the sugar, on an affidavit made by Maze, which stated, that considerably before the issuing of the Extent, the defendants had indorsed the bills of lading of those sugars which had arrived in the port of Bristol, consigned to them from Trinidad, jointly to the claimants, for a valuable consideration : and that the sugars had been accordingly thereupon discharged from the vessel into the warehouse of a cooper, appointed by the deponent and his partners to receive the same, in their names ; and that they had in fact never been in the possession of the defendants, the Bickleys and Wilcox : that on the taking of the Inquisition, [456] the prosecutors of the Extent attended by counsel, and proved, generally, by the evidence of the defendant Wilcox, that the sugars had been consigned to them the defendants, which was the only evidence produced of any interest or property of them therein :—that the said bills of lading, so indorsed to Maze and Ricketts, were tendered in evidence by their counsel, who, at the same time, proposed to the defendant Wilcox the following question : “Were the sugars, specified in these bills of lading ever in the possession of the defendants, and are they the property of the indorsees, Henry Ricketts and Co. and Peter Maze?” but that the Under-sheriff would not allow the said question to be put, or the said bills of lading to be given in evidence : and that he also refused to hear the deponent’s counsel on the merits, or to receive any evidence in support of the said indorsee’s title to the property of the said sugars ; and that thereupon the said Under-sheriff directed the jury to find a verdict for the Crown in respect of the same, which they accordingly did.

On those facts it was contended that the Inquisition was irregular, and they cited the case of *The King v. Bulley and Blommont* (Burb. 233), as an authority, shewing

that a stranger claimant, had a right to attend on such occasions to assert his claim, and support it by evidence, to rescue his property from seizure, and obviate the mischief of such a proceeding, without the expense and delay of a traverse.

[457] 19th December. — Dauncey, and Nolan, now shewed cause. They urged that an Inquisition was altogether an *ex parte* proceeding, as appeared from the constant and uniform practice in such cases, and one of which no notice to the party to be affected by it was necessary to be given, Lilly's Pr. Reg. 630: that the claimant might traverse the inquisition, and that that was the proper and only course of proceeding in such a case; or he might try his right by bringing an action against the Sheriff for wrongfully seizing the goods. On the other hand, they submitted, that if the evidence which had been proposed was to be received by the Sheriff on such occasions, and the jury should find against the Crown, the latter had no remedy, since no other writ could issue.

That the practice had always been, to consider the proceeding by inquisition as an *ex parte* proceeding entirely, and therefore such counter evidence had always been excluded, a practice now too long established to be overthrown by a single case of doubtful authority to the contrary, (*See v. Bulley and Blommart*;) some of the principal grounds of which decision no longer existed now, for it was no longer required that security should be given before plea: nor was it true, that the party has no remedy if aggrieved by the return. And they observed, that the minute book had been searched, and though the order for quashing the inquisition was found, yet that the ground upon which it proceeded did not appear.

Copley, Serjeant, and Gifford, in support of the [458] rule, contended,—that from the terms of the mandatory part of the writ, from the tenor of the language of all the various statutes by which inquisitions are directed to be publicly taken, in all of which the Sheriff is directed to hear witnesses: and from the very object and manner of taking it, the inquisition clearly could not be considered an *ex parte* proceeding. They adverted to the words of the writ, and to the statutes, particularly the 1 H. VIII. cap. 8, which, by section 2, enacts "that every escheator or commissioner shall sit in open or convenient places, according to the statutes heretofore made: and the said escheators and commissioners shall suffer every person to give evidence openly in their presence:" and submitted, that all tended to shew that it was the duty of the Sheriff so to proceed in enquiry, as should conduce to the developement of the truth of the matters to be enquired of, without regard to the single inconclusive object of fixing a *prima facie* title in the debtor, merely to be further agitated by ulterior proceedings: and if an effectual investigation may be had in the first instance, it would be hard to preclude a party interested from the advantages of it. Nor could the Crown be damnified, for a re-investigation might at any time be set on foot by the writ of *melius inquirendo* (Fitz. Nat. Brev. 255 (p. 572)), in case the jury should have come to a wrong conclusion, (citing *Ex parte Duplessis*) (2 Vez. 538-542). In the case of *Doe v. Telford* (12 East, 96), the witnesses for the Crown [459] were cross-examined, and other witnesses adduced, by the party who was to be affected by the inquisition.

As to the argument drawn from the practice, they contended that that proved nothing, since though it might not have been usual to offer such evidence, yet no case could be produced in which such evidence had been offered and rejected, and such rejection approved by the Court. But the case of *Bulley v. Blommart* (they insisted) was decisive on the point, and there was nothing in the books to impeach that case, which appeared to have been much considered, and is reported with unusual minuteness and circumstance, (and it was confirmed (they observed) by a book of MS. notes*, on the subject of Extents, which was tendered by them to the consideration of the Court,) and there the right of a claimant to examine witnesses was clearly established by the authority of the opinion of the Court, and that notwithstanding former practice.

If it were not permitted to a party who claimed property seized under an Extent, to produce witnesses to prove his property in them, it would be unjust and hard in the extreme. Suppose the defendant to be in possession of lands, as tenant at will, or from year to year, and the prosecutor of the Extent, to prove that he was in possession of these lands, which would be *prima facie* evidence of seisin in fee, could it be

* The Book said to have been commended by the Court in the case of *The King v. Belb.* Hughes's Rep. p. 53.

contended that it would not be [460] competent to the landlord to prove that the defendant held the lands merely as his tenant! The question is in fact, not whether a claimant may produce witnesses of his own to the Sheriff to be examined on his behalf, but, whether a witness already under examination may not be cross-examined;—whether such a witness must tell all he knows, as if a book, or other documentary evidence were produced, and the Sheriff should admit a part of it and refuse to receive the rest.

Dauncey, in reply, distinguished the case of *The King v. Bulley* from the present, by the circumstance in proof, and much relied on there, of the Sheriff having been guilty of shuffling and evasion, and other gross misconduct and wilful partiality, in procuring the inquisition to be taken clandestinely; whereas no such thing had been suggested in this case, where the Sheriff's conduct was not in other respects complained of. He admitted that a claimant had a right to be present at the holding of such an inquisition, and that it ought to be open, but contended that he had no right to interfere, either by examining witnesses himself, or cross-examining those produced by the prosecutor, which would necessarily be productive of the utmost confusion; as, if any one should be entitled to do so, there could be no limit to the discussions which might be set on foot by any number of claimants, perhaps to the total hinderance of the taking the inquisition, and that was the reason why such a proceeding was altogether *ex parte*. And he ultimately submitted, that if it had been permitted, as stated [461] in the case in Bunbury, the subsequent constant uniform usage shewed that that practice had been since altered.

Cur. adv. vult.

THOMPSON, Chief Baron, now delivered judgment.

(Having stated the case, his Lordship proceeded.) The inquisition has returned certain sugars to be the property of the person against whom the extent in aid was sued out. The application made is to set aside this inquisition, upon the ground of the Sheriff having misconducted himself, in refusing to receive the evidence to shew that these sugars were the property of a person of the name of Maze, who attended upon the execution of this inquisition. The affidavit states, that the sugars were imported by a ship called the "Suffolk," from the island of Trinidad; and that a considerable time before the issuing of the Extent, the defendants had endorsed the bills of lading to the deponent (that is, Maze) and his partners, Messrs. Ricketts, jointly and severally, for a valuable consideration; and that the last-mentioned sugars were accordingly thereupon discharged from the vessel into the warehouse of the cooper, appointed by the deponent and Messrs. Ricketts and Company to receive the same in the names of the indorsers, and have in fact never been in the possession of the defendants. And he further states, that by virtue of this Extent, an inquisition was taken on the 26th of October, before the Under-sheriff, at which the deponent, on behalf of himself [462] and his partners, Messrs. Ricketts and Co. attended by himself and his counsel; and Messrs. Brown and Co. also attended in like manner; and that it was proved by the evidence of the defendant Michael Willeox, that the said sugars were consigned to them the defendants, which was the only evidence produced of any property of the defendants in the sugars, it not appearing for whose interest, but merely that they were consigned to them. And the deponent also states, that the bills of lading, so indorsed to him and the said Messrs. Ricketts and Co., were tendered in evidence by their counsel, who at the same time proposed (and this was tendering evidence) on the cross examination of the witness produced on the other side, to the defendant Willeox the following question, upon the inspection of these bills of lading, in the nature of cross examination, "Were the sugars, specified in these bills of lading, ever in the possession of the defendants, and are they the property of the indorsers, Henry Ricketts and Co., and Peter Maze?" It certainly seemed a very material question for the witness to have answered, but the affidavit states that the Under-sheriff would not allow the question to be put, or the bills of lading to be given in evidence in any way.

The question here is really upon this point, and it may be decided upon this point simply: that here the evidence of the cross-examination of a witness on the other side was refused, upon a question in what light the goods were consigned, and whether the consignees ever had possession of them! The [463] bills of lading were produced to shew that these were the same sugars, but the question was, "Were they ever in the possession of the defendants?" and the Sheriff would not allow that to be put.

It is not, I believe, very usual, in point of practice, to have these inquisitions, which are stated to be ex parte proceedings, much attended to : but there is no reason why the parties may not attend them, and why they ought not to be allowed to propound all such questions to the witnesses as may be deemed necessary to prove the property in others than the defendant. And the case of *The King v. Bulley and Blomart*, which was much relied on, is of great weight : indeed it is directly in point ; but it is one which I never heard of (so little has it ever been acted upon,) till it was cited upon this occasion. There, the Court held, that a witness should be examined to prove the property ; it does not appear there that there was any refusal to cross-examine the witnesses ; but here, there is the additional circumstance, that the cross-examination was refused. It was laid down that the writ of Extent was a right in the King, not at common law, but given by the statute of Henry VIII. ; and the learned person who stated that said, that he himself had attended inquisitions on elegits and outlawries. Undoubtedly, this is a very strong authority, and it seems to have with it all the reason of the thing ; for, as it was stated in the argument, had this case been then entered into, the expense and trouble of traversing the inquisition would have been avoided. And it seems to be no answer that you may plead the [464] claim : for meanwhile, irreparable injury may be done, when, if the evidence had been suffered to proceed, and had the questions proposed been allowed to be received, it would have shewn the truth of the matter. It seems to us, therefore, that this is an irregular proceeding, and the inquisition must, for that reason, be quashed. It will not, however, I take it, preclude the taking another inquisition on a new writ of Extent of the teste of the one now quashed.

GRAHAM, Baron. I agree with the Lord Chief Baron, that the Sheriff did wrong in not either propounding the question, or suffering it to be put ; but I do not adopt the case in *Bunbury*, however high the authority may be, as deciding the other point.

THOMPSON, Chief Baron. There is quite enough here without that.

Per Curiam. Rule absolute.

[465] KINGSMILL v. BILLINGSLEY AND OTHERS. Thursday, 16th January 1817.—[Of lands exempt from tithes under the 2d & 3d Edw. VI.]—Where the defendants set up, to a bill for tithes, a claim of exemption under the 2d & 3d Edw. VI. cap. 13, and produced much evidence of the land in question requiring to be cleared and levelled, and that it gave more than usual trouble in ploughing, and cost more than the customary expense in manuring it with lime ; the Court ordered an issue, to try whether the lands, of which the tithes were demanded, “were of such a nature as (exclusive of the labour and expense of clearing the same from furze or whins, and preparing the same for ploughing) necessarily required extraordinary expense of limiting and manuring, or labour, to bring them into a proper state of cultivation.

This was a suit instituted in this Court by the plaintiff, (who, by his bill, stated himself to be seised of the impropriate rectory of the parish of Chewton in the county of Somerset, and entitled to all the tithes of corn, grain and hay, and all other prædial tithes,) against the defendants, landholders and occupiers, for the tithe of corn and other grain, and hay, produced on certain newly enclosed land, being part of lands called Chewton Mendip.

The defence set up by the answer was, that the said lands were exempt from tithes under the 2d and 3d Edward VI., cap. 13, sections 5 and 6*, as [466] being barren

* “Provided always, and be it enacted by the authority aforesaid, That all such barren heath or waste ground, other than such as be discharged for the payment of tithes by act of parliament, which before this time have lain barren and paid no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same ; any thing in this Act to the contrary in any wise notwithstanding.”

“Provided always, and be it enacted by the authority aforesaid, That if any such barren, waste or heath ground, hath before this time been charged with the payment of any tithes, and that the same be hereafter improved or converted into arable ground

and waste grounds. And the defendants respectively stated,—that the several closes, from which the tithe was claimed by the bill, were part of the forest of Mendip, and which had been sold to the Earl of Waldegrave, by the commissioners under an Act, passed in the 37th of the King, “For inclosing the open commons and waste lands within and adjoining the township of Chewton Mendip;”—and that the defendants, who occupied the said lands, had cleared and levelled the same, and ploughed and manured them with a large quantity of lime at a considerable expense, and sowed and reaped, cut and carried away, wheat and oats, and grass seed, during the time for which the tithes were sought by the plaintiff;—that some parts of the said lands had not been limed, but had been merely dunged and sowed with oats, and that they produced invariably a poor crop; whereas the parts which had been limed produced a good fair crop. And all the defendants said, that the manner in which they began to cultivate the said lands so newly inclosed and occupied by them, was by inclosing and clearing the same from stones, filling up the pits therein, and levelling the same by ploughing it twice: letting it remain in fallow for many months, and manuring with lime: laying a [467] greater quantity of manure, and at a much greater expense, for the purpose of bringing the lands into a situation to produce corn, than would have been necessary to be laid and incurred on the old inclosed lands in the parish, in the usual course of husbandry;—and that some of the crops of oats and grass on the newly inclosed lands had, since such cultivation, been nearly as good as on the old inclosed lands; but that the crops of wheat had not in general been so good;—that, previous to the inclosure, the said lands had been open commonable lands, fed with sheep, mules and other poor stock; and that some parts of the said newly inclosed lands, which had not been so cleared, levelled, &c. had been let for 5s. an acre.

They further stated,—that before the inclosure, the said lands had been subject only to the payment of small or vicarial tithes;—that the plaintiff was seised of the advowson, and had presented the then incumbent, to whom (by virtue of a clause in the said act, introduced at the request of the plaintiff) a composition, in consideration of the necessary decrease in the value of the agistment tithe, and tithe of wool and lamb, which would be the consequence of the inclosure, was awarded by the commissioners, of an yearly sum of money, to be paid to him for the term of ten years, to be paid and contributed by the owners of the said newly inclosed lands, in discharge of and as a full compensation for all such tithe: and they submitted, that if the tithe now sought were payable by them, the same lands would be charged with great and small tithe at the same [468] time. And the answer also stated,—that although the lands had produced grass before the inclosure, it was not in great abundance, for that it was overrun with fern and furze, and could not agist and depasture a great number of sheep and other cattle; and that the tithe formerly yielded to the vicar was inconsiderable;—and that the lands so inclosed would not produce corn without extraordinary expense and labour in tilling and manuring, and were then worth about 15s. or 20s. an acre; whereas, otherwise, they would not have been worth more than 7s. or 8s.

A great number of witnesses were examined on the part of the defendant, who spoke as to the great expense attending the preparation for tillage of different parts of the land, by levelling, clearing from rock and stones for ploughing, harrowing, cross ploughing and manuring it with lime, (which was expensive in that part of the country, from the high price of coals,) whilst other lands in the neighbourhood, for some distance, would produce two or three crops of oats without lime or manure, when converted from meadow into arable; and their evidence in general went to support the allegations of the bill. Some of them stated that the expense of preparing the old inclosed lands for corn was about 12s. an acre, and that of the new 6l. or 7l.

Thursday, 27th January, Thursday, 28th April, Monday, 2d May 1811.—Fonblanque, and Winthrop, for the plaintiffs, contended, that the lands were not barren within the protection of the statute. All that was put in issue was, not whether the lands were capable of [469] producing a crop, but a good crop: and, no doubt, land

or meadow: that then the owner or owners thereof shall, during seven years next following from and after the same improvement, pay such kind of tithe as was paid for the same before the said improvement: any thing in this Act to the contrary in any wise notwithstanding.”

which was manured, and more liberally cultivated, would produce a better crop than that which was not so well tilled and managed. The term barren, in the statute, relates to the soil itself, and not to the culture or neglect of it : and never was intended to be extended to lands which required to have cost and pains bestowed on them, on account of an irregular and uneven surface. And they cited Bull. N. P. 191 ;—*Witt v. Buck* (3 Bulstr. 166, and 4 Gw. 1574 ;—2 Inst. 656 ;—*Doyley v. Hornby* (3 Gw. 714), and the then recently decided case of *Warwick v. Collins* (M. & S. 349), wherein the question of bareness underwent much discussion in the Court of King's Bench, and Lord Ellenborough gave it as the opinion of the Court, that the criterion of—whether such land, after mere ploughing and sowing, would of itself produce a crop worth more than the expense of ploughing, sowing and reaping, without liming, manuring or tillage, was not the true test of exemption under the statute, nor the rule of law in such cases, by which that defence was to be judged : in the course of which judgment, much of what had appeared in *Stockwell v. Terry* to favour this defence, had been obviated by the observations of the Court on the decision of Lord Hardwicke. And they submitted, that in the present case, the Court ought at least to grant an issue, to try the question of fact of—whether these lands were of such a nature as to require extraordinary expense or labour to bring them into tillage.

[470] Dauncey, and Hall, for the defendants, submitted that the evidence having borne out the defence, that these newly inclosed lands required extraordinary labour, manuring, and expense, to render them fit for tillage, they were at once brought within the protection of this beneficial statute of Edw. VI. ; which, in consideration of its object, ought to have a large and liberal construction. The expense and labour which had attended the improvement of these lands, they insisted, amounted to as much as had ever been considered to give the owner a title to the benefit of the statute. In all the decided cases, the Court had decreed without an issue ; and, in the present instance, the evidence was sufficient to enable the Court to do so in favour of these defendants, there being nothing offered to contradict it on the part of the plaintiff.

In support of these arguments, on the defendants behalf, they cited *Stockwell v. Terry* (1 Vez. 117), *Hutchins v. Maughan* (3 Gw. 1197), *Byron v. Lamb* (3 Gw. 1594), and *Jones v. Le David* (ib. 1336).

With respect to the case of *Warwick v. Collins*, they submitted, that that decision did not on the whole militate against the present defence ; and that there was nothing there which could be construed to the disadvantage of those who now claimed the exemption. The result of that case is, that extraordinary expense, either in manure or labour, must have been incurred in the cultivation. But they observed, that as far as the judgment given in that [471] report detracts from the authority of Lord Hardwicke's decision in *Stockwell v. Terry*, there were no words in the report in Vezey to warrant the construction put on his Lordship's opinion ; and the Court of King's Bench, in pronouncing judgment, never once adverted to the case of *Jones v. Le David*, wherein Eyre, Chief Baron, much considered the decision of Lord Hardwicke in *Stockwell v. Terry*, and recognized the criterion adopted by his Lordship. And they submitted, that it was clear, both from the words of the statute and the language of the cases, that it had never been considered necessary for persons claiming the exemption, to shew that the lands were naturally totally unproductive or barren, in the common sense of that term.

Fonblanque, in reply, contended,—that enough appeared even from the answer of the defendants to render evidence unnecessary on the part of the plaintiff : for from passages read by the plaintiff, it appeared that the occupiers had had crops from parts of the newly inclosed lands, without going to any additional expense, either in employing manure or using extraordinary labour ; and that alone would be sufficient, according to the doctrine of the Court of King's Bench in *Warwick v. Collins*, which had removed the pressure of the case of *Stockwell v. Terry* :—that the term barren, in the statute, was not applicable to land merely poor, and requiring manure ; nor would the local circumstance of a particular species of manure being expensive in the neighbourhood of the lands claiming the exemption, supply the inference deducible in many other cases from [472] evidence of such land's requiring extraordinary expense to subdue it to the purposes of tillage. And they submitted, that the land must be shewn to be of such a nature as to resist all ordinary means of cultivation, and to be neither capable of receiving or yielding benefit without resorting to unusual modes of agriculture, and such as would be necessary to give it a fertility which it does not naturally possess :

and not merely such treatment, however expensive and laborious it might be, as would increase its productiveness.

Cur. adv. vult.

The Court, after taking time to consider their judgment, now shortly delivered their opinion through the Lord Chief Baron^{*1}; and the result was, that an issue was ordered, to try whether the lands of which the tithes were demanded, "were of such a nature as (exclusive of the labour and expense of clearing the same from furze or whins, and preparing the same for ploughing) necessarily required extraordinary expense of liming and manuring, or labour, to bring them into a proper state of cultivation."

End of sittings after Michaelmas Term.

[473] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER. HILARY TERM, 57 GEO. III. AND SITTINGS AFTER.

MEMORANDA.

The Lord Chief Baron was unable, from ill health, to attend the Court during the whole of this Term.

William Firth, of Lincoln's Inn, Esq. was called to the degree of Serjeant at Law. Motto—Ung Roy, ung Loy, ung Foy.

[474] PEDLEY v. FRAMPTON. Friday, 24th January 1817. --If in an action on 2d and 3d Edw. VI., where the first count is for treble value of the tithes, and the rest for the single value, a verdict be entered for the plaintiff on the whole declaration, by consent, subject to the award of an arbitrator, who directs the postea to be endorsed, "30s. treble value of the tithes; damages 1s.; costs 40s.;" held to be within the 8th & 9th Wm. III., and that the plaintiff is entitled to his costs of suit. --A rule obtained on a motion, founded on an opinion that a plaintiff was not so entitled under such circumstances, discharged with costs.

Mereweather had obtained a rule last Term, calling on the plaintiff to shew cause why the postea should not be amended agreeably to the note of the associate endorsed thereon, and why the Master should not, after such amendment, review his taxation of the plaintiff's costs, the defendant undertaking to bring the amount of the costs allowed into Court.

The rule was obtained on an affidavit stating that the declaration contained a count for the treble value of tithes under the statute, and several counts for the single value; that when the cause came on for trial, all matters in difference were referred to the arbitration of a barrister, who, to save the expense of an award, with the consent of the parties, handed over his decision to the associate to be endorsed on the postea, which was done in the following terms: "thirty shillings treble value of the tithes taken away by the defendant; damages 1s.; costs 40s.;"^{*} --that the postea itself contained a general verdict for the plaintiff on all the counts, --and that on the taxation of costs, the Master, considering himself bound by the wording of the postea, allowed the general costs in the cause.

It was submitted that the plaintiff was not entitled to recover his costs of suit under the statute of the [475] 8th and 9th of Wm. III. ch. 11. s. 3^{**}, inasmuch as the

¹ The Reporter was not present when the judgment was delivered, but he is informed that the Court did not give the reasons on which it proceeded at any length.

^{**} "And be it further enacted by the authority aforesaid, That from and after the said five and-twentieth day of March, in all actions of waste, and actions of debt upon the statute for not setting forth of tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, and in all suits upon any writ or writs of seire facias, and suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same in like manner as aforesaid."

value of the tithes found by the arbitrator was the treble value, and the damage awarded had not been found by a jury: and he cited the case of *Burnard v. Moss* (1 H. Bl. 107), where it was decided that the statute was confined to the case of the single value being recovered, or the damages being found by a jury.

Carberd now shewed cause on an affidavit, stating that the jury, having been sworn in the cause, had found a general verdict for the plaintiff, damages £200, debt £700, subject to the award: it then stated the reference and arbitration, and that there was, besides, a special agreement to abide by the result, without taking advantage of any objection on either side. He submitted that in this case the arbitrator stood in place of the jury, and that therefore this case was within the Statute as to the damages found by him: that the verdict having [476] been entered on the whole declaration, the plaintiff was still entitled to recover his costs under the statute on the single value found by the jury—or that in all events the defendant was precluded by the special agreement on the reference.

Merewether, in support of the rule, contended, that as the arbitrator had expressly proceeded on the 1st count in the declaration to avoid the treble value, the single value was put out of the question; and if his award were to be considered as the finding of the jury, this case was not within the statute.

GRAHAM, Baron.—The plain object of the act is, that if the amount recovered by a plaintiff in such an action should not be sufficient to carry costs, that still the plaintiff should have them.

WOOD, Baron. The *postea* is itself a verdict of the jury; but the arbitrator having awarded damages, would entitle the plaintiff to his costs.

Per Curiam. This is clearly a case within the statute. The Rule must be Discharged with Costs.

[477] MANT v. SCOTT AND OTHERS. (Exceptions). Friday, 31st January 1817.—A defendant in a bill filed for a discovery in aid of an action at law, charging that he has debited the plaintiff with larger sums, as paid on his account by the defendant, than were actually paid by him, is compellable to answer whether that were so or not—and that although the accounts have been settled for several years, for there is no period of limitation in point of time within which such a bill must be filed—and though the defendants (men of good reputation) state a very strong case by their answer; for the facts stated in an answer are not conclusive.—Whether an answer may be used, or may be useful if used in a Court of Law, is for the consideration of the Court.—The true tests as to whether questions are to be answered or not are, 1st, Whether the answers might lead to the crimination of the defendant: and 2dly, Whether they are relevant, and may be material to the case of the plaintiff.

This bill, which was filed T. 56 G. III. for a discovery in aid of an action commenced at law, stated that the plaintiffs, who were merchants, had employed the defendants as their agents to sell goods at the usual commission, they (the defendants) paying all duties and other charges thereon; and to deduct the amount from the proceeds in the account sales, which account sales they were to hand over to the plaintiffs, and give them credit for the net proceeds after such deductions. It then charged in substance, that the accounts of the sales afterwards given in by the defendants in the course of their mutual dealings, were false; as the plaintiffs subsequently discovered—that they had there stated the sums for which the goods delivered to them were sold for at considerably less than they had been purchased at: and that they had charged larger sums of money for the duty and entries of the goods, and also for lighterage, metage, landing, wharfage, &c. &c. than they had in fact paid. It charged to the same effect with respect to the sums accounted for, as having been paid for insurance of goods, which they had insured; and that they [478] had also charged for insurances which they had not effected—that certain quantities of the goods so delivered to the defendants for sale (they being also dealers in the same goods,) had been retained by them at prices considerably below their real value, and had not been, in fact, sold at all, or were sold on their own account at an advanced price. And they charged, that if the accounts should be fairly taken between all parties, and certain documents in the defendants possession produced, a large balance would be found to be due from the defendants to the plaintiffs.

On this alleged state of facts the plaintiff put the following interrogatories :

Whether the defendants had not charged the plaintiffs with some, and what sums or sum of money for the duty and entries of the said corn, grain, and other articles ; and also for the several particulars thereinbefore mentioned, or some, or which of them, much larger than was in fact paid by the said defendants for the same, or how otherwise ?

And whether they had not in their said account, charged plaintiffs with divers or some, and what sums of money, for insurance, alleged to be paid by them on the goods sold by them for the plaintiffs : or some, and which of them, or how otherwise ?

And whether they, or any, and which of them, did in fact insure the said, or any, and which of them ?

And whether the said sums paid for such insurance, were not less, and how much less, than the [479] sums charged for insurance to the plaintiffs, or how otherwise ?— and requiring that the defendants might set forth the names or name of the offices in which they insured ; and which of the cargoes of goods entrusted to them by the plaintiffs for sale, as aforesaid : and the sum and sums of money in which each and every of such cargoes was actually and bona fide insured by them, and the said sum and sums of money paid by them for the premiums of such insurance, and for the stamp duty thereon : distinguishing the sums paid for premium from the stamp duty.

And whether they did not afterwards sell the said parcels for a very advanced, or some, and what price ; and whether they did not retain the difference between such price and what they had allowed the plaintiffs, to their own use, or how otherwise ?

And whether they did not make very large, or some, and what profits thereby ; and that they might set forth a full and fair account of all sum and sums of money paid for duty, fees of entry ; and also the several sum and sums of money paid for metage, lighterage, landing, wharfage, portorage in and out of granary or warehouse, re-metage, weighing, rent, insurance against fire, turning and screening in granary, and other expenses paid thereon : together with the quantities, rates, and times, in and for which such expenses were paid, and where and to what person or persons by name, such expenses were paid, and where such persons now reside, and the method of calculating such expenses, deducting from each particular item of expense the discount [480] or abatement declared thereon by the person or persons with whom such expenses were incurred ?

To these interrogatories the defendants answered generally as follows (denying the facts alleged by the bill :) :

That during their employment by the plaintiffs, (which they admitted,) and up to the 5th day of July, in the year 1809 they charged to the said complainants, under the head of duty and entries, a sum at and after the rate of 10d. per quarter on wheat, and 8d. per hundred weight on clover seed ; that after the 5th day of July 1809, when the duty was increased 2d. per quartern, they then added that amount to their former rate of charges, and from thenceforth charged to the complainants, and also to their correspondents generally, at the rate of 1s. per quartern for duty, entry, &c. on wheat. That after they had rendered and delivered to the complainants the five first accounts, they received a letter from the complainants, dated the 15th of August, noticing the charges therein for entry, duty, &c. to be 388l. 4s. instead of which they stated that they had calculated the same to be 339l. 16s. 7d. making a difference of 48l. 7s. 5d. — that on the 18th they answered that letter, referring their charges to a rate which, besides the charge of duty and fees actually incurred, would cover other incidental expenses attending the business, and a reasonable compensation for the additional trouble, which they stated they believed to be perfectly mercantile and regular ; that from [481] thenceforth they continued to make such and the like charges in all their subsequent accounts during the continuation of their employment by the complainants, and their respective copartners, with such addition only as hereinbefore mentioned, and lighterage, and that such charges were afterwards acquiesced in by the complainants. That it was the known custom of the defendants in their business, and the custom of all houses on the Corn Exchange, well known and understood by the complainants at the time of their employment of the defendants, not to charge on the exact or specific amount paid for metage, landing, wharfage, portorage into and out of granary, re metage, weighing and other expenses upon corn, grain, and other seed put into their hands for sale, but instead thereof to charge a general specific rate, which includes a profit upon the charges so made

That it was a general and admitted principle, acted upon by the complainants themselves, and by all merchants, to make a profit upon the charges expended by them in the course of their business, by way of compensation for their advance, expenditure and trouble: and that in the case of corn-factors, the profit on their charges, is the only compensation which they have for their additional trouble in the care, charge management, and superintendence, frequently for a great length of time, of grain when landed into and kept in warehouse, the commission charged by corn-factors being a recompence only for the sale and the risk of the solvency of the buyers.

[482] That it is impossible to introduce or apply any specific sum, part of such expenses, as applicable to any particular parcel or quantity of grain or seed, but that the profit or charges made by the defendants are only a reasonable compensation to them for their expenditure and trouble.

That if the complainants had thought such charges unreasonable, and which were at the time well known to them, and particularly to the complainants, who were residing in London, and well versed in the corn-trade, and in every charge and expenditure appertaining thereto, they might have avoided such charges, by taking the custody and management of the grain into their own hands, as is practised by some merchants, and by employing the defendants in such cases solely in their character of factors, with a commission for sale and guarantee.

The answer also stated, having set forth the rates of charges, that those charges, together with the charge of entry, duty, &c., as therein before explained, were the several charges upon which the defendants, and, as they believed, all other corn-factors, derive a profit, and therefore the defendants admitted that in the instances and under the circumstances therein before and after mentioned, they had, by means of charging the fixed and usual rates thereinbefore specified, charged the plaintiffs in their respective copartnerships with sums of money larger than what was actually paid by them specifically for the same, as they humbly submitted they had a right to do.—That the nature and amount [483] of their charges were known to and understood by the plaintiffs before the employment of the defendants, and before the transactions in the bill mentioned, and were also known to, and fully understood and assented to and acquiesced in by the plaintiffs at the time.

That the plaintiffs paid to other corn-factors employed by them in similar business, as the defendants believe, as high or higher charges on the whole, although varying, in some instances, in mode and form, than the charges made by the defendants;—that the employment of the defendants was on the express understanding and condition that the defendants were to charge to the plaintiffs, with respect to the matters in the bill mentioned, at such rates as they the defendants had usually been accustomed to do, and as the defendants did do to all other persons; and that during the employment of the defendants the object of the charges was frequently discussed and assented to by the plaintiffs and their respective copartners, or some of them, at various meetings that took place at a period subsequent to the plaintiff's letter of the 15th of August 1809, and the answer thereto, at which meeting, (among other matters) the subject of the defendants' charges, and the defendants' mode of transacting their business, was fully entered into, discussed and explained. And the defendants then stated, that unless the plaintiffs assented and agreed to the charges of the defendants and their mode and manner of doing their business, they would not have accepted the employment on any other terms. [484] And they added, that after such meeting the plaintiffs continued their employment of the defendants.

The answer then stated, that all the several charges contained in the accounts rendered by the defendants to the plaintiffs, in their respective copartnerships as aforesaid, were by them, as the defendants believe, again charged to and allowed to them by the owners and proprietors of the said corn, grain, and seed, in the bill mentioned, and have been received back again by the plaintiffs from such several proprietors, with the addition of their usual merchant's commission.

The defendants also stated, that they had not, in their accounts, to their knowledge or belief, charged the plaintiffs with divers or any sums of money for insurance against fire, alleged to be paid by the defendants: because the defendants say that their rate of charge for granary rent, included therein the risk of fire: and the defendants, in consequence of such charge, were answerable and responsible to the plaintiffs for the amount of all such articles belonging to them, and warehoused by the defendants, in case any such had been destroyed by fire while in their care and custody.

And that they had considerable general insurances for their own personal security, running and in force at the time of the transactions with the plaintiffs in the bill mentioned, but not any specific or particular insurance on the property of the plaintiffs. [485] They admitted that they had purchased and taken on their own account the few parcels of the corn, &c. which were set forth in their schedule, but that they were afterwards resold by them on their own account; and where there was any difference they retained such difference, or bore the loss, as the case happened. But they stated, that for the reasons and under the circumstances aforesaid, they had not set forth the sums at which such parcels of corn, &c. were sold by them; and they insisted that they were not bound so to do. They denied that any balance would be found to be due to the plaintiffs: and as to that part of the bill, they relied and insisted that on an account having been settled and allowed, there had been found a balance due to plaintiffs, which was afterwards paid to them by defendants; and that there had been no farther dealings between them.

The defendants in their answer finally stated, that they had not set forth any account of the sum or sums of money paid for duty, or fees of entry, metage, landing, wharfage, portorage in and out of granary or warehouse, re-metage, weighing, turning, and screening in granary, and other expenses paid thereon: nor to what person or persons by name any such expenses were paid, nor where any such persons now reside, nor the method of calculating such expenses; because these defendants say that all such payments and expenses, except turning and screening, are included in and compensated by the specific charges made by the defendants at the rates and in the manner hereinbefore men-[486]-tioned: and which specific charges were so made with the express knowledge and approbation of, and assented to by the said complainants, in the manner, and for the reasons, and under the circumstances hereinbefore mentioned: and they submitted that they were not bound to set forth any such account, for the reasons aforesaid.

To that answer the plaintiffs took the following exceptions:

1st. That the defendants had not answered and set forth, according to the best and utmost of their knowledge, remembrance, information and belief, whether they the defendants had not charged the complainants with some, and what sums or sum of money, for the duties and entries of the corn, grain, and other articles, mentioned in the bill: and also for the several particulars therein, also in that behalf mentioned, or some, or which of them, much larger than was in fact paid by the defendants for the same, or how otherwise.

2d. That the defendants in and by their answer, had not in manner aforesaid, answered and set forth whether they had not, in their account mentioned in the said bill, charged the plaintiffs with divers or some, or what sums of money for insurance, alleged to be paid by them on the goods sold by them of the plaintiffs, or some, or which of them, or how otherwise.

3d. For that the defendants had not, in and by their answer in manner aforesaid, answered and [487] set forth whether they, or any and which of them, did in fact insure the said goods, or any and which of them: or whether the sums paid for such insurance were not less, and how much less, than the sums charged for insurance to the plaintiffs; or how otherwise.

4th. That the defendants had not, in and by their answer in manner aforesaid, answered and set forth the name or names of the offices or office in which they insured all and each of the cargoes of goods intrusted to them by the plaintiffs for sale, as mentioned in the bill, and the sum and sums of money in which each and every such cargoes were actually and bona fide insured by them, and the sum and sums of money paid by them for the premium of such insurance and for the stamp duty thereon: or distinguished the sums paid for premiums from the stamp duty.

5th. That the defendants had not, in and by their answer, in manner aforesaid, answered and set forth whether they the defendants, or some or which of them, or some or what person or persons on their, or some and which of their behalf, did not afterwards sell the parcels of corn and grain and other articles retained by them, as mentioned in the bill: or some or which of them on their, or some and which of their account, for a very advanced or some or what price, and retained the differences between such prices, and what they had allowed the plaintiffs to their own use: or how otherwise.

[488] 6th. For the defendants had not, in and by their answer in manner afore-

said, answered and set forth whether they the defendants, or some and which of them, or some and what person or persons on their, or some and which of their behalf, did not make very large, or some or what profits thereby.

7th. For that the defendants had not, in and by their answer in manner aforesaid, answered and set forth a full and fair account of all sum and sums of money paid for duty, and upon what quantity of weight, and at what rate such duty was paid, together with the fees of entry : and also the several sum or sums of money paid for metage, landing, wharfage, portorage, in and out of granary or warehouse, re-metage, weighing and rent, insurance against fire, turning and screening in granary, and other expences paid thereon, together with the quantities, rates and times in and for which such expences were paid, and to what person or persons (by name) such expences were paid, and where such persons now resided : and the method of calculating such expences, deducting from each particular item of expence the discount or abatement allowed thereon by the person or persons with whom such expences were incurred.

Martin and Wingfield, in support of the exceptions, submitted, that as the interrogatories were such as were calculated to obtain answers which might assist the plaintiffs in their action at law, [489] without criminating the defendants, they were bound to answer them fully.

Wetherell and Barber, for the defendants, insisted, that if the interrogatories put should not be considered altogether irrelevant, they were of such a nature, that the defendants, who were persons of the highest respectability, ought not to have been called upon, and could not be compelled to answer : that they were interrogatories of a criminatory nature, and were so framed : and they contended that, in fact, they were answered as far as was practicable, and could be beneficial to the plaintiffs, if they could use the answer in a court of law : and that, according to the case made by the defendants' answer, the plaintiffs ought not to be permitted to put such questions. And they adverted, as a farther argument, to the distance of time at which the accounts were now sought to be unravelled, the long accounts of the mutual dealings between the parties having been finally closed in the year 1810.

GRAHAM, Baron. I cannot help thinking that the defendants are in difficulty here. We are to look to the position of the cause before us. Here is a bill filed which would go to overreach the charges of an account closed indeed so long ago as 1810, but it states, as one distinct fact, that the defendants had given in from time to time an account as being fair, and which the plaintiffs considered as fair, and upon which they continued to deal for several years : but which they have since discovered to contain a number of improper charges : and that among [490] others there is a charge for duties considerably beyond what was paid by the parties themselves, in repeated instances ; and also, that the charges of commission had been overrated, and that they had retained part of the goods acquired and sold by them as factors, and accounted for prices considerably below what they had in fact received. The plaintiffs pray a discovery of this. Then how is it met ? By an answer that may indeed be true—that these defendants, (who are said to be persons of great credit, and ought not to be called on to go into a detail of these transactions at this distance of time) had by letter come to an agreement with the plaintiffs that they were to make their charges, not according to their disbursements from time to time, but according to the rate of so much per ton or hundred weight, and that this was perfectly understood by the parties ; and then it is argued, that because this is stated in the answer we are to consider any farther inquiry irrelevant, and that it would serve no purpose, because, it is said they must, in a court of law, state a case upon which they are sure to be nonsuited. But in arguing the exceptions, in order to shew that the defendant is not to answer upon the present occasion, it is not to be said that we are to pronounce now that the plaintiff is to be nonsuited at law, and that these inquiries ought not to be made. There is a fallacy in this : for the defendant assumes that that part of his case is proved which he states in his answer. It is true they state that correspondence and discussions took place : but the plaintiff has a right to say, I never did agree to any thing so injurious to my own interest as [491] the paying of such large sums as these. We cannot, therefore, hold, that the plaintiff is concluded by what the defendant says in his answer, for he must support it by proof when he comes forward for decision. The matter then stands thus : the defendants have thought that this is not a case to be enquired into, and that their character and conduct may be involved in the enquiry : but if when called upon they answer it, it must be a full answer, and we are not

prepared to say that it is not a requisite part of the plaintiffs' case to shew, that having placed too great a confidence in the defendants, he was imposed upon. He says, I will shew that they have charged, as a ratio for these duties, infinitely beyond not only what they actually paid for the duties, but even beyond the bounds of their own ratio upon the business which they have done for us. Now I think, that both *ex necessitate rei* & *ex debito justitiæ*, the plaintiff has a right to have the discovery, in order to shew that the defendant did not pay the sums he says he has disbursed, according to the allegations of the bill.

WOOD, Baron. I am of the same opinion. It appears that the plaintiff has brought an action at law against the defendants for the purpose of recovering money overpaid to them, and he files the present bill to enquire into the circumstances and measure of those payments: it is said that the defendants are not bound to give any answer to those enquiries, as the answers would be of no use to the plaintiff at law. That may be so; but how is it possible for us as yet to know that? we [492] cannot say that the answers will be of no use at law till the discovery be made. It is competent for the plaintiff to invalidate the accounts in a court of law; and if he can shew that these accounts have been settled in ignorance of the facts, it would impeach them at law, and entitle the plaintiff to recover. Now it is material in a court of law to shew, that instead of charging for a sum he actually paid, he charged a great deal more: that is therefore a proper discovery to obtain, in order to enable him to maintain his action at law. Then the discovery will not subject the defendant to any imputation of crime, nor is the discovery sought for the purpose of idle curiosity; but it is extremely important and necessary to the plaintiff's case, and therefore he ought to be called upon to answer.

RICHARDS, Baron. I am also of the same opinion. I have looked through the pleadings in the suit, and I think it is quite clear. This is a bill to procure a discovery from the defendants, which is to be used in an action at law, as may be thought necessary. The question is taken from this Court the moment the discovery is made, so that we are not called upon to act upon the discovery in any manner whatever, or to give any opinion on its probable effect. When it is said that the discovery cannot be made useful at law, we ought to be extremely clear that that is true; but if so, it does not prejudice you. Besides, if you say any thing that the plaintiff at law can read against you, in answer you may read your own case; so that in truth the plaintiff gives you the advantage of being [493] a witness for yourself. It is no objection to an interrogatory for discovery, that you state in your answer that it relates to matters which would be of no use at law: If the court of equity, which is called upon to compel discovery, can be satisfied that that is so, it will not give the discovery; but if a defendant be entitled to protect himself, by stating as facts things which are not facts, there could be no discovery obtained in any case; but we are not called upon to believe or disbelieve one word of what he says in his answer, or to exercise any judgment at all. I believe these defendants would not state any thing untrue; but we are to look upon their answer with the same eye as we would regard that of any other suitors of the Court. They must answer the bill for discovery, unless the rules of the court protect them, for they cannot defend themselves by any little obstruction that stands in the way of the plaintiff, and they must answer fully, unless any of the answers called for would be disclosing a crime, or would be clearly irrelevant or useless, or nonsensical. But when it is alleged that the entries and duties are charged for at more than they in reality amounted to, can any body say that the answer to that would be either nonsensical or inapplicable to the case? However just the representation of the character of the defendants may be, still their answer is no more to be believed here than that of any other person putting in an answer in any common case of discovery. It is possible for the plaintiffs to disprove it, by shewing that it is not true in point of fact. The answer is, as it were, an [494] address to a jury on the facts, by the defendant himself; if those facts be true, a jury might give a verdict accordingly; but we sitting here are not a jury, nor are the facts all before us till the discovery is made, and then it is to be carried before a jury.

It is true that nearly six years ago these accounts were settled; but there is no bar in point of time, nor statute of limitations, which prevents their going into the account again. The lapse of time is nothing to us, we are to consider the nature of the case as it appears upon the record. Then the sole question with us is, does the law allow a discovery to be made? Does the practice of the court compel it? Beyond

all doubt it does. And it may be granted, without charging any criminality on the defendants, the allegation being that they, taking advantage of the great confidence reposed in them by the plaintiffs, and acting in a fraudulent manner, have prevailed upon the plaintiffs to settle accounts which have been untruly stated. The defendant says "they are true;" the plaintiff, on the contrary, says, "they are not truly stated." Can we prevent them answering all questions that may be asked, if they be applicable to such a case? Certainly not; and unless we lay it down as a rule, that a defendant in any case may, by stating that the facts enquired of are not applicable to the case depending at law, protect himself from a discovery, we must grant it in this instance. But that is not so. Nor is it because a defendant makes a strong case by his answer that we [495] are to refuse a discovery. The plaintiff may reply, and he may disprove the defendant's case as stated. Upon the whole, we are clearly of opinion that the discovery sought for should be granted.

1st, 5th, 6th, and 7th exceptions allowed.

THE KING, IN AID OF REED AND OTHERS, v. HOPPER AND OTHERS, Assignees of Mowbray & Co. Saturday, 1st February 1817.—A deed of bargain and sale, enrolled under the statute, held to have been rightly enrolled as of the day when it was brought into the Inrolment Office, although delivered to a porter in attendance there after office hours, and not minuted by the clerk, or in fact received by him, till two days afterwards.—The endorsement by the clerk of the enrolments of the day of the inrolment, by way of date, is a part of the record, and cannot be averred against; nor is evidence admissible to shew that it was in fact enrolled on some other day: and that although the date be written on an erasure.

The defendants having put in a claim to the property seized under this extent in aid, as assignees of the bankrupts, had pleaded, that Mowbray & Co. being traders, had become bankrupt, and that afterwards, and before the issuing of the writ of extent, and before the 24th of July (the teste thereof), to wit, on the 22d July, the commissioners did bargain and sell, &c. the effects, &c. of the said bankrupts, to Henry Page, the provisional assignee: which said indenture of bargain and sale was before, &c. (on said 22d July,) in due manner enrolled in His Majesty's High Court of Chancery. Without this, that certain of the bankrupt partners were on the 24th July seized and possessed of the several freehold and leasehold estates mentioned in the schedule annexed to the inquisition as therein supposed: wherefore they prayed judgment and restoration. Replication taking issue.

[496] There were, therefore, three issues to be tried: 1st, Whether the bankrupts were seized and possessed of the freehold and leasehold premises mentioned in the schedule: 2dly, Whether the firm had become bankrupt: 3dly, Whether the commissioners had, by bargain and sale, duly enrolled on the 22d July, before the teste of extent, bargained and sold to Page the provisional assignee.

On the trial before Mr. Baron Richards, at the sittings after Easter 1816, a verdict was given for the defendants, absolutely, on the second issue, subject to the opinion of the Court on the first and third: and that depended on whether a certain deed of assignment had been, in point of law, enrolled, or not, on the day on which it had been brought to the office.

A rule was consequently granted in the following Trinity Term, calling on the prosecutors of the extent, to shew cause why a verdict should not be entered accordingly for the defendants on those issues.

Tuesday, 28th January.—Mr. Baron Richards now read his report of the evidence given on the trial, from which it appeared in substance, to have been proved, that the deed of bargain and sale was taken to the Inrolment Office for the purpose of being enrolled, on Saturday the 22d of July, after the appointed office-hours (from ten till three) and delivered to the porter; that it was the custom of the office, for the porter (who was entrusted with the key for that purpose) so to [497] receive such deeds after the clerks had left the office, who was paid a fee of one shilling with every such deed delivered to him: that whenever a deed was so left, it was the course to make a minute of the day, which was afterwards made the date of the enrolment, but such minute is not made by the porter at the time it comes in, but afterwards by the clerk; that if search had been made at the office for the deed, on

Saturday evening or Monday morning, before the arrival of the clerk, it would have been forthcoming for inspection; that the deeds are not usually in fact enrolled, nor the certificate of enrolment made out, till several days after the deeds come into the office.

It had happened, in the present case, that the clerk, on coming to the office on Monday morning (the 24th), finding the deed on his desk, had entered it in his minute book as having been brought in on the 24th, and it was afterwards enrolled as of the 24th; but discovering the mistake on being informed by the porter that it had been brought in on Saturday the 22d, he altered it to the 22d, accordingly, by erasing the "4th" and writing the "2d." The certificate was not written till some days after the 24th, and the clerk had altered the certificate which he had made originally, purporting that the deed had been enrolled on the 24th, to the 22d, in the same manner. It was also proved, that on the deed being delivered to the porter by the clerk of the solicitors to the commission, the porter, in his presence, opened the door of the office, and took it in and laid it on the [498] desk of the clerk of the enrolments according to his usual practice.

Dauncey, Walton, and Littledale now shewed cause. They contended that what had been done on the 22d could not be considered as an enrolment of the deed in question under the act, nor as being tantamount to it;—that some authentic minute, at least, should have been made of the deed having been brought in by some responsible person having authority to do so:—that the act of enrolment was a solemnity requiring every due formality to be observed in order to render it complete and availing:—that the mere carrying a deed to the office and delivering it to a Porter there, could not be regarded as an enrolment under the statute, or the object of it would be often defeated. Every enrolment was required to be on parchment. Com. Dig. Bargain and Sale, B. 6. 2 Inst. 673. Lill. Pr. Reg. p. 89 (b) C. They submitted also that as it was in evidence, that there were well-known hours appointed for attendance at the office, for the purpose of business, it was the duty of persons interested in the enrolment of deeds to bring them, during those hours, and if necessary to see that they were actually enrolled, or at least minuted, or that something were done which might be considered a beginning to enrol, and that if they did not they must be content to lose the benefit of it.

They further contended that if what had been done on the 22d was not a due enrolment, the Crown was not concluded by the certificate of the date of the [499] present enrolment, but were entitled to go into evidence of the circumstances, to shew notwithstanding the indorsement by the officer, that the deed had been enrolled on the 24th in fact, and not on the 22d, and that it had been originally certified as having been enrolled on the 24th of July; for that as the date, at least, was no part of the record, it might be averred against, and proof would be admissible, that the alleged day of the date was not the true one:—that this was not a judicial record, but merely ministerial, and ought not to be held to be conclusive as against those who might be interested in falsifying it:—that the object of recording the existence of the deed was not such a one as necessarily precluded all right to question the time of the enrolment, which they submitted was no part of the record itself as forming the date: and that they illustrated by the fact of its being pleaded as matter in pais, which they insisted was an admission by the other side, that it was not a conclusive record, for in that case it must have been pleaded with a prout patet; or it would be ground of motion in arrest of judgment: the only fact on record being that the deed had been enrolled. So in *Hynde's case* (1 Co. Rep. 72), the Court held that the time of an enrolment shall be tried per pais, Lill. Pr. Reg. p. 89 (b) H. And to the same point they cited *Holland v. Downe* (Sav. Rep. 91), where the whole question at issue was the time of the enrolment. In Buller's *Nisi Prius*, 6 edit. p. 229, it is said a fine to be proved with proclamations [500] must be examined with the roll, because the chirographer is not appointed by the statutes to copy the proclamations, and therefore his indorsement on the back of the fine is not binding. So here the clerk is not appointed or authorized by the statutes to indorse the deed with the time of the enrolment, and therefore it is not conclusive. Before the 16 Eliz. the date of the enrolment was never inserted, and there is no statute requiring that a date should appear. If inserted, therefore, it cannot, since that act, be considered as in fact any part of the record, and whatever weight the circumstance of the date might have with the jury, it is at least a matter entirely for them. In *The Duke of Somerset's case*, in

Dyer (Dy. Rep. 355 a.), a reporter of high authority, it is said to have been held that a depositing a deed for enrolment in a chest in court, which was not afterwards actually enrolled, was not effectual, and whatever doubt the marginal notes may have thrown on that case, it is still in point to shew that at least such was the opinion of Dyer. They submitted (on a suggestion of Mr. Baron Graham,) that in cases where the question was whether a deed had been enrolled within six months after date or not, if the certificate should be held to be conclusive of that, it must be as was said in *Worsley v. Filisker* (2 Roll. Rep. 119), because the date was made parcel of the record by the operation of the statute. If, however, on the other hand, the indorsement should be held to be part of the record, and that, therefore, it could not be averred against : [501] then they submitted that it ought not to have been altered from what it originally recorded, as the day on which the deed had been enrolled, and certainly not by the clerk without the authority of the Court, whose minister he was. It might (they suggested) have been seen on inspection in the office before the alteration had been made, when it would have appeared to have been enrolled (as it was originally minuted), of the 24th, and the most mischievous consequences might have ensued from such an accident, if it were permitted to a clerk to alter the date at any distance of time after it had been recorded. If his minute of the date of the enrolment were to be regarded as part of the record of the fact of the deed having been enrolled, the Crown, or any other creditor, might have seized before the alteration were made, when the record would have justified the seizure : yet the same record, if permitted to be altered, would support any action brought afterwards for the trespass.

Therefore they contended on the whole, that the present deed had not been duly enrolled at all : or that if it had, it was only effectually enrolled on the 24th :—that it having been once recorded as enrolled of that day it could not be altered to any other day without leave of the Court : and that the day of the enrolment, as expressed in the certificate, being no part of the record, they might be allowed to give evidence against the truth of the endorsement, to shew the true day on which the deed had been in fact enrolled.

[502] And they suggested, that if such alterations were allowable, they would admit all the mischief of practical collusion on the part of the porter and the persons interested.

Scarlett and Hullock, Serjeant, in support of the rule, contended, that the deed of bargain and sale must be considered as inrolled from the time when the deed was first carried to the office ; for that the person bringing it in had no power to compel the clerk to inrol it immediately, and therefore was not bound to see the deed actually inrolled : he had done all in his power to that end, and was entitled to any benefit resulting to him from the act—that it was not necessary to see the deed enrolled, or even minuted : and the thing itself, besides, would most frequently be impossible—that the porter, who was entrusted by the clerk with the key of the office, for the express purpose of receiving deeds for enrolment after what were called office hours, represented the clerk himself, and therefore, a delivery to him was the same thing in effect as a delivery to the superior officer ; nor was any authority cited to shew that such an act was not at least tantamount to an inrolment. As to its being necessary that it should have been begun at least to be enrolled, it is not the practice in any case to do so ; and even judgments are never actually recorded till after execution has been sued out on them, unless from some special purpose.

The next question that arises is, if what was done be to be considered as a sufficient delivery at the [503] office, - whether it ought not also to be held to have been enrolled on that day, although, in point of fact, the formality of ultimate enrolment should not be completed till some subsequent day. On that point the case in Dyer (c) would of itself, perhaps, seem to be an authority that it ought not ; but the marginal notes to that case shew that that decision, as reported, has never since been considered as law, and the cases referred to in those notes are *The Dean and Canons of Windsor v. Middlemore* (cited in *The Dean and Canons of Rochester v. Sir Miles Sandes* (Moore, 676)), *Ludford v. Grelton* (Plowd. 490), and an *Anonymous case* of East. T. 3d Eliz. To the same point also were cited *Garrick v. Williams* (3 Taunt. 544), and *Deponthieu v. Pennyfeather* (1 Marsh. 264).

In all events, however, (they contended) the certificate of the officer of the time

(c) *The Duke of Somerset's case*, p. 355.

of the enrolment must be taken to be conclusive, and nothing can be averred against it; for although it is true that the statute does not require the time to be noticed in the enrolment, yet in common sense, and for obvious convenience, it must be considered a most material part of the record, for often (as in the present case) every thing may turn on that fact. The enrolment here is not denied; the dispute arises as to the time. After the 16th of Eliz. it became a rule in practice, that the date of enrolments should be inserted, and the reason is [504] obvious. Wherever, therefore, the officer certifies the time, the books all hold that it must be taken to be part of the record, and that therefore it cannot be averred against; and they cited *Holland and Franklin's case* (k), *Sir Thomas Howard's case* (Owen's Rep. 138), Lil. Pr. Reg. p. 89, A. (b); *Worsley v. Filisker* (2 Roll. Rep. 119), *Kinnerley v. Orpe* (1 Doug. 56), and *Garrick v. Williams*.

But even if it were not conclusive on that point as a record, they contended that on the evidence, if it were to be let in, it would have appeared to have been enrolled in fact on the 22d, for the deed was, they submitted, actually enrolled on that day, because it was then left at the office.

To meet the objection of the clerk having no authority to alter the record, they insisted that a mere misprision might be amended at any time, as was constantly done; and in a late case even after a writ of error brought:—that the present amendment had been no more than a voluntary correction of an accidental mistake: and they submitted that even if the clerk had done wrong in spontaneously making the alteration, the Court were bound by it, if it be found to be right when called for, however reprehensible it might be in the clerk who has taken on himself to do so (*Garrick v. Williams*, cited ante). If, indeed, the record had been altered [505] from right to wrong, it might perhaps have been restored, on application by them to the master of the rolls, for that purpose, but until that was done, it was binding and conclusive: and they stated that, in point of fact, a petition had been presented for that purpose, but his honour had refused to entertain the application.

As to the suggestion of possible collusion, if there were any such thing capable of being proved, they insisted that it should have been pleaded specially, and that it should have been replied, that the date had been altered per fraudem.

1st February. — Dauncey, in reply, urged the distinction which, he submitted, subsisted between the record of the fact of the enrolment, and of the time of that fact, against the arguments pressed on the other side to sustain the proposition that the date of the enrolment, as part of the record, could not be averred against. And he insisted that another distinction arose, on this being a case where the record had been altered from right to wrong, and that therefore, on those grounds, the cases which had been cited did not bear against the arguments used in support of the present rule. Those cases, too, (he submitted,) which had been opposed to the authorities cited against the rule, were cases where the parties disputing the day of the enrolment were parties to the instrument, and were on that account held to be precluded: whereas, in the present case, the prosecutors of this extent were strangers; and that is the distinction taken in the case of *Holland v. [506] Dawne*, cited from Saville—a distinction which (he observed) reconciled the apparently contradictory decisions to be found in the books, and which should be the groundwork of the doctrine which the Court were about to establish by their decision on the present question.

GRAHAM, Baron. This is a case, not only of great importance to the parties, but involving, in point of practice, a question of considerable moment to the public: I am, however, desirous of deciding it now, on the recent impression of my mind, unless my brothers should wish to take time to consider it.

[His lordship then stated the facts and the question.] The point itself lies in a narrow compass, and in an ordinary case would not have so much occupied the attention of the Court. On the one hand it is contended, that the enrolment is not of itself a record, and that it therefore admits of an averment impugning its date. On the other hand it is insisted, that being a record, it is conclusive: and that as the certificate states the deed to have been enrolled on the 22d of July, it must be taken to be true, and cannot be further inquired of.

Another question is, whether, if evidence could be let in to shew the true day on which the deed was actually enrolled, from the statement of the testimony before

(k) 1 Leon. 183, and *Holland and Bon's case*, 2 ib. 121.

the Court, the deed was not, in point of law, under those circumstances, in fact, enrolled on the 22d of July, the day on which it was brought into the office.

[507] On the first point there exists much contradiction in the cases : but, on due consideration, I am of opinion that, as to all that relates to the fact of enrolment, it must be treated as a record : and I take it that, from its very nature, it must be so considered. The distinction is plain. The instrument itself is certainly not a record : the certificate of its having been enrolled is. The history of enrolments is well known. The preamble to the 27th H. VIII. (ch. 10) details the inconveniences which arose from the effects of the clandestine nature of the doctrine of uses ; and it was intended that those inconveniences should be obviated, by that act requiring deeds of bargain and sale to be enrolled in some court of record, thereby supplying that notoriety, from the absence of which, in such modes of conveyance, so many mischiefs were said to have arisen. The object of enrolment, then, was to give publicity to such conveyances, as in the case of letters patent, which are null unless they have been duly enrolled. All this goes to illustrate the position, that enrolment is matter of record. The case most relied on for the Crown is that of *Holland v. Doane*, in Saville, which is also reported, and with some difference in Owen ; for it is stated in Saville, that the court let the parties in to aver against the record ; whereas, according to Owen, the record was held to be a bar, and conclusive. But giving the Crown the full benefit of that case, as reported in Saville, yet there have been cases in more modern times which have established, that no averment or evidence shall be received to shew that the day of the date of an enrolment is incorrect. It has been said [508] that *Hinde's case* is in favour of the argument used for the Crown on this point, but I think that case makes much more strongly for the defendants, on the present occasion ; for in that case, which arose entirely out of the practice, then usual, of dating generally as of the term, which is always considered as relating to the first day of term, the Court would not suffer that usage to work an injustice ; and the whole reasoning of the Court on that decision tends to shew that they treated the enrolment as a record, and one which concluded all men from denying any thing appearing within the record, as antedate, &c. ; but they certainly held that they might take an averment which stood with the record, and did not impugn any thing apparent within it. Now here the precise day of the enrolment is apparent within the record, and therefore, according to that case, cannot be impugned by going into evidence in support of an averment against it.

Then the very modern case of *Garrick v. Williams* is quite decisive on this point against the Crown. It was in evidence there, that the enrolment had originally stood unquestionably wrong, and that it had afterwards been made right by the clerk, of his own authority. It was contended that the clerk had no right to do so without leave of the Court ; but the Court of Common Pleas held, that the enrolment was conclusive. On that occasion the matter had been brought before the Master of the Rolls, on an application to have the alteration restored to its original state, who put this unanswerable question to the counsel who were in support of [509] the application :—"Is there any case wherein a court has been called on to alter a record from what was right to what was wrong?" The petition was consequently dismissed. That is also an authority to shew that these enrolments are records.

It can hardly be necessary to go to the other parts of this case, or to give an opinion that where all that it is possible for the party to do, whose object is to procure the enrolment of a deed, has been done by him, although the last ceremonials of enrolling, which it is the duty of the officer to perform, yet remain to be done, it is sufficient. The position from Lilly's Practical Register, only goes to what has been admitted throughout, that the time of an enrolment may be tried per pais, but that is only where it is no part of the record. The case in Dyer, I consider as of no authority ; but as to the marginal notes appended to it, they bear unquestionable marks of having been added by some person eminent in the profession. The case in Moore, of *The Dean and Canons of Windsor*, and that of *Ludford and Gretton*, in Plowden, appear to have been the foundation of the marginal note to the case in Dyer, and I think it completely destroys the principal case.

Then, if this is a record, and I think it unanswerably is, the enrolment is recorded to bear date of the 22d of July, and concludes all question as to the erasure ; and even if evidence were admissible, enough would appear to shew the enrolment to have been made on that day. If Young had [510] been in the office on the 22d, when the deed was brought in, it seems to be admitted that it would have justified the date as of

that day, and it would have been for all purposes an enrolment. In point of fact, however, he did not attend then, but it is proved that his servant received it into the office, and by his authority deposited it on his desk that night. It is quite clear, too, that the party desirous of having the deed enrolled had, by bringing in the deed, done all that it was in his power to do towards its enrolment.

It is then said that the deed was not brought in office-hours, but there are no appointed office-hours established or recognized by the act, so that the party has the whole day in which to do it.

I was somewhat staggered by the argument, that it is not required by the act that the day of the enrolment should be recorded, but if it has always been the practice to insert the date, as it appears to have been, I think that is a sufficient answer. It certainly is a very convenient regulation that the date should be inserted, and whenever it is, it must be taken as forming part, and an essential part, of the record. The party, therefore, having done all he could towards the procuring this deed to be enrolled, and it having been accordingly recorded as enrolled on the day on which it was brought to the office, I consider that record as conclusive, and that all parties are bound by the effect of it, and consequently this rule must be made absolute.

[511] Wood, Baron. My brother Graham having gone so fully into the question arising on this case, I might consider it sufficient for me to say, that I entirely concur with him; but in a matter of this very great importance, where the points have been expressly reserved for the decision of the Court, it is proper and necessary that I should state the grounds of the opinion which I now deliver.

The certificate of the enrolment of this deed of bargain and sale, offered in evidence, is dated the 22d of July. It is objected that that is not the true date, and that proof that it is not so is admissible, to shew that it was originally and properly dated as of the 24th, in which case the Crown's extent would be entitled to the preference, otherwise the bargain and sale would have priority. The questions then are, whether the enrolment of this deed is a record, and whether the date is part of it, and whether it is a record of such a nature as that evidence may be received to contradict it. It appears by the cases to be the opinion of all the judges, that it is such a record, and that evidence on an averment against it is not admissible. A distinction was attempted to be made in argument between the fact and the time of the enrolment: but the time of the enrolment is a material part of the fact of the record, and if so put in issue it might have been tried by the record. In the case of *Ludford v. Grotton*, in Plowden (page 491 a.), it is said, that "none can say that the King's charter was made or delivered [512] at another day than when it bears date," (and the reason of that is as stated before, because it is matter of record, and therefore carries in itself absolute verity)—"no more than a man may say that a recognizance or statute-merchant or staple was acknowledged on any writ purchased at another time than when it bears date; for to aver that it was antedated, or that it was delivered or acknowledged after the date, tends to the discredit of the great seal, or of justice, or of the officer of record who recorded the recognizance, or the statute-merchant, and the like." Now, the enrolment of the deed, in the present instance, is a precisely similar case, and therefore you cannot, for the same reasons, aver that it is antedated, because it is an enrolment made by an authorized officer of a court of record, and so produced by him. Nothing can be stronger as affecting this point than the case in *Dyer**, as ultimately considered and decided. (His lordship stated the case at length.) The Court of Augmentations is not a court sitting in judgment, but merely an office of record; and as appears by the authorities collected in the marginal note to that case, it was held, that a deed, when enrolled, vested the interest with relation, and that you are estopped to say, that it is not enrolled according to its date, and the consequence of that doctrine in the case cited from Moore was, that the defendant there was ousted of his term. It is said in a note below to have been held in the Exchequer, E. T. 30th Eliz. that the delivery of a deed to be enrolled in court makes it a record: Manwood denying the opinion attributed to him in the case in *Dyer*. Nothing certainly can be stronger than those decisions, to shew that a deed enrolled is to be considered as enrolled with relation to the day it came in. As to the cases which occurred between the statute of Hen. VIII. and the 16th year of Eliz. there is good reason that a party might be permitted to give evidence of the day of an enrolment having been actually

* *Duke of Somerset's case.*

made, because it was not the usage at that time to insert the particular day, and if a date was given in term time, it was general as of that term which has relation in law to the first day of the term. This inconvenience attended that practice, that if a deed was not in fact enrolled within six months, should that time have expired by the second day of term, yet if it were enrolled at any time before the end of the term, it would have been considered to have been enrolled as of the first day, and therefore it was that the courts permitted the true day of the enrolment to be given in evidence. As to the regulation adopted of inserting the precise date, I consider that the judges must have construed the rule as if it had been one of the requisites of the statute. And that is also recognized in *Comyns* (*Bargain & Sale*, B. 10, p. 64). On that ground, therefore, I am clearly of opinion, that evidence ought not to have been received to contradict this record.

I shall say but one word on the question of deeds being to be considered as enrolled on the [514] day of their having been brought in, although not then actually and de facto enrolled. I am of opinion that they ought to be considered, after enrolment, as enrolled of that day by relation: and the case of *Garrick v. Williams* is very strong on that point, where the Court of Common Pleas so held.

As to what has been said of office hours, the act of parliament appoints no such time, and a party has the whole day to bring in his instrument for enrolment: and the officer appears in this case to have been aware of that, who for his own convenience, if he chose to be absent from the office, left a person there for the express purpose of receiving such deeds as might be brought to the office when he should not himself be there: and it is his duty to record the enrolment as of the day on which it is so brought in. The case of *Combes v. Inwood*, in *Hutton*, I will not advert to; but there is another case to be found in page 63 of the same book (*Jennings v. Pitman*), wherein it was decided, that in the case of those who claimed any estate of persons attainted in the rebellion, where they brought their conveyances to the Exchequer to be enrolled within one year, if they brought and delivered those conveyances it was sufficient, though they be not enrolled, for they have performed as much as was in them.

Then it is said that the officer had no right to alter this record as he has done: but it would be [515] monstrous if we, sitting in this Court, were to be examining into the records made by the officers of the Court of Chancery, for it would induce a clashing of jurisdictions: and the consequences would be absurd, for one Court might hold a deed enrolled on one day and another on some other: nor can we investigate the conduct of those officers over whom we have no controul, or inquire whether they have or have not done their duty. The Court alone by whom they are appointed can do that, but we must take the records as we find them, and are clearly absolutely bound by their import: and to me, in the present case, the enrolment appears to be recorded as made on the 22d of July.

RICHARDS, Baron. I shall be very short, as I am clearly of opinion that evidence ought not to have been received to contradict this record. The case of *Garrick v. Williams* is quite decisive on the point, and it was a much stronger case than the present: for there the officer added to the record four years after the granting of the annuity sought to be set aside, and the Court would not listen to any argument on the misconduct of the officer. The Chief Justice, who took time to consider his judgment, says expressly towards the end of it, that the memorial was conclusive, and "that no averment or evidence shall be received to shew that the date is incorrect;" and though the Court reprehended the conduct of officer, they decided that they were bound by it.

[516] That case came afterwards before the Court of Chancery, on a bill for an injunction to restrain the annuitants from proceeding to execute a warrant of attorney. The bill* stated, amongst many other things, that the memorial was not properly

* *Eagle v. Garrick*.—On a former occasion the Lord Chancellor expressed himself in this case to the following effect: "This Court must consider the record of the memorial in the same point of view as a court of law, and in this case the Court of Common Pleas has decided that it is bound by the record of the memorial as it now stands: if so, this Court is equally bound, and I must refuse the injunction, leaving it to the grantor of the annuity to file a bill in this Court, for the purpose of having the record restored to its original state, if he shall be so advised."

transcribed: and on Mr. Girdlestone's brief I find a short note of what the Lord Chancellor said on that occasion. After travelling through the other points, his lordship proceeds: "If the record have been altered contrary to what it ought to have been, application ought to have been made to the keeper of the records to make it right. At present the record is complete; but if any vice be in it, there may be an application to the Master of the Rolls for the purpose of altering it; but till that time it stands as a good record." The real question was, whether the annuity was enrolled within 20 days. An order was made that the clerk should attend with the memorial itself. Now there was no question of the fact that the deed had not been enrolled within four years, therefore the Chancellor could only have called for the record to see what had been recorded to have been done. [517] The application of the plaintiff in equity was refused at that time, and the Master of the Rolls, when applied to afterwards, also declined to interfere. That is certainly a strong case, and is bottomed on sound authorities. I do not presume to say that there are not modes of pleading by which a case may be made where evidence might be admissible in a court of equity, but on this record there is no such case. The issue is, whether this bargain and sale were duly enrolled, and the plea is supported by producing this record. By the Annuity Act, (53 Geo. III. ch. 141, sec. 7,) the day and hour are required to be enrolled. Here also the date is of the first importance, and ought to be inserted.

On the other point of the case, if we should have been of opinion that this evidence were admissible, I think it would be sufficient to support the plea. It is impossible to dispute that the lodging the deed in the officer's hands is an enrolment. And indeed the affairs of mankind would be in a dreadful condition if it were not so: for when the deed is once so lodged, the party interested in it loses all dominion and controul over it, and it is from that moment left entirely with the officer. If, as has been contended, an actual and complete enrolment were necessary, this deed has not been enrolled on the 22d nor on the 24th of July; but the cases all decide that that is not necessary, and that the instant a deed is lodged in the office, from that instant it must be considered as enrolled, and the practice accords with that rule.

[518] It is admitted in this case, that although the office-hours were over, if Mr. Young, or any clerk, were then there, the lodging the deed on Saturday the 22d July would have been sufficient: because, if a deed is received by the officers, it is sufficient: but who are the officers? Is there any particular person or persons named by the act to receive these deeds? Mr. Young is the chief clerk, and he, or other persons appointed by him, are there in order to receive the deeds that may be brought to the office. If he or his clerks receive a deed, either by themselves or by others, is it not precisely the same thing?

The moment you admit that it was received by Mr. Young at the office, that moment it became an enrolment. It is clear that, if not received by him personally, but by another *bonâ fide* appointed by him, and according to the usual course of the office, it is equally so. Why is it not equally in the office, if so received, as if Mr. Young himself had received it? Mr. Young was examined on the trial, and says, that the office hours are not the only times when he received those deeds, and that he and his clerks sometimes attend after office hours. If so, then there is no magic in office hours. He states that it is the universal practice always to make the enrolment bear date the day it comes into the office; but the enrolment necessarily cannot take place until some days after; but the day on which it comes in is the day upon which the enrolment bears date. [His lordship then went through the leading facts of Mr. Young's evidence, and dwelt on the [519] circumstance of the porter being authorized to receive deeds brought in in his absence.] So that it appears that this porter was as much under Mr. Young's authority as any of the clerks. [He then adverted to the evidence of the clerk, who brought in the deed and left it with the porter.] Now suppose the porter had said he could not do it, then this young man would have gone to one of the clerks. It is impossible to say that the young man (the clerk) was in fault; if there was any negligence at all of the officer, it does not belong to him. [His lordship then applied himself to the consideration of the remainder of the evidence, and observed, that.] Such being the facts of the case, and there being nothing of fraud to affect the question, I should conceive that this delivery of the deed in question, by this young man to the porter left in charge of the office, is as much a leaving at the office as if it were left with the officer himself, or any of his clerks. But then it is

said, that there is no minute made of such delivery. That is only a plan adopted for the convenience of Mr. Young himself. Suppose the minute had not been made for a week, it might be asked, would that affect the enrolment? Certainly not. If the officer choose to trust to his memory as to the time when a deed is left, he has a right to do so. There is no injustice in saying that he may do it. He puts it down in order to remember the day of delivery. He puts it down in his minute or day-book, but that could not be more a public notice than the lodgment of the deed in the office: and if it be not absolutely necessary that the enrolment should be [520] made at the time, (and I have heard no case cited to shew that it is so in point of law,) that which has been done, was in all respects sufficient. But, in point of fact, how is any publicity given to the enrolment taking place, when the formality of enrolment is an act which may not be performed for a great length of time after the deed is brought in? It certainly was not intended for the purpose of making the matter public.

Upon the whole, it seems to me that the first point—that a record cannot be averred against having been decided to be law—makes the consideration of the other unnecessary; but if that were to be acted upon in the event of the other failing, I should conceive that the circumstance of the deed being lodged in the office with an accredited agent of the principal clerk or officer, in the absence of all fraud or other circumstances to impeach or affect it, is as good and as legal a delivery as if it had been handed to Mr. Young himself: and I am therefore of opinion that we should make this Rule absolute.

[521] *BADNALL AND ANOTHER v. SAMUEL*. Saturday, 1st February 1817.—Where all parties have had due notice of the dishonour of a bill of exchange, a subsequent indorser is not discharged by a treaty between the attorney of the holder, the drawer (who was also prior indorser) and the acceptor, that the holder should wait a given time for the payment of the balance, in consideration of receiving from the acceptor and prior indorser, by a certain time, a stipulated proportion of the amount, a part only of which proportion was afterwards paid*: although the subsequent indorser has had no notice of such treaty, or the result, nor was informed of the payment of any part of the money due on the bill, or of the ultimate non-payment of the balance till some months after the original dishonour of the bill.—Sed nota, the subsequent indorser was the person to whom the holders had sold the goods for which the bill was given in payment, and the offer of a renewed bill, by the same parties, had been expressly rejected by them.

This was an action of assumpsit brought to recover the sum of 87l. 19s. 2d., the balance claimed by the plaintiffs on a bill of exchange for 217l. 19s. 2d., dated Liverpool, 6th March 1815, drawn by one J. Henry upon, and accepted by one Thomas Ashton, payable at Messrs. Barclay and Co.'s, bankers, London, three months after date, to the order of the said J. Henry, and endorsed by him to the defendant, and by the defendant to the plaintiffs.

The first count of the plaintiffs' declaration was on the said bill of exchange: and there were counts for goods sold and delivered, the common money counts, and a count on an account stated. The defendant pleaded the general issue.

The cause was tried before Mr. Justice Dallas, at the Lent Assizes for the county of Stafford, 1816, when a verdict was found for the plaintiffs for the said sum of 87l. 19s. 2d.; subject to the opinion of this Court upon the following case:

[522] "The plaintiffs, in consequence of an order given, furnished the defendant with goods to the amount of 242l. 5s. 6d., to be paid for by the defendant at twelve months credit. The goods were forwarded to the defendant at Liverpool, and were received by him there. The twelve months having expired, without any remittance having been received by the plaintiffs for the goods, they wrote to the defendant on the subject, and received from him an answer, inclosing the bill in question, advising—'Enclosed you have Ashton at Barclay's for 217l. 19s. 2d., with which credit our account, and when our advices arrive, should there be any further orders we will acquaint you.'"

"The account of the defendant was accordingly credited by the plaintiffs, for the

* Quere if the whole had been paid, according to the engagement of the party asking the indulgence of time.

sum of 217l. 19s. 2d. and also for the further sum of 24l. 6s. 2d., which last sum was paid to the plaintiff Langharn by the defendant, on the 20th May 1815; and the accounts between the plaintiffs and defendant were then balanced by such last-mentioned payment."

"The bill of exchange was duly presented at Messrs. Barclay and Co.'s (where it was made payable) on the day it became due, but payment was refused; the several parties to the bill of exchange being resident at Liverpool, the plaintiffs transmitted it to Messrs. Haywood and Co. bankers there, in order that it might be presented, with due notice of its dishonour, to all parties respectively; and such notice was accordingly duly given to J. Henry, the drawer of the bill, and to the de-[523]-fendant. In consequence of the applications which were made by the said bankers in Liverpool, for the payment of the bill, Henry wrote to the plaintiff (14th June 1815)."

"The draft, I find this day, has been returned. I applied to Mr. Ashton to take up the same, but he cannot do it for want of remittances; but on Saturday's post he will remit you 100l. in a banker's bill, and the balance he wishes to be renewed for two months, with interest and charges. If you will have the goodness to accept of this, you shall have my security to the renewed bill, as well as Messrs. Samuel and Co.'s endorsement. I have been disappointed in some cash payments, otherwise I should have paid the balance. Please to acknowledge this by return of post, and I will see the needful done for you."

In answer to this letter, the plaintiff, without further communication with the defendant, wrote to Henry on the 17th, as follows:

"In reply to your letter received this morning, respecting the returned draft of your drawing, which we received from Messrs. Samuel and Co., value 217l. 19s. 2d., and which it is very surprising they did not immediately pay, we beg leave to inform you that we shall on no account agree to receive a draft for any part of it, renewed by the parties who have suffered this said bill for 217l. 19s. 2d. to be dishonoured. A regular banker's draft for the amount and ex-[524]-pences, with interest, if it will be any accommodation to Messrs. Samuel and Co. &c., we shall not object to it; but nothing except a regular draft, or bank notes, will we receive. If we receive a good draft for 100l., as you propose, to be sent from Liverpool as this day, the same will be placed to the credit of Messrs. Samuel and Co., and you may assure them, and be assured yourself as a party to the bill, that we shall return any other paper than as above described. We wait, therefore, an immediate and regular remittance (only) for the full settlement of this disagreeable transaction; which unless we receive by return of post, legal measures will, without further notice, be resorted to for the recovery of our demand."

Messrs. Haywood and Co., having endeavoured without success to obtain payment of this bill, returned it to the plaintiffs on the 17th June 1815, in order that they might take such measures for recovering the amount as they should think proper.

After the bill had been so returned to the plaintiffs, they directed their solicitor to apply to the several parties to the bill for the payment of it, which was accordingly done by him; and Henry, the drawer, wrote to the plaintiffs the following letter, dated 20th June.

"Herewith I transmit to you Mr. Thomas Ashton's letter, who will pay 100l. in cash, and requests of me to renew the balance at two [525] months. As you will have the same securities as before upon the bill, I should recommend you to take it, as you may depend upon its being duly paid. I applied to Messrs. Samuel and Co. to pay the balance, but they are short of cash as well as myself, from disappointments of remittances, otherwise I should have paid the balance. If this meets your approbation, please to inform me by return, and I will get you the 100l. in cash, and the renewed bill sent you."

Ashton's letter to the plaintiffs, referred to in this last letter of Henry, was as follows:

"I am sorry to say that my acceptance for 217l. 19s. 2d. to J. Henry's draft, has been returned: the cause of which is want of remittances. I at present will pay 100l. in cash, and request the favour of an indulgence for the balance to be renewed at two months."

In consequence of the directions of the plaintiffs, their solicitor wrote to the house of the defendant, (on 22d June), in terms demanding payment of the bill and expenses, or threatening to proceed.

Other letters of the same date and purport were written by him to Mr. Henry, the drawer, and Mr. Thomas Ashton, the acceptor; and the following letter was then written by Henry to the plaintiffs, 24th June.

"In reply to the letter I received this day, I am [526] sorry it is not in my power to do more for you than get 100l. in bank notes, and a renewal for the remainder. If any proceedings at law take place, Mr. Thomas Ashton positively says he will not pay any of the bill until the law compels him; therefore I would strongly recommend you to take the 100l. and the renewal, as you cannot be placed in a worse situation; and it will oblige me by your taking the 100l., when you will have all parties on the renewed bill. If proceedings take place, you will not recover your money until November, when you now can have 100l. paid immediately; therefore I should strongly recommend you to the terms Mr. Ashton proposes."

This last letter was answered by their solicitor, on the 26th June, as follows:

"Messrs. Badnall and Langham have sent me yours of the 24th: having put the business into my hands, decline having any further communication with you otherwise than through me. As to their accepting another bill from the same parties, I see no advantage that could possibly arise to them for so doing; they have all the parties to the present bill. I must say, I rather expected to have received the 100l., as mentioned in your former letter, and which I should have recommended them to have accepted. Indeed, I will undertake to say, that if you will send the 100l. by return of post, in Bank of England notes, they will accept them, and wait for the [527] remainder till the time a two months bill would run from this day, with interest and all expenses; provided the money and all expenses and interest are paid in Bank of England notes. But this is a proposition of my own, as they have given me positive instructions to proceed; and you must be well aware you are liable to an arrest any day, as well as you seem to know that we could not recover until November. Indeed, they have left it entirely in my hands; and if, therefore, I receive 100l. we will then wait for two months for the remainder, with interest and costs, to be paid in bank notes."

This last letter was replied to, 28th June, by Henry, as follows:

"In reply to your favour, Mr. Ashton will remit you 100l. on account of his acceptance, by to-morrow's post, without fail."

Ashton wrote on the 29th June:—

"Inclosed you will receive in cash, notes, numbers as copied on the other side,—amount 80l., on account of my acceptance to J. Henry, draft for 217l. 19s. 2d. due the 9th instant; and the balance, 20l. as to promise, shall be remitted you in one or two posts, according to your request of the 26th ult. Please to acknowledge receipt of the same."

To which the plaintiff's solicitor replied, 3d July:—

[528] "I received yours of the 29th June, inclosing only 80l., and am surprised that you did not send more: I expect the remaining 20l. in a post or two, as my clients will not be trifled with."

During this last correspondence between the plaintiffs' solicitor and Henry and Ashton, no application was made by the plaintiffs to the defendant, but the correspondence was wholly confined to Henry and Ashton. But in consequence of no further notice being taken, subsequently to this last letter of the plaintiff's solicitor, by any of the parties to the bill, the solicitor wrote to Henry, Ashton, and the defendant, on the 5th September 1815, demanding from each of them payment of the balance due on the bill.

Henry replied to the last letter to him, as follows:

"In reply to your favour of the 5th instant, I called upon Mr. Ashton, and shewed him your letter: he informed me he had received one this morning from you upon the same subject, and he has faithfully promised me, in all, next week he will remit you 50l.; and in all, the next week following, the balance. This I will see attended to myself, so that he performs what he has this day promised. When you receive the 50l. let me know what your charges are: so that I will see that attended to when he remits the last payment."

[529] The following letter was afterwards received by the plaintiffs' solicitor from Messrs. Ingham and Ashton:

"Inclosed is bill, 50l., on account of my acceptance: the remains shall send you in the course of a few posts, twelve days. Please to acknowledge receipt of same."

To which he replied, 26th September, by an acknowledgment of the remittance, objecting at the same time to its shape.

The plaintiffs had altogether received 130l. on account of the bill, viz. 80l. as above mentioned in Thomas Ashton's letter to plaintiff's solicitor; and 50l. as above mentioned, in the letter from Ingham and Ashton.

These sums were received from Thomas Ashton, the acceptor, on account of his acceptance of the said bill of exchange, without notice to, or the assent of the defendant, respecting these payments. Since the second payment, so made as above mentioned, Thomas Ashton, the acceptor, became bankrupt. There remains a balance of 87l. 19s. 2d. (for which this action was brought) still due to the plaintiffs on the bill of exchange.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover this balance from the defendant. If so, a verdict was to be entered for them accordingly: if not, then a nonsuit.

[530] Puller, for the plaintiff, contended that as in the present case it was quite clear that there had been no new security given to the holder of the bill, nor time given to any of the other parties liable on it, so as to discharge the others, the plaintiffs had not foregone their right to sue the present defendants for the balance, by what had been done in the way of treaty between their solicitor and the other parties to the bill. The points ruled by Eyre, C. J. in the case of *Walwyn v. St. Quintin* (1 B. & P. 654), are more immediately applicable than those of any other case in the books, to the questions arising in the present. It was there said by his Lordship,—"Proposals for a security bind no one, unless they can be made use of to impute laches: and after protest, no laches can be imputed." And again, (citing the note of *Johnson v. Kenyon*, B. N. P.) his Lordship says,—"where timely notice is given that the bill has not been duly paid, the receiving part of the money from the acceptor or indorser will not discharge the drawer or other indorsers" (b). Those are the points in the present case. In *English v. Darley* (2 B. and P. 62), Lord Eldon held, that "as long as the holder is passive, all his remedies remain." In all the cases (d) where other parties, originally liable, have been held discharged, either a new security has been given to the holder, or time given [531] to some of the parties liable, to the delay and prejudice of the parties held discharged. Here a proposed new security was expressly refused.

Peake, contra, contended, that the plaintiffs had, in effect, given time to a prior endorser and the acceptor, to the delay and prejudice of a subsequent endorser, who was entitled to consider that, between the 9th June, (when he received notice of the dishonour of the bill,) and the 5th of September, (when he was first informed that there remained a balance due,) the bill had been wholly paid. Such delay must have the effect of lulling a subsequent indorser into security, and might defeat his measures against the acceptor or drawer. It was laches, even after the notice given in the first instance. There having been no laches on that occasion can not cure subsequent laches. Forbearance towards an acceptor, after duly noting and protesting a bill, may be as prejudicial, ultimately, to other parties liable, as forbearance before, which it is clear would be a discharge. The defendant had no notice of any of the subsequent transactions between the parties. The acts of the attorney were the acts of the plaintiff: and the defendant should have been informed of what steps had been taken; the more so, as a part of the money had been actually received, which it was otherwise the plaintiff's duty to have returned. In *Gould v. Robson* (8 East, 580) Lord Ellenborough held, that if the holders of a bill receive a part from the acceptor and agree to wait, it is a [532] giving time, which precludes them from proceeding afterwards against the other parties: and that all arrangements made by a holder are at his peril. In *English v. Darley*, the endorser was held discharged, when the plaintiff, who had got an execution against the acceptor, took his single bond and warrant of attorney only, for securing the payment of the money by instalments. And in *Ex parte Smith* (there referred to,) it was considered, that the holder of a bill discharged an endorser merely by entering into a composition with the acceptor: and courts of law have always proceeded, with respect to those securities, on the same principle as courts of equity. The case of *Walwyn v. St. Quintin*, was a question between the

(b) *Gould v. Robson*, 8 East, 580.

(d) Vide Barnes's 3d edition of *Bailey on Bills*, pages 152 to 157, where the cases are brought together.

holder and drawer of an accommodation bill, and therefore distinguishable. The present case, on the whole, is a much stronger case altogether than any of those wherein it has been ruled that time given to one of the parties liable, discharges the rest. Although the proffered new security was not in fact accepted, yet the full time was agreed to be given; and more was in fact given by the holders, and clearly to the prejudice of the endorser, and without his consent or knowledge; and therefore he was discharged from his liability.

Puller, in reply, was stopped by,

GRAHAM, Baron. This is a very clear case. (His Lordship stated the material facts, and commented on the effect of the correspondence.) Thus it appears that all parties had notice of the [533] dishonour of the bill in due time, and were put on the alert; and each of them were so far, therefore, fixed.

I think there is good sense in the rule laid down in the case cited, (*English v. Darley*),—that “as long as the holder (of a bill) remains passive, all his remedies remain.” Now in this case, whatever measures had been adopted to obtain payment of any part of the amount of the bill in question from any of these parties, they would operate in favour of all the others; and it must be a strong case to discharge other parties where all that it was possible to get from the acceptor has been got from him by any one of them. All the cases go on the circumstance of the creditor having singled out some one of the persons liable, and discharging the others by some binding and conclusive act: as, by taking a new security as a warrant of attorney from him, or taking and using another negotiable bill, when it might happen that he might afterwards actually in the mean time recover, on the bill which had been originally dishonoured, the money which might perhaps also be paid on the second bill becoming due. (His Lordship here read the several letters.)

Then what was the effect of the proposal which was made by the letter of the 26th June? It was that if 100l. were remitted by return of post, the plaintiffs would wait the time that a bill at two months would then have to run.

Now if the 100l. had been paid, according to [534] that proposal, some difficulty might have been thrown on the case; at least I should then have hesitated in saying, that that agreement had not precluded the plaintiff: but that agreement was not performed, for only 80l., in fact, was sent in due time; nor was the 20l. afterwards remitted, so that the plaintiff was then discharged from the observance of his proposal. And I am of opinion that he has done nothing to relinquish his legal right to sue the defendant. Therefore there must be judgment for the plaintiff.

WOOD, Baron. I am of the same opinion. This defendant was, in fact, the principal debtor: for the goods had been sent to him, on his account, and he it was who gave this bill of exchange to the plaintiffs in payment for them. (His Lordship stated the circumstances.)—Due notice having been given of the dishonour of the bill, all parties became liable; and it was then at the plaintiff's option to proceed against all or any of them, and his selection of any one of them for that purpose would not operate to discharge the rest.

All the parties having thus become liable by the notice of dishonour, there must have been something done subsequently by the holder, to discharge the indorsers; but nothing was done here to preclude him from proceeding against the defendants as he has done. He made no new contract which could preclude him, or take away his right of suing the defendant.

[535] There was indeed a proposal made, but that was not complied with: if it had, it might at least have given occasion for argument, that time had been given; but that, I think, would not have been conclusive, and it would have been questionable whether it were binding on the parties, for want of consideration. Here, however, the condition was never complied with, and the plaintiff was then entitled to proceed against the defendant.

RICHARDS, Baron. The question is, whether time was given to the acceptor to take up the bill, so as to discharge the indorser. If there had been time given, I should think it would have discharged the indorser; but in this case I think that time was not given. There was a proposal to indulge the acceptor with time to pay the remainder, on condition of receiving 100l. in part. (Reads the letter of 26th June.) By a subsequent letter, the plaintiff dispenses with insisting on the condition of a remittance in Bank of England notes; but still he rejects the payment of 80l. in part, as being a performance of the condition, for that was not the bargain made.

There was, therefore, no conclusive engagement to give the acceptor time. The conditions of the proposal to do so were never complied with. If that engagement had been complete, there might have been more difficulty in the question; as it is, I am of opinion that the plaintiffs are entitled to their verdict.

Postea to the Plaintiff.

[536] THE KING, IN AID OF GREATRIX AND OTHERS, *v.* KINNEAR. 4th February 1817.—A defendant taken into custody under an extent in aid (the sheriff having also seized his property, being more than sufficient to cover the demand) ordered to be discharged.—Where his property (seized and returned) is ordered to be restored to him on his giving approved security, and it is delivered up by the sheriff before the security be approved, the remedy must be against the sheriff for not having the property forthcoming, not against the party for not giving such security.

Spankie shewed cause against a rule which had been obtained by Stephen calling on the defendant in this extent to shew cause, within a week after service of the order, why an attachment should not issue against him for contempt in not delivering over to the sheriffs of London certain bills of exchange mentioned in a schedule annexed to an inquisition which had been returned by the sheriff, pursuant to order of Court of the 15th Nov. last *; and also for not complying with that order.

The facts were, that the defendant was examined on the inquisition taken on the 21st Nov. when he admitted having bills of exchange in his possession amounting to more than the debt, but he refused to deliver them up to the sheriff. The defendant had not entered into the security. It was admitted that the order as to giving security was optional, and that therefore, his not having done so did not amount to a contempt of Court; and for that the case of *Fricker v. Eastman* (1 East, 319) was cited. It was also [537] contended that the defendant was not bound to deliver up the bills of exchange.

Stephen, for the prosecutors of the extent, insisted that the conduct of the defendant amounted to disobedience of an order of the Court, and that the only remedy was by attachment, which he prayed might be ordered; but,

The Court expressing disapprobation of attacks on established practice, intimated that in all cases the strict severity of rules should be mitigated. The sheriff having restored the property returned by him as seized, and which ought to have been in his hands, was still responsible for them, and therefore the prosecutor had mistaken his remedy by the present motion as against Kinnear, which, they observed, was one that ought not to have been made or encouraged.

Rule discharged, with costs.

[538] ROBINSON *v.* WILKINSON. Wednesday, 5th February 1817.—A creditor is entitled to sue a dormant partner of his debtor—if unknown to him to be so at the time of furnishing the subject matter of the debt—for whatever had been supplied to the firm during the partnership. It is not an answer to the circumstance on which the reason of the rule is founded—the partnership not having been known to the plaintiff—that it might have been known to him if he had used diligence, inasmuch as the defendant (the partner not originally known) had been a registered part owner of the ship on account of which the goods had been supplied, at the time, because the register is not readily accessible, nor conclusive when found.—None of the acts done by an ostensible partner, which are usually

That order had been obtained on a motion made by Dauncey for the discharge of the defendant, whose person had been taken under the extent, out of custody, on an affidavit that the sheriff had, besides taking the defendant in execution, taken possession of certain premises of the defendant; and it was made absolute, after cause shewn by Richardson for the discharge of the defendant's person. The Court also ordered (by consent) the liberation of the defendant's goods, on his giving such good security, in double the amount of the debt sought to be recovered by the extent, as should be approved by the officer of the court; and undertaking to bring no action.

held to operate to discharge the others—such as selecting one, accepting new bills, &c.—will operate to discharge a partner not known to the creditor, if done during the time of the concealment of such partner.

In this case, which was an action of assumpsit for goods sold and delivered, a verdict had been found for the plaintiff, (Hants Sum. Ass. 1813,) damages 449l. 10s. 5d., costs 40s., subject to the opinion of the Court on a case, which was in substance as follows:—The plaintiff was an agent and ship-chandler at Portsmouth. The defendant, and Christopher John Cay, before and in the beginning of the year 1810, were registered owners of the ship “Lord Eldon,” of which Ralph Symes was master. The defendant continued a part-owner till the 15th of June 1810, when he sold his interest in her to Mr. Cay, who then became the sole registered owner of the ship, and continued owner during the whole time in which the debt due to the plaintiff was contracted; in the months of May, June, July, and August 1810, the ship [539] being at Portsmouth, the plaintiff supplied her and the captain with stores and cash on account of the ship, to the amount of 1014l. 5s. 4d.

The amount of the debt up to the time when the defendant ceased to be a part-owner, was 401l. 16s. 1d. (See the note * p. 538.) The master drew bills, dated 2d August 1810, on the ship's agents in London, for 264l. 5s. 4d., and 750l.; total, 1014l. 5s. 4d., the whole amount of the plaintiff's demand. After these bills were drawn and sent for acceptance, Cay wrote to plaintiff to say the demand would be settled, but requested he would withdraw the bill 750l., and draw on him for it at three, four, and six months, which plaintiff did on 3d November 1810, when he wrote to Cay the following letter:

“Yours, without date, I received on Saturday, and have valued on you as on the other side,” (alluding to a statement, on the other side of the letter, of the amount of the sums for which the three new bills were drawn,) “and past the several drafts through my banker's hands, which I should hope would be duly honoured: I assure you it's quite contrary to my mode of doing business; and you must be aware it's not regular to renew bills, particularly to six months: and you will not fail giving directions to Messrs. Welbank and Petit to accept the other drafts, as I cannot think of renewing them.

“I shall return you captain S.'s draft when I have your acceptance.”

[540] The other drafts alluded to in the above letter were the bill for 264l. 5s. 4d. above stated, and which was not then due, and another bill for 68l. 2s., which had been drawn for some articles furnished by the plaintiff in August 1810, and which were not included in the 1014l. 5s. 4d. These bills were paid, but the three bills which were given in lieu of the one for 750l. were dishonoured by Cay, who proved to be insolvent; and to prevent his bankruptcy he proposed to the plaintiff to pay him a composition or dividend of 13s. in the pound, secured by the acceptance of his friend, a Mr. Wilson, of Bishops Weymouth, (a partner in the firm of Spence and Wilson,) for the balance due, which the plaintiff agreed to take in full discharge of such balance. This acceptance not being transmitted so soon as expected, the plaintiff's attorney, on the 8th May 1811, sent the following letter to Messrs. Spence and Wilson:

“Mr. Robinson has been with me again respecting his demand, and is somewhat distressed at the apparent neglect paid to the business: I must therefore beg of you most earnestly that you write me, by return of post, the reason of delay in the payment of the dividend by the remittance of the promised bill.”

After this letter Wilson accepted a bill drawn by Cay for 13s. in the pound, of the demand payable at eight months after date, which was sent to the plaintiff.

[541] This bill, which was negotiated by the plaintiff, was also dishonoured, both drawer and acceptor having become bankrupts before the bill was due, and no part of the amount has been received.

At the period of these several transactions, the plaintiff considered Cay as the sole

* The verdict was afterwards altered to 401l. 16s. 1d., the precise amount of the debt due at the time the defendant ceased to be a part-owner. The account stood thus: Goods supplied, 21l.; cash, 376l. 18s. 5d.; balance of former account, incurred whilst defendant was at Portsmouth, 3l. 17s. 8d. 401l. 16s. 1d.

owner of the ship, and did not know that the defendant was a part owner : immediately on his discovering this fact he made a demand on him, and he refusing payment, this action was brought : the writ was issued in September 1812.

The defendant contended that he was discharged from the payment of any part of the demand. The plaintiff insisted that the defendant was liable to the whole demand due when he ceased to be a partner : and that if he were entitled to any credit on account of the bill for 264l. 5s. 4d. it was only to the sum of 21l., the amount of the plaintiff's claim on account of goods supplied by him to the time of the defendant's ceasing to be a part-owner of the ship.

Gaselee, (abandoning the question on the 21l.) insisted that the plaintiff was entitled to keep his verdict for the remainder, for that the present case was distinguishable from all those which go to determine that the acceptance by a creditor of one of several partners, as his debtor, works a discharge of the rest ; because it is found as a fact, in this case, that the plaintiff, at the time of furnishing the goods supplied, was ignorant that the defendant [542] had been a partner of Cay, the insolvent. It is said by Lord Mansfield, in *Hoare v. Dawes* (Doug. 356), to be clear law that dormant partners are liable, when discovered ; and on that rule the plaintiff relies.

Lawes, E., *contra*, submitted that the plaintiff could not avail himself of that want of knowledge in this case, even if it gave him a right to recover : because as it is found that the defendant was a registered owner of the vessel, the plaintiff might have known it, and ought, therefore, to have made himself acquainted with the fact of what persons were the owners of the vessel when he supplied her with stores.

It was then contended that another insuperable objection was opposed to the plaintiff's right to recover in the present action against this defendant and that arose from his having taken Cay's sole bill, and his having allowed him to renew it when it became due. For in the case of *Reed v. White* (5 Esp. N. P. C. 122), it was held by Lord Kenyon that a plaintiff dealing with one partner separately, adopts him to the discharge of the others. In that case a bill had been drawn on and accepted by one of several partners, and being dishonoured was renewed by him alone. In the case of *Evans v. Drummond* also (4 H. 91), it was ruled by the same authority, that after even a joint bill has become [543] due, if the holder take the separate bill of one, he discharges the rest. But this case goes farther, for the plaintiff afterwards accepts the security of a third person, (Wilson) by the bill drawn on Wilson and accepted by him, and such acceptance by a third person has been decided to be a satisfaction, otherwise it would have been a fraud on Wilson, according to the case of *Steinman v. Magnus* (2 Camp. 125. 11 East, 390).

To oppose the point made on the fact of its not having been known that the defendant was a partner, the case of *Newmarsh v. Clay* (14 East, 239), was cited as establishing, that an unknown partner was discharged by the delivering up of old dishonoured bills, and receipt of others. The fact of some part of the whole demand having been paid was adverted to as raising a question of appropriation, and particularly as to the bill for 264l. 5s. 4d. which had been actually paid. And the case of *Dubois v. Schroder* (14 East, 226), was cited to shew that a defendant might plead in abatement, that he had a partner, although he were a secret one, and the plaintiff could know nothing of it.

Gaselee in reply, relied on his former position, and contended that the ship's register would not charge a person named therein as part owner, *Tinkler v. Walpole* (1 Marsh. 261). To hold that a man [544] must know all the parties connected with the person with whom he contracts, before he sues, would render it impossible to proceed against any person who had a dormant partner. The case of *Newmarsh v. Clay* does not apply. The question there was merely as to the effect of a specific appropriation, and that being decided as it was by that case, the plaintiff had been overpaid during the period of the defendant's partnership. As to all the other cases, the distinction here is, that the partner was unknown.

GRAHAM, Baron. The fact of this defendant Wilkinson not being known to be a partner at the time the goods were furnished, certainly goes a great way to decide the several points of this case, and distinguishes it from most of those which have been cited for the defendant. In general, a release of one partner is a release of all, but a party has always a right against a concealed partner of whom he has previously had no knowledge, as soon as he discovers him, unless that ignorance were his own fault, as if he had not used due diligence in finding him. But it is not to be expected

that the plaintiff must search for a ship's register all over the kingdom, which after all is not conclusive.

Then it is said that the plaintiff discharged the defendant by accepting the bill drawn on Wilson by Cay. Had Wilson fulfilled his engagement it would have been a discharge, but on his failing to do so, the debt against Cay remained undis-^[545]charged, the plaintiff had a right to resort to his original remedy, which was then revived against all persons primarily liable.

The case of *Newmarsh v. Clay* was one very differently circumstanced, and raised a different question, which was answered by the fact of the debt of the unknown partner having been satisfied out of money clearly appropriated to its payment at the time. In this case that goes only to the 21l. and that sum must be deducted, and the balance will be what the plaintiff is entitled to recover.

WOOD, Baron. (Having shortly stated the facts of the case.) This defendant was not known to be a partner when the goods were supplied, but as soon as his partnership is discovered the plaintiff sues him. And there is no doubt that in respect of the stores furnished during the period of his partnership he is liable. Then it is contended that the drawing these various bills discharged the defendant. And so it would if they had been paid, but drawing bills which are afterwards dishonoured is no discharge. As far as they were paid they are a discharge, and therefore the 21l. must be allowed. If Cay had been discharged, the defendant as his partner would have been discharged, but that was not so here.

RICHARDS, Baron, of the same opinion. The question is, whether this defendant is discharged by any thing that has taken place. Whatever effect ^[546] any or all of these transactions might have had if Wilkinson had been known to be a partner of Cay, is entirely put out of this case, because the plaintiff certainly dealt entirely with Cay, and knew nothing of Wilkinson, who was nevertheless clearly *primâ facie* liable.

It is clear law that a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner by any acts of his during the concealment of the unknown partner. If it were otherwise, and this action be not maintainable, a door is widely opened to defraud creditors by means of dormant partnerships. If the plaintiff had originally known that this defendant had been a partner he would not have dealt with Cay alone, or if he had discovered it earlier he would probably not have done many of those acts which, without such knowledge, he has done.

It is quite clear that this verdict ought to stand for the 380l. 16s. 1d.

Postea to the plaintiff.

^[547] NICHOLS AND ANOTHER v. CLENT AND ANOTHER. Friday, 7th February 1817.—An actual possession given to a factor by a carrier, by order of the shipper, after his (the shipper's) bankruptcy, is not such a possession as will give him a lien against the assignees, although the goods were shipped on account of the factor, and bills had been accepted by him on the faith of it.—Such an order rather operates to defeat his claim of lien, as being an act of ownership exercised by the bankrupt.—Nor is a delivery to a master of a vessel, where the consignor has written to the consignee, apprising him that he has consigned to him, and requesting him, on the faith of such consignment, to accept bills (which he accordingly accepts and pays), such a constructive delivery to a consignee as will give him a lien against the assignees—it is not within the principle of the cases, which decide that an equitable right will supply the deficiency of an actual delivery, in support of a well-founded lien not perfected by possession.—Letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment, are not equivalent in effect to bills of lading endorsed.

[See *Bryans v. Nix*, 1839, 4 Mee. & W. 781.]

This was an action of assumpsit, brought by the plaintiffs as assignees of Disston, a bankrupt, for money had and received to their use, and upon an account stated with them as assignees.

The defendants pleaded the general issue, and the cause came on to be tried at the last summer assizes for the county of Gloucester, when the jury found a verdict

for the plaintiffs for 461l. 14s. 10d. subject to the opinion of the court, upon the following Case :

Disston, the bankrupt, previous to his bankruptcy, was a miller and mealman, carrying on his trade at Nafford Mill, in the county of Worcester; and the defendants, who were resident at Bristol for a few months before his bankruptcy, his factors, under a *del credere* commission for the sale of flour made at his mill. On the 16th of October 1813, Disston, in consequence of permission before granted to him by the defendants, drew a bill of exchange on them at two months for 335l., which was on the same day accepted by them, and afterwards paid. On the 20th day of the same month, Disston sent to the defendants the following letter :

[548] "Gentlemen,—I received your favour, and note the contents: as our markets are no lower, and I hope you will get out at 77s. I shall send you 100 sacks, of fine, mostly on Friday by Brown, and the remainder on Monday night from the mill; I don't know whether he will send two trows or not, at present; I shall have about 200 sacks in the whole, but will write you more particularly to-morrow."

The 182 sacks of flour, which were afterwards sent by the bankrupt, are those which are alluded to in this letter.

On the following day, the 21st of October, Disston drew another bill on the defendants at two months for 76l. which was accepted by them on the 23d of October, and afterwards paid; and on the 22d of October he addressed and sent to them the following letter :

"Gentlemen,—I have sent you by Brown's barge to-day, 55 sacks of good old fine Lammas flour, and 40 of very good Lammas seconds, there will be 50 or more, when dressed: shall have enough to make up about 200 Friday, for the barge on Monday, if we are not stopped, as I hope we shall not: but we had a deal of rain yesterday. I have drawn a bill on you at two months, in favour of Ricketts, Thorne & Co. for 76l., which I should be obliged to you to accept. I intend to be down on Wednesday about the time the flour is likely to be in. It will be mostly Lammas seconds, and mixed; I shall have no cone."

[549] On the same day Disston the bankrupt put on board a trow belonging to one Brown, at Nafford Mill, 54 sacks of fine Lammas flour, and 16 sacks of Lammas seconds; and on the 26th, a further quantity, making in the whole 182 sacks of flour; but there was no invoice of either quantity of flour: nor were there any directions given to the trowman as to the person to whom it was to be delivered.

At the time the flour was put on board, it was entered in the bankrupt's book, by his order, "per Brown of Tewkesbury." It was denominated in the trow bill, "Disston's Flour;" and Disston was charged with and paid the freight for it. The flour was landed on the 28th of October, at a wharf at Bristol, belonging to a person who acted as agent for the owner of the trow, being the place where goods brought by his trow were usually landed. After the flour had been put on board the trow, the bankrupt himself went to Bristol; and on the 29th of October he there gave an order to the wharfinger to deliver the flour to the defendants, and in pursuance of such order it was delivered to them on the same day.

Disston committed an act of bankruptcy on the 27th of October 1813, and on the first of November in that year, a commission of bankrupt was duly awarded and issued against Disston, under which he was duly found and declared a bankrupt, and his estate and effects were assigned to the plaintiffs.

The defendants sold the flour for 607l. 17s. and received the produce thereof, and paid over to the [550] plaintiffs as assignees, the sum of 146l. 2s. 2d. before the action was brought, claiming to retain the balance of 461l. 14s. 10d. for the amount of the said two bills of exchange, and some other small sums due to them from the bankrupt, and their commission on the sale of the flour in question, amounting to 22l. 15s.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover the whole, or any part of the said sum of 461l. 14s. 10d. for which the verdict was taken.

Richardson, for the plaintiff, contended, that under the circumstances of this case, the transaction between the parties amounted to merely an executory agreement, which, for want of ultimate completion by subsequent possession of the goods, vested no property in the defendants, nor gave them any lien on the goods. This, he submitted, was a transaction between principal and factor, not between vendor and purchaser, and that there was nothing to fix these particular consignments till they

came into the actual possession of the defendants. A factor has a general lien certainly when his principal's goods have once come into his possession, but he has none till then. Even that lien may be lost by loss of possession. The general principle, that possession is necessary to give a factor his lien, is fully established by the case of *Kinloch v. Craig* (3 T. R. 119 and 783). In the present case there was no actual possession by the defendants till after the act of bankruptcy had been committed by Disston, when [551] all property in the flour had become vested in his assignees. The debt, on the other hand, was due to the defendants, not from the assignees but from the bankrupt.

It will, however, be contended, that the putting the goods on board the trow was a delivery; but it was no such thing, nor would it have been a delivery even if a bill of lading had accompanied them, for they might then have been stopped at any time in transitu by the consignor. If they had been burnt or sunk in the Severn, Disston, not Clent, must have borne the loss. All the facts of the case are indicia, which shew the property to be in Disston till he transferred it, and he might have ordered the goods to have been delivered to any other person in Bristol whom he chose; but any such order at that time, which was after the act of bankruptcy, would have been wrongful, as against creditors, and therefore clearly void, and could not bind the assignees. As to any hardships in the case, that cannot be used as an argument on a point of law. In the case of *Wilson v. Baljour* (2 Camb. N. P. C. 581), Lord Ellenborough, delivering judgment against the defendants, expressed himself as considering it a case of extreme hardship on them, but that the rules of law must prevail, and accordingly decided that, where bankers had fraudulently sold out stock, the property of a customer, standing in their names, as a security for which they deposited bonds wrapped up in an envelope, [552] where they lodged the securities belonging to other persons who dealt with them, and which on the eve of their bankruptcy they sent to him;—such customer could not retain the bonds against the assignees; and that because the whole rested merely in intention till the eve of the bankruptcy, and because the defendants never had actual possession of them till then. That was a much stronger case than the present, for what was done there was done in contemplation only of bankruptcy. Here, the bankruptcy was complete; and in the present case, also, there was never an actual or even a virtual possession of these goods by the defendants till after the bankruptcy of Disston. In the case of *Sweel v. Pym* (1 East, 4), it was decided, that after delivery of goods to a carrier to be conveyed on account, they could not be stopped in transitu, so as to affect a reviver of the original lien which the party had on them while they were actually in his possession.

Another question arising on this case is, whether the defendants, as factors, are entitled to a lien for their commission on the sale of the flour, and are entitled to retain the sum charged against the assignees, by whom they had not been employed. A factor has only a lien on the commodity, which entitles him to keep it against his principal. By retaining the charge for commission, the defendants admit themselves to be factors; but it is clear that the bankruptcy of Disston had the effect of countermanding the order to sell the goods, and [553] therefore they can have no right to charge commission for doing that which they had no authority to do.

Taunton, W. E., contra, (admitting this to be a case between principal and factor,) insisted that the plaintiffs were not entitled to recover either of the sums for which the action had been brought. The present action, he submitted, was, both in substance and in form, (assumpsit for money had and received,) an equitable action, and founded on an equitable right, and could not be maintained against an opposite equivalent equitable right in the party defendant. The bills, in the present case, had been drawn for a very considerable sum, and had been accepted by the defendants, expressly on the faith of these very consignments to be made to them of the cargoes of flour sent to Bristol for their indemnification. The strength of the defendant's case consists in the fact and purport of the letters which had been written to them by Disston, at the time when he shipped the flour, and their effect, as giving a decided character, in point of law, to this whole transaction. At the time when those letters were written the defendants had obviously contemplated the possibility of Disston's bankruptcy; and on accepting his bills, had prudently and fairly stipulated, as they legally might, for the consignment of the flour to them, as an indemnification against such an event. Those letters speak of and describe, specifically, these very cargoes sent by the same trow and master as are mentioned by name in the

letters, and that for the avowed purpose of meeting these acceptances. Coupled with those letters, the delivery to Brown was a delivery to the defendants; [554] and it was a delivery before any contemplation of bankruptcy by Disston. That was the substantial delivery, though afterwards perfected by—what was, under the circumstances, a mere formality,—the order given by Disston to Brown, at Bristol, to give the defendants possession. It was that very act of Disston's going to Bristol on that occasion on which his bankruptcy was founded; and it would be strange that that order should have the effect of putting the defendants in a worse situation than they would have been in without it. An interest had become vested in the defendants in the flour, on such delivery to Brown; and that interest could not be divested by the subsequent act of bankruptcy; for on having been once put on board for the purpose declared by the letters, they became clothed with a trust for the benefit of the consignee; and his lien attached then, and the subsequent order to deliver, was not necessary, but altogether nugatory, or, at most, a formality. The letters would have been a sufficient authority to Brown to deliver the goods to the defendants, and perhaps stronger than a bill of lading would have been, because they stated the consideration for the delivery; and the more so, as it is not the practice to make out bills of lading with goods sent by the Severn trows; and such letters as these stand consignees in better stead. No subsequent countermand of Disston's would have been good as against the effect of those letters, and Brown would have done wrong to have preferred any such countermand to them, as he might, by so doing, have rendered himself liable to an action by these defendants.

[555] Previous to citing the cases brought together in support of these propositions, on the part of the defendant, the grounds of the decisions relied on for the plaintiff were thus attempted to be distinguished from those of the present case. The case of *Sweet v. Pym* was said not to apply, in any respect, to support the plaintiff's arguments, but was rather the other way, because there the Court held that the delivery to the captain of the vessel on the behalf of the bankrupt, was equivalent to a delivery to him, and on that ground the decision proceeded. In *Wilson v. Balfour*, the whole transaction originated with the bankrupts, in contemplation of their immediate bankruptcy, without any act on the part of the defendants expressive of their concurrence; and the judgment of Lord Ellenborough was founded on the basis of the whole resting in intention—the possession never having been out of the bankrupts. Nothing was done in that case to appropriate the bonds, and they might at any time have changed their destination; nor did the defendant know any thing of the transaction, and nothing was done by him in the way of consideration for the bonds, for he had not assented to their application of his stock to their own use. None of those circumstances of objection occurred in the present case. The case of *Kinlock v. Craig* was admitted to press more strongly against the defendants. In that case, however, there had been no letter written by Steine to Sandiman and Co. specifically appropriating the cargo, or stating that the consignments were made in consideration of the acceptance of the bills. It was, [556] moreover, a very distinguishing fact in that case, that Sandiman and Co. had originally, as a point of honour, refused to receive the goods, or to suffer them to be unloaded on their account, because they had then become bankrupts; and it is there said by Mr. Justice Ashurst, that the plaintiff had not even a constructive possession. There, too, both parties had become bankrupt; and that is made matter of observation at the conclusion of the judgment delivered, (p. 123) and is stated as one of the reasons; and the assignees of the factors could certainly have had no right to recover those goods in specie, in an action of trover, after the consignees had expressly refused to accept them.

In support of the argument, that the defendants had such an equitable claim on their goods as prevented any property passing to the plaintiffs as assignees of the bankrupt Disston, while they no longer really and beneficially belonged to the bankrupt, the case of *Smith v. Pakering* (Peake, N. P. C. 50) was cited, where Lord Kenyon held that to be the law on a question, whether, where a bill of exchange which had been delivered to the plaintiff for a valuable consideration, but had been omitted to be indorsed at the time by the drawer, to whose order it was payable, had been indorsed by the drawer after he had, in the mean time, become bankrupt; and his Lordship ruled that it might be so indorsed, saying, that "though the bankrupts had the legal estate in the bill, yet it was unattended by any interest, and they were bound to indorse it." So here, Disston had only [557] the legal estate in the goods

consigned, and the order afterwards given by him to deliver them to the defendants, was as much a mere formality as was the indorsement of the bill, in the case cited; and that order was, moreover, by no means necessary, after such a letter, to give a property in the goods to the consignees.

It was then submitted, that although there could be no case found, precisely in point, on the present question, yet that principles might be collected, from the united result of the various decisions on questions arising between principal and factor, and consignor and consignee, which would go to decide this point.

In the case of *Tooke v. Hollingworth* (5 T. R. 215), the converse of the proposition submitted in argument on behalf of the present defendant, was held—that a plaintiff who had sent bills and light gold, specifically to enable a person under acceptances for him to a considerable amount, to meet such acceptances, was entitled to recover them back from that person's assignees, who had taken possession of them under a commission against him, on their arrival, the plaintiff having himself paid the holders of the bills the full amount. And that case is in point to shew, that where goods are sent for a particular purpose, they must be applied to that purpose, notwithstanding the intervention of a bankruptcy in the mean time.

[558] In *Walley v. Montgomery* (3 East, 585), it was held that a bill of lading and invoice, divested property out of a consignor, by delivery on board a vessel, for every purpose except that of stopping in transitu; though in this case there was no bill of lading or invoice in fact, yet there was what may be considered as tantamount in the tenor of the letters written by Disston to the defendants on shipping the goods. But the general principle on which this case, and all of a similar description, should be decided, is to be found as laid down most strongly and emphatically by Lord Mansfield, in *Alderson v. Temple* (4 Bur. 2239), where his Lordship says, "The most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined on natural justice and not upon the niceties of law), is to do substantial justice: and therefore, I will avoid laying the stress that might properly be laid upon the assent being necessary to complete the contract, or the want of a delivery: the solid ground of which is, that a contract shall be presumed complete upon any distinction, where the justice of the case requires it, though there is no actual delivery. And it is settled that if a man sends bills of exchange, or consigns a cargo, and the person to whom he sends them has paid the value before, though he did not know of the sending of them to the carrier, will be sufficient to prevent the assignees from taking these goods back in case of an intervening act of bankruptcy." Nothing can be [559] more applicable to, or conclusive of, the point in the present case, than such reasoning; which bears most forcibly in favour of these defendants. In another part of the same judgment, his Lordship says, (speaking of what acts a man may do on the eve of his bankruptcy, which, in consequence, gives a preference to a particular creditor)—"It never entered into the mind of any judge to say, that a man in contemplation of an act of bankruptcy, could sit down and dispose of all his effects to the use of different creditors: but if done in a fair course of trade, and not fraudulent, it may be supported." That is precisely this very case; the consignment was in the fair course of trade, and not fraudulent: but on the contrary, for an equivalent consideration benefiting commensurately the bankrupt's estate.

As to the fact of shipping the goods being an incipient delivery, vesting the property in the consignees, the case of *Care v. Harden* (14 East, 219), establishes that the shipment of goods gives a property to consignees, and if they are not afterwards stopped in transitu by the consignors in exercise of their right to do so, the property is completed and irrevocable in the consignees, on the goods coming into their possession.

It has been argued that actual possession of the goods is necessary to the factor's lien, but it was determined in *Drinkwater v. Goodwin* (1 Cowp. 255), [560] that a factor having sold the goods of his principal, who had, in the interim, become bankrupt, might even afterwards receive the purchase-money from the buyer, by virtue of his original lien, where money is due to the factor from the principal on account of the goods so sold: and in the case cited, the Court held expressly that "a factor has a lien on the price of goods in the hands of the buyer, although he had not the actual possession of them." From the case of *Hammonds v. Barclay* (2 East, 227), also, it appears that where a consignee has paid money, and accepted bills on the credit of a ship and cargo consigned to him for sale, he has a lien upon the proceeds, he having been at one time in possession. In that case, too, the plaintiffs, who were executors

of the consignor, were held to be bound by the consignment of the testator—so, here, the assignees are in the situation of the executors, and the death there, was as the bankruptcy here. In all these decisions (it should be observed) the Courts have uniformly adverted in their judgment to the consistency of their determination with the justice of the peculiar case.

In the case of *Lempriere v. Pasley* (1), it was expressly determined, after great discussion and time taken by the Court to consider their judgment, that “as between the person who has the equitable lien (against a bankrupt), and the assignees, if the lien subsisted before the bankruptcy, they shall [561] never recover or retain the thing without discharging the money due. The party who has the equitable lien,” (continues Mr. J. Ashurst, following up the distinction), “ought not to be on a footing with the rest of the creditors, for whom the assignees are trustees; for the creditors at large trusted to a personal credit: but he who has the lien never gave a personal credit, but trusted to the thing. The money lent to the purchaser would never have become a part of the assets of the bankrupt, had it not been lent upon the credit of the thing pledged; and when the money is taken out of the bankrupt’s effects and repaid, they are only just where they would have been if the money had never been advanced. As between the person having the lien and the assignees, they must stand in the place of this bankrupt, and take his property, subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. By the act of bankruptcy they only get the legal right. The bankrupt himself had the legal right before the bankruptcy, but he could never retain the thing against the lien, without paying the money borrowed. So neither can the assignees. Nor if the party obtains the possession, can they get it from him without paying the money advanced.” Now that is a clear, solid, and equitable distinction, consistent with justice and equity, furnishing an integral principle on which the decisions in all such cases ought to proceed, so as to reach the right, according to the particular circumstances of each. In that case, the act of bankruptcy had been committed after the assignment of [562] the goods, and before the indorsement of the bill of lading. The only circumstance in that case distinguishing it from the present is, that the assignment was made as a collateral security for a debt, whereas, here, it was to indemnify the party against his acceptances. The reason given at the close of that judgment (p. 496) for the decision pronounced by it is, that “It might be a great inconvenience to commerce if it were to be laid down as law, that a man could never take up money upon the credit of goods consigned, till they actually arrived in port.” Now, certainly, the inconvenience to commerce would be as great, or greater, in the case of the consignee having accepted the bills of the consignor, which the former afterwards pays.

The last case on this point is that of *Huille v. Smith* (1 Bos. & Pul. Rep. 563). The bill of lading was there held (ib. pp. 570, 1) to operate as evidence of a change of property—that the change of property ought to be construed with reference to the agreement between the parties (which was, that the consignment should secure them against the large credit given by the consignees, as bankers to the consignors)—and that the doctrine of transfer ought to be expounded very largely upon the agreement of the parties, and upon their intent to carry the substance of that agreement into execution. And said Eyre, C. J. “This will lead to the conclusion, that the moment the goods were put on board the *Hawke*, and [563] the bill of lading was indorsed and remitted to Smith and Atkinson, the property was changed, and was to remain in their hands clothed with the trusts expressed in the agreement.” In the present case the letters were equivalent to the bill of lading in that instance, and the more so, as the bill of lading was not handed to the captain but remitted by the shipper to the consignees: and, continued his Lordship, “I shall have no difficulty in holding that this cargo was vested in Smiths and Atkinson, notwithstanding the risk remained in those who transferred the cargo; and notwithstanding that cargo was to be sold, with a view to the profit or loss of the consignors.

One of the plaintiff’s positions, that this transaction had been originally in fact, what it was described to be in argument, — only an executory agreement — was met by putting the case thus: Admitting that to be so, yet even then, on its completion, all the equities attending it, and all the legal consequences resulting from such completion, would have relation to the time when it had been first made, if nothing had

(1) 2 T. R. 490, and *Falconer v. Case*, there cited.

been done in the mean time to vary its terms : and the case cited above (*Huille v. Smith*) was reverted to in support of that doctrine.

As to the smaller sum of £22, 15s., it was insisted that in any event the defendants were entitled to retain that : for if they were right on the other part of the case, that would follow of course. If, on the other hand, the opinion of the court should be against them on the more important points, the [564] plaintiffs were precluded, by the form of action adopted : for as they had not brought trover, but assumpsit, for money had and received, they had therefore acknowledged the sale by the defendants as factors on their behalf, and rendered themselves liable to its consequences : one of which was, that they should pay them their commission, and therefore on that point the defendants must necessarily succeed in their defence.

Richardson, in reply, submitted that the defendants had failed in the attempt to establish, that the delivery to the barge-owner was a delivery to them, or that the letters had made it so in effect. The owner of the tow knew nothing of the defendants, and on his arrival at Bristol was bound not to deliver over the cargo till further orders, for Disston had all along complete controul over the goods, and they were unquestionably at his disposal, which the bargeman could not have disputed.

It has been attempted to found an argument on the notion, that on the delivery to Brown the goods were clothed with a trust—an ambiguous phrase to use in a court of law—but this Court cannot contemplate any such suggestion on a question arising out of an action of assumpsit for money had and received.

The case of *Smith v. Prekering* was treated as very distinguishable from this, because that was the case of a bill of exchange which had not been endorsed, as it should have been, by an omission, which [565] was the effect of mistake or accident : and no doubt the bill having been actually delivered over for a valuable consideration, the property in it passed to the holder, and his possession entitled him to sue on it. The determination in *Tooke v. Hollingsworth* affirms a principle which has nothing to do with this case. Among the facts of the cases of *Walley v. Montgomery*, and *Cor v. Harden*, will be found the prominent one of the goods having been shipped expressly on the account of, and at the risk of, the consignee, and therefore the court held that the property passed on their delivery on board the vessel : and in the latter, the consignee having got possession of the goods, whether right or wrong, it was determined merely that the right of stopping in transitu was then gone. The dicta of Lord Mansfield, in the case of *Alderson v. Temple*, were admitted to be incontrovertible as applied to the facts of that particular case, where the bills of exchange had been put into a letter indorsed *bonâ fide*, and without fraud, and sent to the persons to whom the bankrupts were indebted in a much larger amount : and had the goods in the present case been sent, accompanied with a bill of lading duly indorsed, with directions to the captain to deliver them accordingly at Bristol, it would have then been a case approaching more nearly to that of *Alderson v. Temple* : but it is the want of those requisites which marks the broad distinction between the cases. In *Drinkwater v. Goodwin* the point decided was merely, that a factor who has sold the goods of his principal has a lien for his commission on the proceeds, because he is entitled to receive [566] the purchase-money from the buyer. In *Hammonds v. Barclay* the executors affirmed the contract after the death of the testator. The same distinction that had been taken in observing on the case of *Alderson v. Temple*, it was contended, rendered the determination in *Lamprive v. Pasley*, totally inapplicable to the present case. That was an assignment of goods then at sea for securing a debt, and a bill of lading was subsequently indorsed to the assignee : although in that case an indorsement of the bill of lading was not actually necessary to give effect to the assignment, and the more particularly as the bankrupt had also, as a further security, deposited the policy of insurance with the defendant. In the case of *Huille v. Smith* there was a special agreement between the parties, and the Court thought themselves bound to give effect to it.

It was finally insisted that the cases of *Wilson v. Balfour*, and *Kinlock v. Craig*, already cited, were conclusively decisive of the present, in all points : and as to the distinction attempted to be made, that the bankrupts had, in the case of *Kinlock v. Craig*, refused to accept the goods, the answer to that was, that the judgment did not proceed on that ground, or even notice the fact, but was wholly grounded on the principle of want of actual possession destroying the factor's lien. That the defendants never had possession here, even constructively, is quite clear, even from these letters, which have been so much relied on. It does not appear from them that the bills were

accepted in consideration of a consignment of the specific goods [567] sent; and the second letter expressly reserves a controul over the flour till the bankrupt's arrival in Bristol. Whatever hardship therefore there may be on the defendants, the principle of law, established as it is by the authority of all the cases, is peremptory, and cannot be broken in upon in their favour from any such consideration.

On the latter point it was submitted, that as the defendants had sold the flour without any authority from the plaintiffs, they could not claim to retain the commission charged by them for doing that which they had no right to do, and had done at their peril; and therefore on both questions the plaintiffs would be entitled to keep their verdict.

Cur. adv. vult.

7th February.—GRAHAM, Baron, now delivered the judgment of the Court.

[Having stated the circumstances of the case and the question before the Court,] The plaintiffs (said his Lordship) rely on the case of *Kinlock v. Craig*; and certainly though the law is quite clear that when a factor obtains possession of goods consigned to him, he has a lien for his general balance, yet it is as clear that he must obtain actual possession of the goods, for that is essentially necessary and indispensable.

The defendant's counsel has argued most ably and ingeniously: 1st, That this being an equitable [568] action in form and effect, is subject to the conflicting equities of other parties against whom it is attempted to be supported; but that proposition, specious as it is, we think far from being true, and we must consider this case as if the action were trover or trespass, in form, and brought for the recovery of the subject matter in specie, or for damages. The difficulty of maintaining that the delivery of the goods on board the trow, was an actual delivery to the defendants, was felt, and therefore that was given up. From all the cases of delivery of goods to be carried to a consignee at a distance, it appears that where such a delivery has been considered any thing like a delivery to the consignee, it has been invariably at his proper risk, and under a formal consignment by indorsement of bills of lading.

Then it is put with equal ingenuity, but with equal fallacy, that this delivery to Brown must, under the circumstances of the present case, be considered as clothed with a trust for the benefit of the defendants, so as to give them an interest which the subsequent bankruptcy of the consignor could not divest: that Brown was therefore made a mere trustee for the defendants by the effect of the letters, and that the subsequent order given to him by Disston, on the arrival of the trow at Bristol, to deliver the goods to them, was a mere formality, both superfluous and unnecessary. If, however, the property in these goods were completely transferred before, without that order, it would have been a transfer at law as well as in equity; but we think [569] that that last act was necessary in this case to give the consignee his lien, because without it he could not have had actual possession. The delivery at Bristol, therefore, was not merely formal, but of the essence of the transaction.

The principal case in point of applicability that has been cited on the part of the defendants, is *Smith v. Pickering*; and high as the character of the learned judge who decided that case stands in the profession, it was still a determination at Nisi Prius, and it is in fact very distinguishable by the circumstance of its being a question as to the mere endorsement of a bill of exchange; and I have no difficulty in supposing that Lord Kenyon said, that if the holder had brought an action on the bill the court would have allowed him to use the bankrupt's name; and nothing is more common than for courts of equity to compel the obligee of a bond that has been assigned by him for a valuable consideration to lend his name to the assignee to enable him to sue on it. The omission of the endorsement was a mere formal error, and by permitting it to be corrected, or the bankrupt's name to be used, a circuitry of proceeding would have been at once avoided. That case, therefore, does not stand much in the plaintiff's way.

A great many other cases were cited for the defendant, and the dicta of Lord Mansfield, in *Alderson v. Temple*, was strongly relied on and much pressed; but the whole of the learned judge's doctrine in that case must be taken with reference [570] to his decision, under the circumstances, which were very peculiar; and his lordship's attention is directed wholly to the consideration of fraud or no fraud. In fact the court did not arrive at a conclusion as to whether there had been a delivery or not of the note in that case; because they held that it was a fraudulent preference. (His lordship having examined the grounds of the decision in that case, observed, that after

all, the question there turned principally on the want of assent; the absence of any accustomed dealings between the parties in the way of trade; the preference in contemplation of the bankruptcy, and fraud; and that Lord Mansfield was manifestly getting rid, by what he said of the minor objections founded on the defendant's mere want of knowledge, that the decision might rest on a broader basis, as was clear by the reference to the case in *Strange*, where it was held that, as the goods had been delivered to the defendants for a valuable consideration, an actual assent was not necessary, but would be intended where there was not an express dissent.)

A mere consignment of goods is not sufficient to give the consignee a lien, without other circumstances. And certainly the case of *Kinloch v. Craig* is a most material one on the part of the plaintiffs, and is in all its points exceedingly strong in their favour. In that case, it is true, the bills of lading were not endorsed, but it was proved to be common and frequent in their course of trade not to send bills of lading, or to send them unendorsed; but the whole of the judgment proceeds [571] on the fact of the plaintiff's never having had possession of the cargo, and it was distinctly decided that no property was vested in the plaintiffs by operation of the executory agreement, that those consignments should be made to them on the faith of their acceptances. The circumstance of Sandiman and Graham having declined to receive the goods, from motives of delicacy, does not distinguish that case from the present, because that fact is not adverted to in the judgment delivered by Mr. J. Ashurst. Applying that case, as well as that of *Lempriere v. Pasley*, and the cases there cited, by Mr. J. Ashurst, from the Courts of Equity, to the present, on the ground of the equitable view of it, they are decisive, for a multo fortiori, ought the court to have done in those cases what it is contended they should do in this. There is a marked distinction between this case and that of a person having an equitable title, seeking to get in the legal estate. The conveyance in that case is undoubtedly matter of form; but the present case is wholly different from such a one. The defendants had no title to any specific shipment; their claim was general, and how could the letters give them an equitable right to the goods in the tow, or have entitled them to demand a delivery of them; and up to the last moment they had nothing more efficient than those letters; no bill of lading—no invoice. On the other hand, the bankrupt in fact acts as owner by the very order which he gave the defendants at Bristol.

The minor question is altogether as clear the other way. The assignees have ratified all that [572] the defendants have done: and otherwise, indeed, they could have no title to receive the proceeds of the sale; and they must receive them, subject to the defendant's claim for commission. The plaintiffs, therefore, must keep their verdict for the price of the goods sold, minus the charge made for the sale by the defendants.

Postea to the Plaintiffs.

PALFREY v. BAKER. Saturday, 8th February 1817.—If a tenant on whom his landlord have distrained for rent, give a promissory note for the amount jointly with another person to release his goods, and a subsequent distress be made on him for arrears of rent accruing due after the period to which the note referred, the produce of the sale of such latter distress must be applied in discharge of the note. The landlord cannot apply it in discharge of the subsequent rent, and then sue the person who joined in giving the note for the former rent.

In the present case the plaintiff had sued the defendant on a promissory note, given by him to the plaintiff jointly with one Bidgood. It appeared on the trial of the cause at the Devon Spring Assizes, before Mr. J. Parke, that the defendant had joined Bidgood in the note, which was dated 23d April 1814, on occasion of the plaintiff having distrained on Bidgood for rent then due to him, and costs of distress, in order to prevent a sale. In August 1815 the plaintiff distrained again (Bidgood still continuing his tenant), when the goods were sold. The amount of the sale was more than sufficient to satisfy the balance due on the note, part of which had been paid in the meantime, but not sufficient to pay the subsequent rent [573] also. The jury, under direction of the judge, found a verdict for the defendant.

Gaselee having obtained a rule for setting aside that verdict, and for a new trial,

Pell, Serjeant, and Gifford, now shewed cause:—They contended that the plaintiff had no right to hold the defendant to a continuing responsibility on the note, but

was bound to apply the money levied by the subsequent distress in discharge of the rent for which the note had been given; that the note had not discharged the rent first due, or taken away the plaintiff's right to distrain again for the same rent, but remained a mere collateral security; and the plaintiff having in the end recovered from his tenant by the second distress, the amount of the rent due when the note was given, could not apply it to the payment of the rent accruing due afterwards, and then sue the defendant on the note, and while the note was unpaid the plaintiff's remedy by distress remained, and he was obliged, if he distrained, to apply the produce to its discharge.

Lens, Serjeant, and Gaselee, on the other hand, submitted, that the plaintiff might use his higher remedy for the rent subsequently due, and resort to the security for the former rent. The plaintiff distrained for rent due afterwards, and in case of a replevin, he must have confined his avowry to that period. He might elect to apply the produce of the sale under the second distress to the rent for which in fact he distrained, and might have [574] resorted to the defendant for the former rent, by suing on the note which he accepted in discharge of the first distress, because he trusted to his security for the rent then due; or he might not have suffered Bidgood to have continued his tenant longer, or have chosen to have given him credit for more rent than the amount of the value of his stock on the premises.

GRAHAM, Baron. The goods taken under the first distress, never having been sold, they were merely a pledge in the custody of the law, and might have been redeemed at any time on payment of the rent. Instead of proceeding to a sale, as he might have done, the plaintiff agreed, *pro hac vice*, to take the defendant's note, and whilst that note was unpaid, his remedy by distress remained, the note being merely a collateral security.

The plaintiff made a second distress the next year, and under that he receives more than enough to pay the rent for which the note was given. It has been said, he must have avowed for the rent subsequently due; he has not done so, however. He received the rent from the tenant by resorting to his highest remedy, and having so received it, he discharged his tenant, as far as the amount proved to be, and so far also his collateral security. Therefore, the verdict is right.

WOOD, Baron. Of the same opinion. The note did not, till paid, discharge the rent, or destroy the landlord's higher security. The original [575] rent had never been in fact levied by the distress, for the goods distrained were not sold; the note was given to prevent the sale: the produce, therefore, of the second distress must be applied, as far as it would go, in discharge of the note, or rather of the debt for which the note was given. It was an ungracious attempt, on the part of the landlord; no objection was made to the money being applied in discharge of the old rent, and therefore an assent to it must be inferred.

RICHARDS, Baron, concurred. The note was given, in point of fact, as a collateral security, and by the tenant himself. The landlord's right of distress, therefore, was not affected by it, nor would it if it had been a bond.

Rule discharged.

JERRITT v. WEARE AND OTHERS. Tuesday, 11th February 1817. A lease by a stranger, and entry by the lessee, is not a disseisin in fact, without an entry by force, or an avowed intention to disseize.

This was an action of covenant tried at the summer assizes 1813, at Gloucester, before Mr. Justice Bayley.

The action was brought on the covenants in an indenture of release, grounded on a lease for a year, bearing date 2d September 1799, and made between Edward Harford, Abraham Ludlow, William Battersby and Joseph Harford, all since deceased, the said John Fisher Weare and John [576] Scandrett Harford, one Thomas Walker, also deceased, and the said Charles Joseph Harford and Samuel Lloyd Harford, of the one part; and the plaintiff, and one Moses Daniel, of the other part: By which the parties of the first part, in consideration of 2000*l.* granted, bargained, sold, released, and confirmed to the plaintiff and Moses Daniel, their heirs and assigns, all those several messuages, tenements, cottages, and buildings, some time then since used as copper and spelter works; and all gardens, yards, outlets, and apartments thereto belonging; and also the several closes, pieces or parcels of ground thereto also belonging,

respectively, of and belonging to the grantors, situate at Conham, in the county of Gloucester, called their Conham Estates and Works, containing in the whole 37A. 2R. 5P. or thereabouts, and particularly set forth in a plan made thereof; and of estates and works belonging to the said grantors, called their Cupola Works or Estates, in the year 1776, but which works and estates, called their Cupola Works and Estates, or any part thereof, was or were not meant to be comprized in or pass under said conveyance; which plan was contained in the book of maps of the several estates of the said grantors, and a true copy of which said plan, and of the table of contents thereof, so far as related to the premises thereby granted, was annexed to the said indenture; which said table of contents contained 24 numbers of particulars: to hold to plaintiff and Moses Daniel and their heirs, to the uses for the benefit of the plaintiff, his heirs, appointees and assigns: to be holden of the chief lord or lords of [577] the fee or fees of the same premises, by and under the rents and services therefore due and of right accustomed; and also to a certain annual sum of 10*l.* for the support of a meeting-house therein mentioned. And defendants and the deceased grantors covenanted with the plaintiff, that they, immediately before and at the time of the sealing and delivery of the said indenture, were lawfully and rightfully seized of, interested in or entitled unto all said hereditaments, of a good, sure, perfect and indefeasible estate of inheritance in fee simple, without any manner of condition, trust, limitation, use or uses, estate or estates tail, contingent remainder or remainders, or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burthen, impeach, incumber, or determine the same, except only as aforesaid: And also, that defendants and said deceased grantors, immediately before and at the time of the sealing and delivery of the same indenture, had in themselves, or some or one of them had in themselves or himself, and in their, some or one of their own rights or right, full power, good right, and lawful and absolute authority to grant, bargain, sell, alien, release, and convey all said hereditaments unto the plaintiff and Moses Daniel, and their heirs, to the uses and upon the trusts in the said indenture of release expressed.

The plaintiff by his declaration assigned a breach of each of the said covenants as to the premises generally, without any specification as to part.

[578] There are also other covenants in said conveyance, viz. covenants for quiet enjoyments, free from incumbrances, and for further assurances, which are restrained and limited to the acts and deeds of the grantors, and all persons lawfully claiming or to claim by, from, or under them.

The defendants pleaded that they and the other grantors, immediately before and at the time of the sealing and delivery of the said indenture, were lawfully and rightfully seized of, interested in or entitled unto all said premises: and also, that defendants, &c. immediately before and at the time of the sealing and delivery of the said indenture, had in themselves, or some or one of them, and in their, some or one of their own rights or right, full power, good right, and lawful and absolute authority to grant, &c. Upon the above two pleas issues were joined.

There were two other pleas, introducing the qualified covenants of the defendants, to which the following facts not being so pointedly applicable as to the issues already stated, they are not set out here.

Upon the opening of the case at the trial, it was agreed, that the damages should be assessed by an arbitration if the plaintiff should obtain a verdict upon either of the issues.

On the part of the plaintiff it was proved, that in 1790 or 1791, and for five or six years after-[579]-wards, one John James worked a small quarry of stone on part of the lands in question, being the very outskirt of the defendants premises, called their Conham estates and works, and bordering upon the waste of the manor of Barton Regis, as to which the breaches of covenant were assigned, and being part of the lands leased to Bell, as hereinafter mentioned, under the authority and by the licence of Mrs. Chester, the lady of the manor, and the successive owners of the manor; and paid an annual acknowledgment of two guineas to Mrs. Chester, and her successors, for working the said quarry; part of the land in question was covered with low brushwood, and part with the cinders and ashes from the defendants' works. By indenture, dated the 1st day of August 1792, Mrs. Chester demised part of the lands, being then a parcel of waste ground, and described as three-quarters of an acre, with the abutments and boundaries, (and on which a lettage was afterwards built by the

lessee,) to William Tyler, for ninety-nine years, if three persons or the survivor should so long live, at the yearly rent of 2s. 6d. And by another indenture, dated the 4th day of July 1792, Mrs. Chester demised other part of the premises, being a cottage or tenement, and garden, and small plot of ground, containing four lugs (with the exception of the mines and quarries, and liberty to work the same,) to one Bell, for a term of ninety-nine years, if three persons or the survivor should so long live, at the yearly rent of 2s. 6d. Mrs. Chester departed this life in the year 1797, leaving Thomas Masters, esq. [580] heir at law; and the lessees respectively entered on the premises demised to them respectively, immediately after the date of the leases to them respectively, and continued in the exclusive possession thereof down to the time of this trial; and the reserved rents on the leases have been regularly paid by the lessees, and those who claimed under them, to Mrs. Chester, during her life, and after her death to the said Thomas Masters.

On the part of the defendants it was proved, that they were partners in Bristol in carrying on the copper and brass trades upon an extensive scale; that the premises which they sold and conveyed to the plaintiff were one set of their works, called their Conham works, consisting of all the particulars set forth in the plan annexed to the conveyance to him, and the table of contents at foot thereof, viz. large copper and brass works, and various yards and extensive lands round the works, which had been damaged by the smoke thereof, a manager's house, and various cottages and gardens for their workmen, including the cottages and land in question, in the whole 37 acres, 2 roods, and 5 perches.

That coal in the neighbourhood growing scarce, they, in 1792, shut up those works and opened others in Wales, and their manager and principal workmen were removed into Wales, and those works were abandoned and left unprotected, open and void, and fell into a ruinous state, and lay in [581] that state till 2d September 1799, when they sold them to plaintiff, and made the conveyance to him as stated in the declaration.

That as they had another large set of works adjoining, called the Cupola works, which were stopped at the same time, to avoid any mistake as to the particulars sold to plaintiff, those sold to him were all set forth in the plan annexed to the conveyance, which in the deed is declared to be a copy of their plan of those works made in 1776, and contained in the book of maps of their several estates.

That from the date of their conveyance to plaintiff, viz. 2d September 1799, no complaint was made to them by plaintiff, or any one for him, that he had not obtained possession of all the premises conveyed to him; on the contrary, he sold the whole to one Lukin; and in 1806, he repurchased them of him; and in 1808, nine years after the sale and conveyance to him, he, for the first time, by letter dated 26th October 1808, from his solicitors to defendant's solicitors, made complaint that he had not obtained possession of the parts now in question, being part of No. 23 and No. 24, as marked upon the plans.

The defendants then put in and read a deed of feoffment, dated 27th Nov. 1654, whereby Thomas Chester, esq., the then lord of the manor of Barton Regis, sold and conveyed to Michael Dayas, in fee, a messuage, tenement, orchard, garden, and thirty acres of land, with a coppice belonging, [582] called the Outwoods, alias Conham, situate in the hundred of Barton Regis, in the county of Gloucester; with all waste grounds, woods, and woody grounds to the same belonging, under the yearly rent of 5s.; and that copper and brass works were erected on the premises in the last deed; various other deeds were put in and read, deducing the title in the last mentioned deed to defendants and their partners, who sold and conveyed them to plaintiff. It was also proved that the parcels in question, viz. No. 23 and 24, No. 23, consisting of 2A. 3R. 10P.; and No. 24 being a house and orchard, comprising 1R. 4P. in the conveyance from defendants to plaintiff, were parts of said premises, in the conveyance from said Thomas Chester, subject to the said yearly rent of 5s.

That said Mrs. Chester, who succeeded to the estates of the Chester family, actually received said rent of 5s. of defendants, before and at the time she granted said leases to said Bell and Tyley; and she continued to receive the same of them from the time of granting those leases up to her death in 1797; and that Mr. Masters, who succeeded her in the estates of the Chester family, continued to receive said yearly rent of 5s. of defendants up to the date of their conveyance to plaintiff, viz. 2d Sept. 1799.

That the premises No. 24 were occupied by the workmen of defendants, and their

families, free of rent ; and that No. 23 was the place where the ashes of the works were deposited, and was always [583] called the Ashbank, belonging to the said works ; and that the ashes of the works were upon it at the date of the conveyance from defendants to plaintiff.

That defendants regularly cut the brushwood and fern upon these parcels, and used the same at their works as often as the same were fit to cut, up to the time they shut up their said works, as before stated.

Upon the above evidence the learned judge, notwithstanding it was objected on behalf of the plaintiff, that prior to the conveyance to him by the defendants, they were disseised of the cottages and land in question, by Mrs. Chester and her lessees, and consequently could not support their issues, directed the jury to find a verdict for the defendant : stating his opinion to be, that there was a wrongful dispossession only, and not a disseisin.

The jury found a verdict for the defendants.

In the ensuing term an application was made to this Court to set aside the above verdict, and have a verdict entered for the plaintiff : and on such rule coming on to be argued, the Court desired the above facts to be stated in a special case for their opinion.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover ? If he were, the present verdict was to be set aside, and a verdict to be entered for the plaintiff ; if not, the verdict to stand.

[584] Preston, for the plaintiff, contended that the leases of Mrs. Chester, and the entry of the lessees, and payment by them of rent, amounted to an actual disseisin, and the consequence, he contended, would be that the defendants had no right to convey the cottages and land so leased and entered on, and therefore could not support their issue. If the defendants were in fact so disseized, he insisted, they must have regained their seizin to enable them to grant to a stranger : that not having done so, they had only a mere right, and a right of entry is not transferrable. That proposition is clearly laid down in *Shep. Touchstone*, p. 139, Co. Litt. 214 b. and *Lampel's case* (10 Co. 48 b.). He insisted that the defendants could not have obtained possession against the cottagers, whose title was adverse without entry ; and that that right of entry was not transferrable. Before the authorities were adverted to, it would be proper, he submitted, to consider the case on general principles. Every person in possession must be so by estate or by sufferance ; and where two persons are in possession, one with and one without title, the law treats the estate as in him who has the right. Disseisin, and a consequent possession without right, is the lowest interest a man can have, but it is one which is often the foundation of a fine. An entry, generally, on any possession, is a disseisin, and every adverse entry on the possession of a freeholder, and an ouster is a disseisin. There cannot be a dispossession of a freeholder as contra-distinguished from disseisin, other-[585]-wise a trespasser could never gain a title. The case of an entry on a tenant for life or years, in possession, for the purpose of claiming his estate, is indeed no disseisin of the fee, because there is no adverse possession or title against the reversioner ; but a general entry would dispossess the termor, and disseize the owners of the inheritance. A disseisin of tenant for life, claiming his estate only, is no disseisin of the reversioner, because it does not divest his (the reversioner's) estate ; but if an ejectment had been brought by the defendants against these cottagers after twenty years possession, they could not have recovered, for the cottagers had an adverse possession, and were tenants to their lessor. The real circumstances in this case raise this question : Does a stranger by making a lease acquire a seisin in the freehold ? In other words,—Is he a disseisor ?

And certainly it does amount to a disseisin, as the entry of the lessee would in law be considered to be by command of the lessor : and there cannot be a tenant in possession, as of a particular estate, without a reversion or remainder expectant on it in some person ; nor can a lessor make a lease reserving rent without necessarily claiming title to the reversion whenever the lease shall expire. Every lease supposes and admits a lessor. Whenever a particular estate is created, there must be a reversion, out of which it is derived.

There are conflicting decisions on this question, but the weight of authority is in favour of the pro-[586] position, that a stranger, by making a lease, gains the freehold by disseisin against the lawful owner, and drives the disseisee to his assize or entry. There is a distinction between disseisin in fact, and disseisin at election ; and it has been attempted to carry disseisin at election to an extent which would destroy all

notion of actual disseisin, so well known to the law, and so long established. Disseisin at election is never an actual disseisin. It only serves to give the disseisee a remedy by assize, and never gives the freehold; whereas, an actual disseisin gives an incipient title, under which a sixty years' possession, or a fine and non-claim, would clearly bar the disseisee, and all claiming under him.

And the question now before the court is, Whether what has been done in the present case does amount to such a disseisin as turns the estate into a right of entry? The earliest authority on this point is in the year-book of 12 Edw. III. fo. 12, b. pl. 5. It was in that case held, that a tenant at will, making lease for a term of years in his own name, is a disseisin; the reason is, that by such an act a tenant at will has no longer any interest in the premises; he has determined his tenancy by his own act, and therefore, as a stranger claiming a right, he acquires a freehold by disseisin. Bro. Abr. title Disseisin, pl. 67, 58, is to the same purport. A man, by making a lease for years, under which the lessee enters, and the lessor receives rent, makes the lessor a disseisor. *Ib.* pl. 76, 77, and *Rowse's case* (Ow. Rep. p. 28).

[587] But it will be contended that this law is obsolete, and it will be urged, that there are more recent decisions which have since more fully defined a disseisin to be, when one enters intending to usurp the possession, and ousts another of his freehold; and further, that it has been ruled, that it is at the election of him to whom the wrong is done, if he will allow the wrong-doer to be a disseisor, and himself out of possession by disseisin, so that it is at the election of the person put out of possession either to charge the wrong-doer with a disseisin, by bringing an assize, or with a dispossession by bringing any other action. In the case of *Blunden v. Baugh* (Cro. Car. 302), the first of those wherein the old doctrine has been attempted to be impugned, it is said, that it is established that there must be an obvious intention to oust the freeholder, and that, therefore, *querendum est a judice quo animo hoc fecerit*; but this observation is clearly applicable to those cases wherein the act is doubtful, and cannot apply to an actual disseisin, as the act of Mrs. Chester was. That case has recently been well considered by Lord Redesdale, whose opinion is given in the report of the case of *Horvuden v. Lord Annesley* (2 Sch. & Lefr. Rep. 621). There his lordship recognizes the old doctrine, and adverts to the true distinction, that a disseisin at election is where the possession is gained under a title consistent with that of the occupier having the right, and who was in possession. Thus, a mortgagor paying interest cannot disseize a mortgagee by [588] making a lease, because it may be referred to his equitable interest at the election of the party dispossessed. The case of *Blunden v. Baugh*, however, stands alone; and it does not appear that any of the earlier cases which have been adverted to on the present discussion on the part of the plaintiffs were cited or noticed on that occasion; nor was the case of *Shaw v. Barber* (Cro. Eliz. 830), adverted to there, and that case is in direct opposition to *Blunden v. Baugh*; neither is there, on the other hand, any authority given for the doctrine said to be held in *Blunden v. Baugh*. All the decisions are entirely the other way. That case is indeed recognized by Lord Mansfield in *Taylor v. Horde* (1 Burr. 112); but the principle on which the doctrine of Lord Mansfield is founded will not bear investigation. It is, that there must be an intention to oust the freeholder to effect a disseisin; but it is clear that the intention of a party cannot controul the legal consequences of his acts, and if an act amount in law to a disseisin, it will not be permitted to the wrong-doer to say, that no disseisin was intended by him. If, indeed, it were in the election of the person disseized to choose in all cases whether he would have been disseized or not, there would be no longer in law any such thing as disseisin; nor any bar, by the operation of non claim on fines; or by the statutes of limitation, for those statutes never operate by way of bar, unless there has been an actual disseisin. Then the sole [589] question is, whether there was in this case a disseisin in fact, for if there were, the plaintiffs had no title to convey without a previous re-entry.

As to the fact stated in the case, of part of the demised premises being in the possession of the defendants, who used it as a cinder bank, it would be absurd to contend that the throwing the cinders of the works on other land kept the possession of the cottages and lands in question. That the lessees were in the occupation of the cottages and gardens and land, is a sufficient answer to that part of the case. To state that fact, is at once to answer it, for possession of other land not within the limits of the cottages and gardens, fully, completely and exclusively occupied, could not be a continuance of the possession, or of seisin of those cottages and gardens.

Puller, for the defendants, (having observed that the question had been much narrowed by the confined terms of the issue in this action of covenant, which reduced it to the inquiry of, whether the defendants were seised at the time of the conveyance to the plaintiffs,) submitted that the leases by Mrs. Chester were, at the utmost, a dispossession, and could not be construed to amount to a disseisin, according to the definition of that act in Co. Lit. 153 b. : nor could they operate to divest the right of the grantors, so as to invalidate their conveyance of the 2d September 1799. It was clear that the leases must have been made under a mistake, and that there could have been no intention, on the part of Mrs. Chester, to oust the grantors, or ac-[590]-quire the freehold : and it is not only necessary to a disseisin that there should be an entry, but an ouster also, (Co. Lit. s. 279, p. 181 a.). Now Mrs. Chester was receiving, not only the rent of 2s. 6d. from her lessee, but also a rent of 5s. from these defendants : so that if there was an entry by her, there was no ouster, and consequently no disseisin. In an *Anonymous case* in Salkeld (vol. i. p. 246), it was laid down by Holt C. J. that a bare entry on another, without actual expulsion, would not work a disseisin. The leases were, in fact, rather in the nature of an intrusion, which is distinguished by Bracton (*h*) from disseisin, as being merely a wrongful possession, “*possessio nuda sine aliquo vestimento*.” The same distinction was taken in the case of *Matheson v. Trot* (1 Leon. 209), where it was held that a lease, and entry under it, was not a disseisin by the lessor.

This sort of dispossession might have been either by right or by wrong. There is no doubt that, if the cottagers had got in under a grant from another person, ejectment might have been maintained. After all, it was merely a chattel which Mrs. Chester had granted, and that could not operate to disseize the defendants to whom Mrs. Chester's ancestors had granted in fee, receiving from them a fee farm rent of 5s., and which was afterwards received by Mrs. Chester herself, and for premises of which the [591] demised lands formed part. In the case of *Goodright v. Forrester* (1 Taunt. 559), it was contended in argument that no actual disseisin could be committed by a person making a lease for years, who had not previously entered for the purpose of gaining the freehold : and that no person could, by mere receipt of rent, be an actual disseisor ; and for that was cited *Blauden v. Baugh*, *Pousely v. Blackman*, and all that class of cases (Palm. 201, Cro. Jac. 659, and 2 Roll. Rep. 284). And there is much good sense in that doctrine. Nor is it any alteration of the old law, but the result of a better understanding of that law, which has obtained of late years, establishing that no one can be said to disseize who does not claim the freehold, and enter for that purpose, ousting the rightful owner. Now here there was neither a claim of the freehold by Mrs. Chester, nor did she enter in fact, or oust the defendants ; nor could she have been aware that, by granting the leases, she was disseizing the prior grantees of the freehold, much less could she have intended to do so. It is said, that Mrs. Chester cannot be permitted now to say, that her leases were not a disseisin. In fact, she does not say so : but these defendants, who have nothing to do with Mrs. Chester's grant, say so in support of their own title ; and it appears by the case, that at the time when they granted to the plaintiff, they had all the possession which they could have. But if Mrs. Chester herself should disclaim any intention [592] of committing a disseisin, as she has done, by continuing to receive the fee-farm rent, there seems to be no reason why that should not destroy the effect of her acts : for if she never intended any such thing, nor made that intention notorious, the making the leases and receiving the rents and profits, would not amount to a disseisin. That was so held, in the case of *William, Lessee of Hughes and Another v. Thomas* (12 East, 141), where it was established that the rents and profits must be received with intentions adverse to the party entitled, and by one claiming to put himself in his place.

It was then urged that in point of fact, the defendants had had possession constantly, notwithstanding the leases, for they had always used the premises as the place where they threw the cinders and ashes from their works, and it was actually in their occupation as an ash-bank at the time that the lease in question was made ; and that completely negatives the notion of an ouster by Mrs. Chester, however she might, by leasing to the cottagers, have disturbed the defendant's possession.

On the whole, it was submitted, that there had been no disseisin effected by the leases of Mrs. Chester : and that, however the facts stated might have operated to

afford to the defendants the remedy of disseisin at election, they did not therefore destroy or disturb their actual seisin, which was the sole point put in issue by the pleadings.

[593] Preston, in reply, contended that even a dispossession by Mrs. Chester, would be sufficient to entitle the plaintiffs to recover in this action of covenant: for the defendants had no right to suffer the possession to be incumbered, therefore it was necessary for them to prove that they were in possession. And they accordingly say that they were possessed, in fact, because they were actually constantly in the occupation of one part of the premises leased, inasmuch as it was used by them as an ash-bank. But that could certainly not be considered as a possession against the person who actually occupied the house and garden, and gathered the fruit. The circumstance of their throwing the ashes from the works there, was not even a constructive possession of the cottages and gardens included in the leases, nor were they thrown there *animo clamandi*, but merely as any trespasser might have done.

Then it is said that Mrs. Chester did not mean to commit a disseisin, and that may be admitted: for she probably considered herself in possession of the premises as lady of the manor, thinking that they were part of the waste; still, however, the lease and possession by her lessees, gave her a seisin adverse to the title of the defendants, and her adverse title began from the leases: she had then an incipient right, which would in time be perfected into a good title. The case of *Blundell v. Baugh*, and the other cases of that class, arose entirely out of the question,—Who was to be deemed the disseisor? Whether the lessee or lessor answered that character; and there was no question in [594] that case of the fact of a disseisin having been worked: the only doubt was, by whom the disseisin was effected—the lessor or lessee.

It is not every lease which makes a disseisin: for a lease by *cestui que trust*, or a mortgagor, or by a particular tenant, would not occasion a disseisin; for in all those cases there is ground for the possession, and the possession is consistent with the seisin of the legal owner. The particular tenant can create a disseisin only by feoffment, or by what is equivalent to it. The disseisin gives the naked possession only, without right at first, and an entry might avoid it: but 60 years possession, or a fine and non-claim for five years, would convert the possession into a right. So, entry under a void grant would be a disseisin, and a title to the freehold might be acquired thereby, otherwise no length of possession would give such a title: every actual disseisin by entry gives a fee, whether it be *eo intuitu* or not. It is, in short, in cases where the lessor has no interest in the demised premises that his lease amounts to a disseisin. He becomes the reversioner of the lessee: for if there be a lease, there must be a lessor, and a reversion expectant on the term created by the lease. The lessor gains something, and he can acquire nothing short of the freehold; for there is no particular estate in existence to which the lease can be referred. By the act of making the lease, he of necessity claims the freehold, and by the entry of his lessee the lessee acquires the possession, and the lessor is seised of the fee, and he becomes the only person able to convey [595] or deal with the seisin: nor could the disseisee make any effectual conveyance during the continuance of the disseisin. To convey or assure any part of the property, he must make a previous entry, *Page v. Jordan* (1 Leon. 122). On the other hand, the disseisor may incumber the estate, or transfer it. All such power would be acquired by the very act which Mrs. Chester has done,—an act by which a tortious possession of the fee is gained, and that without any intention on her part; and even although she were under a mistake in conceiving that the premises were no part of the property conveyed by her ancestors. An act of disseisin cannot be qualified by the circumstance of mistake, or the fact of disavowal of intention. In either case the act would be adverse to the true title, and it might always be questionable whether the demised premises were in point of fact part of the property granted, and therefore the acceptance of the fee farm rent by her from the defendants might be referrible to other parts of the property, and would not necessarily be an admission of their right to the particular premises afterwards demised by her. A writ of assize might have been brought against Mrs. Chester, and if it had succeeded, her tenant would have been discharged from payment of rent, for want of privity of contract, *Webb v. Russell* (3 T. R. 393. 8 East, 552).

He then urged that the cases which had been cited for the defendants, were either not applicable, or were not founded on the rules of law. The case of [596] *Hickman v. Thomas*, he insisted, was not law—that it was in direct opposition to *Thorp v.*

Forrester (1 Taunton, 518), which was decided in the same Court two years before, and subsequently in the Exchequer Chamber; and that those two cases could not stand together. In *Williams v. Thomas*, the Court were surprised into that decision, and did not advert to the circumstance, that there could be an intrusion against any person except the crown. In the *Anonymous case* cited from Salkeld, Lord Holt's observation applies to mere trespassers, and not to a case like the present; and undoubtedly, where two persons are in possession at the same time, the law considers the possession to be in the person who has the right. On minute attention to the circumstances of the case of *Blundell v. Bough*, that case, so far from conflicting with these general propositions on the subject of disseisin, will rather be found to support and confirm them (vid. p. 304). Those propositions are of great importance to titles, and though taken from the old books are nevertheless law; and if overthrown, would render all those titles unsafe which depend on the long-established doctrine of disseisin and adverse possession, non-claim on fines, statutes of limitations, bar by warranty, &c.

This case, (it was submitted) ought to be decided in the same manner as if the question were raised on an ejectment against the lessees—whether it be practicable, after 20 years peaceable possession in [597] them, to oust them by ejectment! And if they have terms of years, Mrs. Chester must have the reversion. In this instance, Mrs. Chester was, by her tenants, in possession—an actual bona fide and substantial possession—and the possession of her tenants was a seisin to her.

Cur. adv. vult.

GRAHAM, Baron, now delivered the judgment of the Court, which, his Lordship stated, would be directed to the points which had been raised, as if the present action had been, in fact, an ejectment against the tenants claiming under Mrs. Chester's leases; although the frame of the issue, having been modelled on the covenant, did not necessarily involve all the questions which would have arisen in such an action, but had considerably narrowed the object of enquiry.

[Having stated the case at length, and pointed out the material facts on which either party relied.] The breach, said his Lordship, rests entirely on the effect of the leases by Mrs. Chester, and a load of knowledge has been brought forward in support of the position,—that they have necessarily the effect of a breach of the covenant,—which has very extensively burthened the case, and of which it is necessary that the question should be first disencumbered. It does not, however, seem necessary that the Court should, on the present occasion, enter into any controversy of the doctrine of Lord Mansfield, in the case of *Taylor v. Horde* (1 Bur. 60). That case [598] stands entirely on its own grounds; and so it must, until it may become necessary to dispute the doctrine there held, in some future case, when any such shall arise as may be in circumstances precisely similar. The principle on which that case was finally argued and decided, rests on a foundation not to be shaken. Whether Lord Mansfield went too far in the first case, the ultimate decision being long subsequent to the first argument, when the merits might have been more fully discussed, or not, I need not enquire. The decision, however, rests on principle, but as to whether a feoffment grounded on naked possession gives a fee, or not, it has been since determined, that a feoffment with livery did not operate as a disseisin. In the case of *Doe v. Horde* (Cowp. 689), Mr. Justice Aston, reasoning on the doctrine of recoveries, held that none could be suffered without the concurrence of the party having the estate for life; and that the deed could only authorize a recovery with the consent of the tenant for life, and tenant in tail. Sir Robert Atkyns, however, having contrived to get possession, his levying a fine to make a tenant to the precipe, was held a fraud for want of the concurrence of the jointress; and the estate went to the person entitled under the limitation. The cases would be stretched to an unsustainable latitude, if a tenant by sufferance, or tenant at will, making a lease the mere act, should be construed to amount to a disseisin. A manifest intention to oust must be clearly shewn. When the case in *Palmer*, 201, *Pousley v. Blackman*, [599] was mentioned, the Court was quite astonished. Why is it that the lease of a mortgagor is no disseisin? Because the mortgagee meant that he should keep the possession, and no intention of an ouster could be made apparent in such a case. There must be a manifest intention to oust, as well as an actual ouster; and we must look to see what it was the real intention of the party to do, before we hold the act done to be, in point of fact, a disseisin.

In this case, the position that the mere circumstance of a lease by a stranger and entry by the lessee, whatever might be in fact the intention of the parties, in point of

law, amounts to a disseisin, is the principle on which the whole argument on the part of the plaintiff rests. For that position the authority in Bro. Abr. tit. Disseisin, pl. 76, is relied on. Now that passage literally translated, is to this effect,—A. leases land of I. M. to me for years, rendering rent, the lessee enters and pays rent to the lessor, the lessor is a disseisor : the reason given is, because he who commands another to enter is a disseisor, which, take notice, is on account of the void lease. That comes to this, the lease, being void, is equivalent to a command to enter, but that refers wholly to the mode of effecting disseisin in those days, when it was often accompanied with force. That dictum too, such as it is, is not quoted by Comyn : and therefore it was, probably, not then considered law, but if it be, still applying it to the present case, it establishes no more than this—that if Mrs. Chester commanded her lessee so to enter, she was a [600] disseisor. Thus the whole of this elaborate doctrine rests on the most slender grounds : yet mark how this nucleus is rolled up into a mass of argument ! Because a little cottage, by a blunder of Mrs. Chester, has been leased without right, that is magnified into a disseisin, which is to destroy the title of these defendants who claim under her deed. It would be quite absurd if such a thing should be suffered ; and I am really ashamed of the pains I have taken in looking into the old cases which have been cited, to discover if they furnished any such doctrine as would support the argument used for the plaintiffs.

Then let us see what a disseisin in law has been defined to be, and that may readily be shewn by a few passages from the old books. Lord Coke has adopted the definition of Bracton* and Fleta (the Mirror), (Co. Lit. 153 b.). “Disseisina is a putting out of a man out of seisin, and ever implieth a wrong : but dispossessing, or ejectment, is a putting out of possession, and may be by right or wrong.” Then he comes to his illustration, “Omnis disseisina est transgressio, sed non omnis transgressio [601] est disseisina. Si eo animo fortē ingreditur (now that word fortē is extremely important) fundum alienum non quod sibi usurpet tenementum vel jura, non facit disseisinam sed transgressionem, &c. Querendum est a iudice quo animo hoc fecerit, &c.” Then adopting the criterion querendum est quo animo, let us see what was the intention of the parties in doing the act which has created the present question ; and that it is easy to collect from the circumstances of the case. [His Lordship took a brief review of the facts.]—Then the argument used for the defendants was properly this :—Could Mrs. Chester have intended to disseise the plaintiffs, when she and her successors have ever since been receiving the 5s. rent from them ? She had, in fact, no more idea of committing a disseisin than a robbery. But then it is said, on the other side, that we are not permitted to seek for any such explanation of her acts from her intentions, however obvious, because those acts cannot be so qualified—for that their effect in law is not to be explained away ; and that is really the doctrine which the common sense of the Court is called on to adopt. Now nothing could be more absurd in us, than to hold such a doctrine at this time of day ; but the old books do not, in fact, afford any pretence for the argument, and the very definitions which I have cited clearly shew it.

Then let us go still further : I will suppose, for a moment, that Mrs. Chester was a stranger ; and even then I would say, that this act of hers would [602] not have operated as a disseisin in the absence of intention. Now Mrs. Chester was by no means a stranger, and her acts are not to be construed so rigorously. But if we add to all this the fact of her acknowledging the plaintiff's title, by receiving suit and service, it becomes so clear that she did not mean even to dispossess them, as to leave not a shadow of doubt on the effect of this act.

If, however, Mrs. Chester should at any time afterwards have insisted on any claim which the consequences and legal operation of such an act might, under any other circumstances, have given her : an answer to it is to be found at hand in the doctrine of estoppel. In Co. Lit. 352 a. & b. it is said there are three kinds of estoppel : by matter of record—by matter in writing—by matter in pais. Two of those three

* Bracton, in l. 4, f. 161, 2, has enumerated very many various modes of disseisin, wherein the main distinctions taken between disseisin and trespass appear to be founded on the criteria of the nature and character of the acts of the disseisor—as, whether the putting out were violent, unjust, et sine iudicio,—and so as to a keeping out, if the possession had been vacant, whether it were animo clauandi, or contra voluntatem possidentis.

are directly applicable here: there is no matter of record in this case certainly, but there is matter of writing, because Mrs. Chester is in privity of feoffor, and she would be concluded by her deed. Then there is also this very case, which might have served to illustrate the effect of matter in pais—her continued acceptance of rent from the party against whom she would have to make good her claim.

But let us admit that this act of the lease by Mrs. Chester were, in point of law, a tortious ouster by her. In that case it is clear the tenant could claim nothing but his term. Mrs. Chester would then be the disseisor, having the reversion [603] in a tortious fee: and her acceptance of rent from the defendants as her tenants, would in such a case have the effect of remitting them to their ancient estate.

Then again—Suppose Mrs. Chester to be in the situation of a person making claim, after entry tolled, as heir of a disseisor. There is a passage in the text of Littleton (sect. 692), which clearly shews that she might then have disclaimed, and the tenant might lawfully enter because of the disclaimer. Now that position, as applied to this case, founded on the fact of the acceptance of the freehold rent up to the latest moment, which is an express disclaimer, is an argument against any claim under what has been called this disseisin, which is really past the power of answer.

On the whole, therefore, it appears to me, that the arguments used in favour of these plaintiffs, whose case rests on the slightest possible grounds,—that this lease of Mrs. Chester operated as a disseisin,—are totally without foundation: but then, even admitting that, under the circumstances of this case, there had been a disseisin in fact, it is gone, purged, and in all respects waived by the subsequent acts of disclaimer.

I do not charge my brothers with concurring in all that I have said in expressing my sentiments on this case, but I believe I may say that they in effect entertain the same opinion.

[604] In another point of view, if this were a disseisin, as has been contended, I am of opinion that the defendants would still be entitled to their verdict, for there has not been any breach of this covenant: for there is no defect in point of fact in the general title. What can a man be supposed to covenant against beyond the validity of title? and most assuredly not against these surreptitious pocket leases. It is enough that a man covenant fairly against defects in his title, but he is not to be bound by such ridiculous rigour as these plaintiffs would hold him to. Suppose that Mrs. Chester had brought an ejectment, what could she have said to the objection, that she had received rent? Yet is this pretended possession of paper and packthread to be called by the tremendous name of disseisin: and on that the plaintiffs would induce the Court to set aside the judgment obtained by the defendants, and to which they are clearly entitled.

Wood, Baron, concurred. I will say one word only on the last point: I am quite clear that there has been no breach of covenant in this case. The action of covenant only extends to the consequence of legal acts, and the reason is to be found in the case of *Hayes v. Bickerstaff* (s), that the law shall never judge that a man covenants against the wrongful acts of strangers.

Postea to the Defendants.

[605] CLARKE v. MANSFIELD. 12th February 1817.—If a defendant have only signed one (the first) skin of his answer, which is an irregularity, the Court will not order it to be taken off the file, but will permit the defendant to sign the others.—And if he reside in the country, they will give him an opportunity of coming to town for that purpose.

Treslove opposed this motion, made by Dauncey, for taking the answer to an injunction-bill off the file, on the objection of an irregularity, (the defendant having signed the first skin only of several which the answer had occupied) praying, that as it was a mere omission, the Court would permit him, if the rule required it, to sign the other skins now, and give him time to come from the country for that purpose.

Graham, Baron. This objection should have been made in limine.

Dauncey. Notice of the motion was given on the day of the filing the answer.

GRAHAM, Baron. Such a rule ought to be founded on long practice, and in my

(s) Vaughan, 121. And see the cases in Note 10 to *Wotton v. Hall*, Saund. 181 a.

time I do not remember that it was ever done. The defendant here clearly meant to do all that was right, and if he has omitted to do enough, he may do it now.

WOOD, Baron. That will be the best way of disposing of it.
Ordered.

[606] THE KING, IN AID OF BUSK AND ANOTHER, *v.* CRIPPS AND OTHERS, Assignees of Montgomery and Another, Bankrupts. 12th February 1817.—The Court on application of claimants, will by rule to shew cause, order a vendi exponas to issue before the due time arrive for selling the goods of a bankrupt seized under an extent, on an affidavit that it would benefit the bankrupt's estate, because the price is expected to fall, &c.; the sheriff to pay the prosecutor's demand into the hands of the Deputy Remembrancer, to the credit of the cause, and the remainder to the assignees: the defendants (the claimants) paying into Court 100l. beyond the amount of the debt claimed by the prosecutor.

Cause was this day shewn by West against a rule obtained by Littledale, in this case, on behalf of the assignees, on the 5th inst. calling on the prosecutors of this extent to shew cause why a writ of venditioni exponas should not issue, directing the sheriff of Lancaster to take and dispose of the goods, &c. of the bankrupts, returned by the said sheriff as seized under the inquisition; and why the sheriff should not be ordered to pay into the hands of the Deputy Remembrancer to the credit of this cause, out of the produce of the sale, the amount of the debt claimed by the prosecutors, and to pay the remainder over to the defendants, without prejudice, &c.

The affidavit of the defendants, on which the rule had been obtained, stated that the goods, chattels, and effects seized, &c. were more than sufficient to satisfy the sum mentioned in the extent to be due, &c. exclusive of the lands, &c. which had been taken, &c.;—that the goods seized were of fluctuating value, and that it would be for the benefit of the bankrupt's estate that some of the merchandise seized, should be immediately sold, because the price of such articles was high at the time of making the application, but was expected to fall on the then expected opening of the navigation of the Baltic.

[607] It was also stated, that some of the property was receiving injury from the dampness of the place in which it was then stowed. Under these circumstances

The Court made the

Rule absolute.

The defendants to pay into Court 100l. beyond the amount of the debt claimed.

End of Hilary Term.

[608] SITTINGS AFTER HILARY TERM, 57 GEO. III. GRAY'S-INN HALL.

WARD, Clerk, *v.* SHEPHERD AND OTHERS. 1st March 1817.—A defendant in a title cause having set up a defence of composition real, cannot afterwards rely on its being in fact a modus. —Such a defence is double, and too uncertain. [As to the mode in which the defence was laid, and whether it were doubtful if the defence, though approaching more nearly in form to a composition real than a modus, might not be consistent with a statement of modus, —see the terms of the answer as given verbatim, in its several doubtful parts, in the course of the judgment.] The objection to a composition real being presumed from usage, is founded on the maxim *nullum tempus occurrit ecclesie*.

The plaintiff, as rector of Langley (Derby), prayed by this bill a general account of tithes.

The defendants pleaded, that before the reign of Elizabeth certain closes of land called the Snapes (or Little Snapes), containing about 32 acres, and a horse gate or horse-grass, or the privilege of keeping and depasturing a horse throughout the year on another parcel of land in the said parish, called the Park, were by the then owners thereof duly conveyed to the then rector, in full satisfaction of all tithes. And the answer also stated, that a former occupier of the piece of land called the Park, used in his lifetime to pay to the plaintiff's predecessors the yearly sum of 3l. 6s. 8d. in lieu of, or as a rent or compensation for, the said gate [609] or horse grass. The defendants

admitted that they had not in their possession, custody, or power, any deed, &c. whereby the said conveyance had been effected, or any extract therefrom, alleging that many ancient documents, &c. which ought to be in the cathedral church of Litchfield, had been destroyed in the civil wars : but that they nevertheless hoped to be able to prove the existence of such a deed. They then adverted to certain terriers, from some of which they stated it would appear, that the said closes and horse-gate had been accepted by the plaintiff's predecessors in lieu of tithes : and from others, that the defendants lands were exempted from the payment of tithes, and charged non-payment of tithes in kind or sub modo from time, &c.

This case had been much argued, and underwent very considerable discussion during several days : but the judgment of the Court is so fully given, and all the grounds and authorities of their decision, as well as the facts, the statements in the pleadings, the defence to the bill, with the proofs, and the objections to the defence, that on a question so often before the Court, it has been thought sufficient for all the purposes of the Report to give the judgment alone.

Dauncey, and Wetherell, were of counsel for the plaintiff.

Martin, Clarke, and Dowdeswell, for the defendants.

[610] Such of the barons as were now present * delivered their opinions seriatim.

WOOD, Baron. The case of *Ward and Shepherd* now stands for judgment. And I am sorry to say, that in this, as in most others involving the same point, I am compelled to differ from the rest of the Court : and that arises from my notion of the principle of law on which I judge this sort of case, differing most materially from those formed by the rest of the Court, and on which their judgment proceeds.

The principle on which I go in all these cases is this :—That where for a length of time, as far back as living memory goes, there has been a modus, or an ancient composition paid in lieu of tithes, it is to be presumed that it had a legal origin.—Upon this principle Courts of law proceed, and I myself see no good reason why Courts of equity, when they are deciding on a legal question, should not adopt the same rules : they are rules, I am sure, founded on public convenience, and if adopted and adhered to, would prevent a vast deal of litigation in causes of this description.

Another rule is this : that where it appears upon the whole of an answer, and from the evidence to support that answer, that there is a good defence : [611] although the answer may not be drawn so precisely and formally, or technically, as it ought to be, that defence ought to prevail : these are the two principles on which I judge this case.

I will now state what it is. The bill was filed by the plaintiff, as rector of the parish of Langley, or Church Langley, in the county of Derby, against four persons, to recover the tithes of a certain district in that parish, called Meynell Langley, consisting of about 1000 acres of land. His title is, that he is rector, and therefore he has nothing more to do than to prove that he is rector. The defendants, by way of defence, deny that he is entitled to tithes in kind, because, they say, “there has been a composition real, and they doubt not to prove, that long before the reign of her Majesty Queen Elizabeth, a certain close or parcel of land, now divided into four parts or closes, commonly called or known by the name of Snapes, lying within the district or division of the parish called Meynell Langley, and containing by estimation 32 acres, and a horse-gate or horse grass, or the privilege of keeping or depasturing a horse throughout or at all times of the year, in a parcel of land within the said district or division of the parish called the Park, was given or set out by the persons who were then seized of those premises, to the rector, in lieu of tithes : and that the close and horse were then duly conveyed to the then rector of the parish, in due form of law ; and that no tithes whatsoever, either great or small, have since been paid.” So that by this first [612] answer they set up a composition made before the reign of Queen Elizabeth.

In the second answer—for the bill is amended for some purpose or other, and there is a second answer put in by the defendant, on the bill having been so amended to interrogate them as to whether they had any composition deed in their custody, or not—They say, “that they have no such composition deed in their custody, but that

* The Chief Baron was absent, from ill health, and Mr. Baron Richards had proceeded on the circuit. It appears, however, from what fell from Mr. Baron Graham in delivering his judgment, that they concurred with him.

they have been informed, and believe it to be true, that a great number of ancient documents, deeds, writings, and other instruments relating to the possessions of the churches within the diocese of Litchfield and Coventry, were destroyed during the time of the civil wars, and that many evidences and writings which ought to be found in that cathedral have been lost or destroyed ;"—and then they go on to state farther, what they had not done in the former answer. "That it appears from a terrier of the parish of Langley, exhibited in the year 1612, which appears to have been signed by Thomas White, the rector of the parish, and by the churchwardens of the parish, and divers other persons, that the close called the Little Snapes, and the horse-gate in the parish, had been accepted by the predecessors of the said Thomas White in lieu and recompense of Meynell Langley tithes, and that the same had been continued time out of mind by way of composition." Now some stress may be laid upon the words "by way of composition ;" but "by way of composition," certainly may mean a modus, for there is no differ-[613]—ence that I know of between a composition real, and a modus, except that one is made within the time of legal memory, and that the other is before the time of legal memory ; and they may both be called compositions. Then they state, that it appears by that terrier that such composition had been continued time out of mind : and that must mean from time immemorial : for that is the legal sense and meaning of the words time out of mind.

Then they go on to say, that "it appears from divers other terriers, and particularly by a terrier exhibited of the year 1701, that the whole of the lands in Meynell Langley were exempted from the payment of tithes, and, they believe, that no tithes in kind, arising out of this division, have ever been paid to, or received by, the complainant or any of his predecessors, rectors of the parish of Church Langley, from the time whereof the memory of man is not to the contrary :"—now those are strict legal terms of prescription of custom :—"and that all the lands within the said district are, and from the time aforesaid, have been, by prescription or otherwise, legally exempted or discharged from the payment of all manner of tithes :—but although it alleges "or otherwise," yet it alleges, that "from the time whereof the memory of man is not to the contrary, it has been exempted," and that therefore does not vary it :—"and that the rectors of the same parish for the time being have, from the time aforesaid," (that is, from time immemorial,) "held and enjoyed the said close or closes called the Little Snapes, and the said horse-gate, in lieu [614] and full satisfaction of all tithes, both great and small, yearly arising within that district." So that, thus far, it appears most undoubtedly to be a defence founded upon immemoriality. Then there are some words afterwards which may perhaps require to be explained : because, they say, that they have not, owing, as they believe, to the ancient documents, evidences, and writings formerly in the registry of the Cathedral Church of Litchfield having been lost or destroyed as aforesaid, been as yet able to find that deed of composition.

Upon this bill and answers, depositions have been taken, and by those depositions this case which is insisted on, on the part of the defendants, has been fully proved. It has been proved that in the year 1612 there was this terrier, which was signed by the rector of that day, and was written three or four years after the reign of Queen Elizabeth ; and they speak of it as of time out of mind, so that there is no doubt that it existed before that time : and if we carry it back to 40 years, or some distant period, so as to give it an origin before that time, why may we not go as far back as the time of Richard I. ? They have also proved other terriers, which mention the same thing. There is some little variation as to the quantity of the Snapes, but that cannot make any difference, because they are defined by name. They have also proved by their evidence that this horse grass is rented by the owner of the park, who pays a sum of money for it. So that a case of an immemorial modus or composition has been clearly made out in evidence, as it is asserted by the answers.

[615] Now, there are two questions arising upon this : First, whether this is a composition real ; and on that, I think, there can be no doubt ; but, however, it is said that a composition real cannot be proved unless you produce the deed, or give evidence of its existence. With respect to that point, I have already given my opinion very fully in the case of *Bennett v. Neale* (Wightw. 324), and therefore it will be unnecessary to repeat it. I still continue of the same opinion ; and insist that on all principles of law and justice a composition deed ought to be presumed from length of usage and enjoyment ; but I will not go into that, because it is sufficient to refer to Mr. Wightwick's book, where I find my opinion given very fully.

The earliest case is that of *Robinson v. Appleton* (Gw. 1101), which was somebody's manuscript case, (whose I cannot tell,) but it is quite loose, and seems to have arisen without any argument. It has, however, been implicitly followed ever since. But before that time, I find a case in which Lord Hardwicke sent a composition real to be tried when there was no evidence of any deed, or any thing like it, as it appears to me. I allude to the case of *The Archbishop of York v. Hunter and Stapleton*, which is to be found in 2 Atkins, 136, and 2 Gwilym, 772. That was a bill filed by the Archbishop of York against Dr. Hayter and Sir Miles Stapleton for an account of tithes, and to establish the custom of setting out the corn in stooks or stacks. Several questions arose in the course of the cause: one of those questions was upon a right of exemption claimed of all the lands that had belonged to the [616] dissolved monastery of St. Mary, in the neighbourhood of York. Then there was another question as to the composition real for Main Meadow of about 200 acres, in which it was insisted that five acres, called Tithe Acres, were set apart in lieu of tithes for the rest. And as to that an issue was directed, though there appears to have been no deed of composition, or any thing of that sort produced in evidence in that case, to establish that real composition: and yet my Lord Hardwicke says,—The first issue must be as to the manner and method of tithing: the second issue, as to the exemption: and he directs a third issue, as to the real composition. Now, there was nothing in that case to establish that composition, but the evidence of usage, and no objection was taken on that ground. At that time of day it never occurred to that great judge, who was a judge both of law and equity, that usage would not be evidence of a real composition. Twenty years after came *Robinson v. Appleton*, which has been followed ever since; but I protest against that case altogether. That decision however is not one which we are particularly called on to consider upon this occasion. My position is, that upon this answer, and upon the evidence, a decree ought to be made in favour of the defendant, or that an issue ought to be directed to give him an opportunity of trying this immemorial composition: for I conceive that the second answer has put it on that footing. It was so considered by the counsel in argument, and evidence has been read to it: or otherwise, in reading that evidence, if it does not apply, we have lost a good deal of time, and why should we hear such evidence if it were a case wherein we ought [617] not to admit it? I however consider that it was right to admit the evidence, and for that purpose.

Now, in order to prove the position which I set out with,—that where it appears, upon the whole of a case, that there is a good defence, that defence ought to prevail, although it may not have been formally and technically put on the record,—I shall refer to some of the cases to be found in the books which warrant me in maintaining that in this case (though there may be something in the first answer which seems to confine the usage within the time of legal memory,) yet if the evidence is fairly set out, and that proves it to be an immemorial composition, an issue ought to go to try whether it is such an immemorial composition or not, if the rector chooses to try it.

Of the authorities I will mention the first, is the case of *Atkyns v. Lord Willoughby de Broke* (4 Gw. 1412). In that case, it was set up that there was an immemorial payment due and payable by the owners or occupiers of certain lands by way of modus or composition. It was contended by the counsel for the plaintiff that the modus was not set forth with sufficient certainty; for it was pleaded as a modus or composition, whereas the claim of exemption set up, being against common right, must be accurately defined: With respect to the first objection, the Chief Baron says, "To the modus set up in this case, several objections have been taken; first, it has been argued, that it is not laid with sufficient [618] certainty to found a decree, and if this were a bill to establish these moduses, that might be the case, but in an answer such strictness is not requisite, if it appears that there is a good defence, that is sufficient." So here, I say, it does not appear that there is a good defence, and therefore that is sufficient, just as much in this case as it was in the case of *Atkyns v. Lord Willoughby de Broke*.

Another case, in which I find the same doctrine, is *Strutt v. Baker* (4 Gw. 1430). In that case there was a bill filed to establish the rector's right to tithes, and for an account: the defence was a prescription *de non decimando* in a que estate, as to two-thirds possession by the lord of the manor, under an apparent title, by various conveyances, &c. stated by the answer, from 37 Henry VIII. of the lands, with tithes generally, or two-thirds specifically, with evidence of reputation and notice to the

plaintiff, who had purchased the advowson and was lessee of the tithes. So that that was pleaded as an exemption with respect to two-thirds of the tithes. Now it turned out upon the evidence that it was not an exemption; that so far from it, it was a proportion of two-thirds of the tithes that the defendant was entitled to; and see what the Court say upon that subject when the objection is taken. The Court states, "that the defence is very fairly to be collected from the answer. The person who drew it, if he knew what a plea was, did not mean to put in a plea of prescription against the demand of the [619] tithes. That plea, not only in substance but in the manner in which this is expressed, 'or by other lawful ways or means,' would be clearly bad. It is quite impossible it could have stood: he could not apprehend he was drawing a plea. But the answer has very fairly set out all the facts which constitute the defence, and put the plaintiffs in possession of all the case he is to meet, and it is no matter how it is argued in the answer."

Now apply that to the present case: do not the defendants in this case fairly set out all the facts which constitute the defence? And they give evidence to prove them. They produce the terrier of 1612, reciting this to be an immemorial composition: they state that there are terriers subsequent to that which recognize it also; they state that the horse grass has been occupied by the owner of the land, he paying a rent for it. All that is stated and proved. Then is there not a full and fair defence stated, so that the plaintiff cannot be surprised? The evidence fully establishes the case as stated, and when it is fully proved, what does it matter if it should be incorrectly stated in point of time of commencement? A defendant is not to be confined to time. You state your whole case, and put the plaintiff in possession of that case; how does it signify that it is ascribed to a wrong origin when he might have ascribed it to a better? You must undoubtedly put the plaintiff in possession of all the case he is to meet; but having done so, it is no matter how it is argued in the answer.

But in later days there has been another case, in [620] which I had the honour of giving my opinion, that is the case of *Clarke v. Porter* (Hil. T. 48 Geo. 3).

That was a bill filed by the vicar of Great Waltham, who claimed the small tithes: the defendant, Porter, was the occupier of a farm which belonged to the President and Governor of Guy's Hospital, in that parish. The defendants claimed to be exempt, on the ground that those lands had belonged to the dissolved priory of Leighs. That was the defence set up: but that turned out not to be the precise exemption: for it appeared, that in point of fact those lands had never been parcel of the possessions of Leighs priory, but had belonged to Littley chapel, a free chapel, given by the statute of Edw. VI. to the Crown, from whence the title was derived by the Hospital; and the Solicitor General, who was for the defendant in that case, said he was ready to admit that the answer was drawn on a mistaken view of the question; but taking the answer to have been drawn on a mistaken view of the question, that they were misled in supposing the lands to have belonged to Leighs priory: yet if they should appear to have been exempt as part of a free chapel, why (he asked) is the defendant to be deprived of the benefit of it? as whether it belonged to Leighs priory or not was perfectly immaterial, for they had an opportunity of negating that.

It was contended, on the other hand, that as the defendants had by their answer put their defence on a title which supposed the tithes to have been parcel of the possessions of the priory of Leighs, and which [621] was fully negated by the evidence, the Court ought to decree against the defendants. But the Court were of a contrary opinion. They said that they ought to look at the whole case, and see whether the plaintiff's title, as vicar, was made out; and they directed that the plaintiff might have an issue to try his title as vicar, if he pleased; which at first he declined, but afterwards he took an issue and failed on the trial.

Now these, in my mind, are strong authorities to shew that you ought not to look minutely and strictly to these pleadings, but to say whether there is in substance a good defence: and if upon the whole case, as it turns out before the Court, you see that although there be no existing proof of a deed of composition, there is still proof of immemorial non-payment, the party ought to have the benefit of it. Therefore, I am of opinion, that the defendants are entitled to an issue to try whether this is an immemorial composition or not*.

* Vide ante, vol. i. p. 236, *Prevost v. Bennett*; and the note, & *Bullen v. Mitchell*, vol. ii. 399. Et vide *Bennett v. Shiffington*, vol. iv. 143.

GRAHAM, Baron. My learned brother Wood has very truly stated, that in this case there is a difference of opinion among the judges: and undoubtedly I do not mean to say that this is not one of those cases which, amongst the several which we have before us, have more than all the rest justified the time which the Court have taken, to make up [622] their minds upon the subject; and I am very free to say, that in the opinion which I have formed upon the present occasion I have come to the conclusion which has determined my decision, with a considerable fluctuation of opinion in the course of my enquiries upon it: but upon the fullest consideration that I can give to the subject, it really does appear to me, that upon the present occasion the defence put upon this record cannot be sustained.

The bill has been stated, and the circumstances. It was filed for the tithes of a very large district of this parish of Church Langley, which is divided into two districts: and that is met by a claim of exemption from the payment of tithes by the defendant, as set forth in his answer. Now the short ground of my opinion is this, — that taking the original answer and the answer to the amended bill together, the defendant has substantially, and in strict language, put his defence upon the single ground of a composition real; and I think that, under the circumstances of this case, the Court might run the risk of doing very great injury to the party plaintiff in the present cause, if it were to give that defence any other shape; for that it is which forms the difficulty in this case,—whether the Court is to step in to aid the defendant upon the present occasion or not. Now I state, that, substantially, it appears to me, on reading these two answers, that the defendant rests—(and he probably had very fair ground to rest upon it from the persuasion, founded on the tradition in the parish)—upon an exemption under a composition within time of memory. It is impossible to construe [623] it otherwise, and I will not take up the time of the Court in canvassing the language of the answer. My learned brother Wood admits that in the first answer the defence is put on the ground of a composition real. No man can read it, and particularly that part where he says, that “long before the time of Elizabeth, &c.” without seeing that he speaks with a marked distinction between the period within the time of memory and the period antecedent; and when he talks of long before the time of queen Elizabeth, he means antecedent to the date of the 13th of Elizabeth: his allusion to that period marks his clear intention to stand on that ground. Then the defendant says that he is informed, and he verily believes, that at a period within time of memory a composition did take place; —that in consideration of a certain portion of land, at that time of day consisting of 16A. or thereabouts, and a horse-gate, the proprietors of lands in Meynell Langley were exempted from the payment of tithes,—thus calling it a composition in terms. This is the nature of his original defence: and notwithstanding the words of the terrier, which he rests on in his answer, he does not affect to misunderstand the expression of time out of mind as applicable to a time antecedent to the reign of Richard I.: he considered that terrier, when he says that it has been continued by composition time out of mind, as referring to a period only that would overreach the 13th Elizabeth.

The great question is, whether he has receded from that defence, and really and distinctly in [624] terms, as he is bound to do, abandoned that defence. There is one difficulty, that in that view we must understand him to say that he believes it was a composition real within time of legal memory; and that in his amended answer he believes it was before, —that is something of an objection; but taking this as it stands on the first defence, it introduces but a few words on the subject of composition real.

Our difference of opinion is such as would make it extremely unbecoming to argue the question of the composition real being supported or not supported, with hostility, or an adverse turn of mind: but my opinion rests not on the authority of *Robinson v. Appleton*, nor the conviction of every lawyer I have talked with only, but on plain sense: and notwithstanding that case which is alluded to, of Lord Hardwicke's, (the particular circumstances of which we do not know,) it may not unfairly be presumed that Lord Hardwicke, who had not been so conversant as other eminent persons with the practice in such cases, might have done what Lord Mansfield did,—misapply the doctrine of the acquiescence in tithes by length of time, in the case of the church, overlooking the plain distinction grounded on the maxim *nullum tempus occurrit ecclesiæ*. That is not only the acknowledged maxim now, but when it was suggested, and was the subject of consideration in the legislature, with a view to shorten the time with respect to the clergy, and prescribe some limit of time as applicable to them; I

remember an admirable speech being made by Mr. Skinner, afterwards Lord [625] Chief Baron, who impressed the House with the danger and impropriety of so doing ; and the danger and impropriety of doing it would undoubtedly be extremely great, because, if you were allowed to support a defence of composition real by parol evidence of usage, so as to change it into a modus, it is perfectly clear that no man in his senses would ever plead a modus : because, by pleading at once a composition real, according to my learned brother Wood, a defendant would have the advantage of non-usage, and he would thus get rid of the objection as to rankness on all occasions. Not only so, but we should make every modus a composition real, and thus expunge the doctrine of moduses from the books. But it does more, because so many years have elapsed since the 13th Elizabeth, we could not tell, from a non-payment of 200 years, whether the composition were before or since the time of Elizabeth, and we should be giving validity to alienations of church property on the ground of prescription : for the period of the 13th Elizabeth will be just so far remote as to permit a defendant to set up composition without those instruments which the law constantly requires to be given in evidence to support such a defence. You would presume it on usage of 100 years ; and in all the lesser possessions of the church, where poverty exists, and a frequent succession of incumbents takes place, these compositions would be set up on all occasions. Therefore, the distinction, I think, is wise and sound, and I shall never be induced to recede from that opinion which I have always held on these questions, and in which I am confirmed [626] on the present occasion by the high authority of the Lord Chief Baron, and my absent brother Richards.

Then it brings us to this consideration,—What is the real and true defence which this defendant has been advised to make ! I am sorry if there is a better, as if he could have said, I believe that the render of this equivalent has existed from time immemorial, that he has not done so ; for if he had said so, I should perhaps have conceived that probably the evidence might apply : but he has taken his own choice, and stated it to be a composition real, and we are to conclude from that, that he is governed by a tradition in the parish, and on that he accordingly founds the statement in his answer. It must be taken that the tenants and their landlords knew perfectly well, and had it handed down to them, that it was a composition made some time shortly before the reign of Queen Elizabeth, and they even profess to make a search, in the repositories for documents of this sort, trusting that they shall find them. This being the shape of the case, how does the amendment put it ! And now let us see what the defendant can fairly be understood to mean, and whether he does seriously mean to put his case on an immemorial modus ; because, if he does not mean to do it, it is an act of injustice in the Court to say, we will suggest a ground for you that you are not aware of ; because it would be sending the case to a jury with a prejudice. If, indeed, they had distinctly done so in the amended answer, I will admit that perhaps the circumstances of this [627] case might have justified their expecting that some further enquiry should be instituted. But let us see what the language of this answer so amended is, and whether in a court of justice we are bound to put a strained and forced sense upon it, and one which he has not chosen to do himself. Now the amended bill, I presume, from the nature of the answer, had only interrogated more particularly as to this supposed instrument which had been alleged to have been placed in the depositories of Litchfield, and had been lost in the general ruin and devastation of papers in the time of the civil troubles in this country. The plaintiffs wished to know more of the nature and particulars of that instrument, which was professed to be forthcoming ; and the answer to that is, that the defendant again repeats the former part of his case with respect to the Snapes, and asserts that a composition deed once existed and is now lost ; and it may be that he thought so ; but so little does he give up the idea of its not existing at this time, that he says, that though it is not in his power to produce it, he believes the plaintiff has possession of it, for he says it is in the power or possession of the complainant. The words of the answer are : “and these defendants further say they have been informed, and believe it to be true, that a great number of ancient documents — [for what purpose is this introduced, unless it is to shew a ground why the Court should step in to aid them under the loss of an instrument which they cannot produce !] — that a great number of ancient documents, deeds, writings, &c. &c. in [628] struments relating to the possessions of the churches within the diocese of Litchfield and Coventry, were destroyed during the time of the civil wars, and that many evidences and writings

which were previously to be found in the registry of the cathedral church of Litchfield have been lost or destroyed: but these defendants"—[now observe, they do not set out by saying that they believe that from time immemorial this composition had existed; but they give us merely the contents of the terrier of 1612]—but these defendants say, that it appears from a terrier of the said parish of Langley, in the year 1612, and which appears to have been signed by Thomas White, the rector of the said parish, and by the churchwardens of the said parish, and divers other persons, that the said close called the Little Snapes, and the horse-gate in the Park, had been accepted by the predecessors of the said Thomas White, in lieu and recompence of Meynell Langley tithes, and that the same had been continued time out of mind by way of composition."—They give you merely what this terrier consists of: there is no allegation, and no assertion on the part of the defendant that he believes this was continued by way of composition from time whereof the memory of man runneth not to the contrary; but he says only that this terrier was signed by Thomas White, the rector of the said parish, and by the churchwardens of the said parish and divers other persons: by which it appears that the Little Snapes [629] and the horse-gate were accepted in lieu of tithes. Now we come to that which is to be construed into an assertion, that this has been an immemorial composition:—"And these defendants say, they verily believe that no tithes in kind yearly arising within the district or division of the parish called Meynell Langley, have ever been paid to or received by the complainant, or by any of his predecessors, rectors of the said parish of Church Langley, from time whereof the memory of man is not to the contrary." Now I admit that that is an allegation that he believes no tithes in kind have been paid from the time whereof the memory of man is not to the contrary; but that is not what he is called on to assert, because what he says is consistent with the terrier,—that there have been from time immemorial, compositions,—and he may therefore say very truly that he believes no tithes were ever paid: and I believe that that is the history of the parish, and I cannot say but that with respect to the terrier there is something like evidence that these compositions were continued from time to time: but that they must be shewn to have been invariable to give them the effect of a modus.

In the year 1612, the number of acres of the Snapes was sixteen—(I do not rest on it as a strong circumstance, but it marks that there was in fact a variation in the arrangements of the composition from time to time so as to defeat its operation as a modus,)—and in 1682 they turn out to be thirty-two: now that goes in a great measure to shew the [630] uncertainty of this kind of language, and that it does not come to the point,—that he believes this has been a payment from the time whereof the memory of man is not to the contrary: for there might have been nevertheless, and perhaps there had been, compositions from the earliest time. But the defendant says that all the lands are, and from the time aforesaid have been, by prescription or otherwise, legally exempted or discharged from the payment of all manner of tithes: what are we to understand by that case? I understand him not to have abandoned his resort to this composition real, which he has not yet found: there is therefore no allegation that he believes that they were, from time immemorial, exempt by prescription as the law of moduses requires: but he means to annex that composition pleaded in the first answer, and which he does not abandon, to the defence set up in the second answer. But at the next period he says, he does not doubt that he shall be able to prove this composition. Now we must expect a distinct allegation in these cases, and I would ask a plain question,—Could this man, at the time when he concluded his amended answer with a profession of an expectation to find this instrument, expect to be told, you have put your defence on a totally different ground? You have said it was an immemorial exemption, and therefore you are defeating your own claim, because you allege it at the same time to be a composition of the 1st or 2d of Elizabeth. It is going a great deal too far to say that that is the ground [631] of the defence he makes, and it is not to be permitted him so to shift his ground. This is not one of those instances where a man has mistaken his case from the beginning. Where we see, upon the proper documents, that a man has really mistaken his ground of exemption, the Court will, in aid of ignorance or mistake, substitute one defence for another; but the Court will not suffer a man to put two defences, I will not say diametrically opposite, but at least very different, and certainly quite inconsistent, on the same record, to take his chance of the alternative,—that if the Court should be of opinion that he has not a composition, he may still call it a modus. That, according to my

idea, ought never to be admitted. If one only puts the case in this way : Suppose the defendant had filed a bill and prayed for the establishment of this payment, or rather this commutation of the Snapes, and he had prayed it might be established as a composition real, or as a modus, I presume that would not be sustained. I am pretty clear, and I say it with some boldness, but subject to correction of higher authority, that if a man was to declare on the presumption of such a right, it would not do to say, I was exempt before the time of Queen Elizabeth ; or, I am entitled by immemorial usage ; that would be a demurrable declaration. But the principal ground is substantially this, he has put the case on the footing of a composition real alone ; if, therefore, we are of opinion that there are not those traces to establish this composition real, the bill in the present case, without prejudice to another case now stand-[632]-ing for judgment, must be maintained. The answer is double, manifold, and uncertain. It is not filed upon the only ground it could succeed upon. Therefore I think there must be a decree for the tithes of such titheable matters (I need not go into a detail of them) as are admitted to have been in the possession of the defendants, and in that opinion I have the concurrence of my absent brothers.

Decree for the plaintiff (without costs).

End of the Sittings after Hilary Term.

REPORTS of CASES ARGUED and DETERMINED
in the COURT of EXCHEQUER, at Law and in
Equity, and in the EXCHEQUER CHAMBER,
in Equity and in Error, from Easter Term,
57 GEO. III. to the Sittings after Trinity Term,
57 GEO. III., both inclusive. Vol. IV. By
GEORGE PRICE, Esq., of the Middle Temple,
Barrister-at-Law. London, 1819.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER,
AND EXCHEQUER CHAMBER, EASTER TERM, 57 GEORGE III.

MEMORANDA.

In the preceding vacation, the Right Hon. Sir Alexander Thomson, *knt.* late Lord Chief Baron of this Court, died at Bath :

Sir Richard Richards, *knt.* one of the Barons of the Court, having been appointed to succeed him, took his seat, as Lord Chief Baron, on the first day of term.

In the early part of the term, Sir William Garrow, *knt.* resigned the office of His Majesty's Attorney General : and, having been called to the [2] degree of the Coif, was appointed one of the Puisne Barons of this Court, supplying the vacancy caused by the promotion of Sir Richard Richards. His rings bore the device of "*Fas & Jura.*"

On the promotion of Sir William Garrow, Sir Samuel Shepherd, *knt.* late Solicitor General, was appointed to succeed him as His Majesty's Attorney General ;

And the office of Solicitor General was supplied by the appointment of Robert Gifford, *esq.* towards the end of the term, who was in consequence some time afterwards knighted.

[5] *HOMAN AND ANOTHER v. MOORE AND WIFE, MILLER, MALING, HUNTER, AND GRANT.* Friday, 25th April 1817.—A lessee proceeded against by ejectment, and who has received notice from a claimant disputing his landlord's title, not to pay him any more rent ; and has been threatened with a distress by his landlord if he does not :—cannot sustain an injunction in Equity to restrain either the ejectment or the distress ; for he is not permitted by such means to bring his landlord's title into dispute.

Martin, and Wakefield, shewed cause on the merits, against the order nisi for dissolving the injunction which had been obtained in this case, to restrain the defendants Maling and Grant from proceeding in actions of ejectment commenced against the plaintiffs ;—and defendants Moore and Wife and Miller, from distraining for rent, until a dispute as to the title of the plaintiffs' lessor, should be decided.

The plaintiffs' bill stated, in substance,—that in the year 1805 certain persons, from whom the defendants Moore and Wife, and Miller, derived title, fraudulently pretending to be seised in fee of the premises, let them to plaintiffs for a term of twenty-one years ;—that in July 1814 they received a notice from the defendants Maling, and Hunter (since dead) and Grant, trustees of Maling, claiming title to the

premises, addressed to them as the tenants in possession, requiring them to give up the possession at the end of the year, and in the mean time not to pay any rent to any other person; that Moore and Miller had refused to indemnify them against the payment of rent to them, and threatened to distrain for arrears; and that the defendants Hunter and Grant had commenced actions of ejectment to recover the possession: and therefore plaintiffs prayed, &c.

[6] The answer of Maling and Grant stated, that in September 1707 a former proprietor of the premises demised them for a term of ninety-nine years to Richard Frankwell, and that defendants Moore, Wife, and Miller, got into possession of the said premises under the said Frankwell, before the year 1806, when the said term expired, and still continued in such possession; that plaintiff Maling became seised of a certain share in the said premises: and denied that Moore and Wife and Miller had any right or title to the said premises, except through the said Frankwell, and by holding over after the expiration of the said term: believing it to be true that a fraud had been practised on the plaintiffs.

The answer of Moore and Wife and Miller denied fraud; and alleged, that complainants well knew their title to and interest in the premises, at the time when the lease was made; and denied altogether the title of Maling and Grant, and the right of the former to convey to the latter, claiming for themselves an absolute interest in the said premises from long and uninterrupted possession of themselves and those under whom they claimed; and admitted their intention to distrain.

Under these circumstances, it was submitted as cause, that the right of the defendants Moore and Wife, and Miller, had ceased, and therefore the plaintiffs were entitled to pray that the injunction as to payment of the rents, might be continued, till [7] the title had been tried at law by the result of the ejectments pending.

[Richards, Chief Baron. On what equity? They are your landlords.]

It is shewn that they have ceased to be landlords, for the term has expired; and that a gross fraud was practised by those under whom they derive title, in letting the premises for a term beyond their own right of possession.

RICHARDS, Chief Baron. Still they are the plaintiffs' landlords; and the tenants cannot be relieved in this way, even if they have demised to them premises which they had no right to let. They cannot so bring their landlords' title into dispute.

Dauncey, and Roots, contra.

Per Curiam. Injunction dissolved.

[8] HODDER v. WATTS AND OTHERS. Saturday, 26th April 1817.—Plea of account stated and settled, to a bill for an account, must be supported by averments shewing an actual (though not final) settlement, as from security being given for the balance, and that all vouchers have been delivered up.—Nor is it sufficient that the last fact is stated in a schedule of the statement of the account referred to by the answer, without a positive averment of it in the plea.

To this bill, for an account to be taken of all monies, bills, &c. and of all dealings between the parties, and, on settlement thereof, for delivering up of all bills of exchange, notes, &c. of the plaintiff in the hands of the defendants, &c. and for an injunction of all actions at law in the mean time, stating, that no fair or correct account, or any account whatsoever, with proper rests or balances, had been delivered, and that a considerable balance was, in fact, due to plaintiff:—

The defendants pleaded in bar,—as to such part as sought the account of any monies, bills, notes, and other securities and effects, received by defendants previous to the 17th May 1815, in the way of their trade or dealings as bankers, from complainant, and of the manner in which they had been disposed of:—That on that day they made up, stated, and settled an account in writing of all dealings, &c. previous thereto, whereby it appeared that there was then a balance of 655*l.* due from complainant to defendants:—and that the said complainant, after examining (together with his solicitor) the said stated account, and every particular thereof, and all the books, vouchers, and accounts of the said banking house or firm relating thereto, so far as he or his attorney thought proper, did approve and allow of the said account;—and that the said account was [9] stated and settled as in a schedule annexed, which, &c.:—and that the account was a true and just one, according to their knowledge and belief: all which matters and things touching the said stated account, and

the approval and allowance of the same by complainant, defendant did aver to be true, and were ready and willing to prove, &c. and therefore pleaded such stated account in bar, &c. And (not waiving, &c.) as to so much of the bill as sought an account or discovery of any dealings, &c. before the 25th August 1810, that defendants made up, stated, and settled an account in writing of all dealings, &c. previous, &c. whereby it appeared that there was a balance of 419l. 19s. 9d. in favour of defendants, which was, after examination by complainant, approved, allowed, and subscribed by him: and that he gave the defendants, as a security for the balance thereby appearing to be due, his promissory note for the same, dated 25th August 1810, (referring to schedule for the account); at the foot of which was this memorandum:—"1810, Aug. 25. Settled the above account, (errors excepted,) when all deeds, papers and vouchers were delivered by Messrs. Watts to Mr. Hodder." (Signed by Watts, Hodder, and Watts, junior.) Averred it to be a true and just account, according to the knowledge and belief of the defendant, and that all matters and things touching said account, and the approval and allowance thereof, were true, as he was ready to prove: therefore, &c. judgment, &c.

Wingfield, and Tinney, in support of the plea, [10] submitted, that it was a complete bar to the plaintiff's bill, and contained every necessary averment to meet the general charges made. And they cited the case of *Drew v. Power* (1 Sch. and Lef. Rep 192), as an authority that the Court would not open a settled account, where a security had been taken on the foot of it.

Martin, and Williams, contra, contended that the pleas were bad, because they did not shew that there had been a settlement of the accounts by distinct and positive averments, but left it to be collected from the other averments by inference and intendment;—that it did not appear, by the first plea, that the vouchers had been delivered up, or that security had been given for the balance. The second, which was a little more formal, stated a note being given, and had referred to the schedule, where it was stated that all vouchers had been delivered; but still there was no positive averment in the pleas of that fact, as was indispensable. And, admitting that the account need not be shewn to be final, yet something like an actual settlement of it should be shewn, and averred in terms.

The Court ordered both pleas to stand as a part of the answer, with liberty for the plaintiff to except.

Pleas disallowed.

[11] REX (IN AID OF HORN) v. SCOTT AND ANOTHER, Assignees of Watts. Saturday, 26th April 1817.—It is not matter of conclusion to the country, that the proceedings which have been had are not conformable to or authorized by the usage and practice of the Court: for evidence of such usage is not admissible on that issue.

Carr now moved in arrest of judgment, or that a new trial might be granted in this case, which had been tried before the Lord Chief Baron at the last sittings.

The defendants having cravedoyer of the Inquisition, &c. had pleaded to the Extent which had been issued,—that Watts at the time of the extent was a trader within, &c.;—that he was duly declared a bankrupt on the 9th of January;—that an assignment was executed of all his estate and effects to the defendants; that the prosecutor of the extent being so indebted to his Majesty, as in the said inquisition on the said commission is mentioned, did therefore, to wit, on the 7th December, &c. in order to oppress the said David (the bankrupt,) and to obtain an undue preference over the said other creditors of the said bankrupt, and to deprive them of the payment of their just debts, fraudulently, and without the consent of his said Majesty's Attorney General, procure the said commission to issue, for the purpose of placing their said debt to his said Majesty on record, and did then and there fraudulently, and without such consent, cause the said inquisition to be taken on the said commission: and did then and there fraudulently, and without consent as aforesaid, procure the said extent to [12] issue against them, (the prosecutors,) and the said inquisition to be taken thereon, and the said debt, so due from the said bankrupt and Sarah Rippon, as in the said writ of extent against them mentioned, to be seized into his said Majesty's hands: and did then and there fraudulently, and without such consent as aforesaid, cause the said writ of extent to issue against him the said bankrupt, and

Sarah Rippon, and the said hull or hold of the said ship or vessel to be taken and seized under the said last mentioned writ of extent, —*parati sunt verificare*, — wherefore they prayed judgment if, &c. Replication, *protestando*, &c. &c. Yet the said Attorney General, on behalf of his said Majesty, for replication in this behalf, says, that the said commission, inquisition, extent, and proceedings thereon, were severally procured, had and taken by the said prosecutor, according to the usage, course and practice of his said Majesty's Court of Exchequer; and the said last-mentioned proceedings were issued, had and taken under the authority of the same Court, and of the Barons there: and at the several times of issuing, having and taking of such proceedings, the said prosecutor was so as aforesaid indebted to his said Majesty; and the said David and Sarah were, at the several times aforesaid, indebted to the said prosecutor, &c. &c. (and finally traversing all the other allegations in the plea.) Rejoinder, traversing that the said commission, inquisition, extent, and proceedings thereon, were procured, had and taken according to the usage, course and practice of the said Court, in manner and form, &c. —concluding to the country. —*Similiter*.

[13] On the trial, the Lord Chief Baron refused to receive evidence of the irregularity of the proceeding, and of the usual and necessary course being, that the consent of the Attorney General should be obtained to authorize and sanction it: ruling, that that was not a question for the jury but the Court; and a verdict was given against the defendant.

On making the present motion, it was stated that the defendant was prepared to shew the origin of the practice of issuing extents without the consent of the Attorney General; and that it had never been done till within the last twenty-five years. And the question on the record was whether, by the usage of the Court, the consent of the Attorney General was necessary to found the proceeding.

But the Court were of opinion, that a question of regularity of practice was not a matter to be put in issue on the record. As well (observed Mr. Baron Wood) might a defendant, in an action on a judgment, plead that that judgment had been irregularly obtained. The only mode by which such a question can be brought on, is by special motion.

Rule refused.

[14] ADAMS v. EVANS, Clerk. Friday, 25th April 1817.—Where an occupier of lands is plaintiff in an issue directed by this Court to try a *modus*: and proves on the trial that the defendant (the vicar) and his predecessors have not received tithe of hay within a certain township, either in kind or *sub modo*, within living memory: and that the vicar and his predecessors have been in possession of a piece of meadow within the same township, said in some of the terriers produced, to have been given in lieu of tithe hay: and no evidence is adduced to rebut such a case on the part of the defendant: — if the jury find for the defendant, under the direction of the Judge, “that they must be satisfied from the evidence that the defendant and his predecessors have held the meadow in lieu of tithes from before the commencement of legal memory,” — it is not ground for a new trial.

This was an issue, directed by the Court of Exchequer to try a *modus*, which was the defence set up by the plaintiff (at law) to a bill filed by the defendant, (who was vicar of Ruyton in Shropshire,) — for the tithes of hay arising from lands in the township of Wickey, in the vicarage and parish of Ruyton. The answer admitted the vicar's title to all tithes except hay, in Wickey: and as to that, pleading (the *modus*,) for that from time whereof, &c. the vicar of the said vicarage and parish church has held, &c. a certain piece of land, containing about two acres, within the said township of Wickey, and has taken and enjoyed the profits thereof in lieu of and as a *modus* for all the tithe of hay and clover-grass arising, &c. within the said township of Wickey. On the hearing of the cause in the Court of Equity, certain terriers, which had been admitted, were read, dated in 1612, 1693, 1698, 1701: and several others more recent, from 1726 to 1805. The first terrier (of 1612) made no mention of any substitution in lieu of tithes: but one of the items of the vicar's rights noticed therein, was one meadow in the township of Wykie in the said parish, containing half an acre, lying, &c. The next terrier (of 1693) mentioned, [15] amongst many other things, one meadow at Wickey given in lieu of tithe hay. So also that of 1698. That of 1701 called it one inclosed piece, given in lieu of tithe hay. That of 1718 said

nothing of any close or meadow, but enumerated, amongst the other sources of the vicar's profits, every tenth cock of hay, when made; the like of clover. The terrier of 1726, which contained the fullest description of the vicarial rights, contained the following item:—"There belongeth to the vicar all tithe of hay and clover throughout the whole parish, except the township of Wikey, who refuse to pay it in kind, and is therefore now contested by law." In the next terrier produced, (of 1733,) which was also full and particular, was this item:—"There belongeth to the vicar all tithe hay and clover throughout the whole parish, except the township of Wikey." And all the subsequent terriers, amounting to a considerable number, contained the same exception in favour of Wickey.

These terriers having been read, the Court inquired what answer the vicar's counsel could give to them: when, after reading the answers of two witnesses (Crisp and Ireland) to the second and third interrogatories, in which they deposed, that the vicar was reputed to be entitled to tithes of hay within the said vicarage, the Court said, that they could not make a decree in favour of the vicar on such evidence, in opposition to the terriers, but must dismiss the bill with costs: and the counsel for the vicar then claimed a right to have an issue, which was ordered.

[16] Dauncey, and Benyon, for the plaintiff, in equity.

Fonblanque, and Courtenay, for the defendant.

On the trial of the issue, in addition to the above terriers, it was proved that no tithe of hay had ever been paid in kind, in Wickey, within living memory, and that some old people, deceased, had been heard to say, that the meadow in Wykie had been given to the vicar in lieu of it. But the learned Judge (Abbott) before whom the cause was tried at Shrewsbury, at the last assizes, directed the Jury,—that proof of no tithe having ever been rendered in kind within living memory, was not alone sufficient to sustain the plaintiff's case:—that further proof was necessary to entitle him to succeed on this issue, which was that the alleged compensation had been enjoyed immemorially: which word did not mean beyond what time memory could carry it, but beyond legal memory, which was a period of 600 years; and that as to the terriers it was to be remarked, that the first, and oldest, did not speak of the meadow having been given in lieu of tithe of hay, but merely enumerated it amongst the vicar's possessions: and his Lordship observed, that it was impossible that that terrier should have been silent on that fact if it were so, and he added, that the word used in the terriers was "given," which was also matter of observation, as implying something modern.

On that direction the Jury found a verdict for the vicar, (the defendant at law).

[17] A rule had been obtained, to shew cause why there should not be a new trial granted, on the ground of a misdirection, by which the jury had been led, at least, to consider that the plaintiff ought to have carried his proof beyond the common *primâ facie* case; which, it was submitted, it was not incumbent on him to do.

Richards, Baron, having read the report of the learned Judge; wherein his Lordship explained, that the cause being tried by a common Jury, his object was merely to guard them from the vulgar error, that immemoriality meant merely time beyond living memory, whereas it in fact meant legal memory, which went as far back as the reign of Richard II. and that they must be satisfied that the defendant and his predecessors had enjoyed the meadow for so long a time, or they must find a verdict for him,

Dauncey, and Taunton, W. E. shewed cause: submitting, that the onus lay entirely on the plaintiff at law: and that as he had failed in satisfying the Jury, under the direction of the Judge, who had not expressed disapprobation, the verdict ought to stand.

Fonblanque, Jervis, Courtenay, and Puller, in support of the rule, pressed the arguments used on the former occasion, and contended, that the direction as to the meaning of legal memory, ought to have been carried further, and so explained, as that the Jury might not have supposed that the plaintiff was actually to prove the defendant's predecessors to have been in possession 500 years ago. And [18] they also submitted that too much stress was laid on the language of the terriers, as importing that the vicar had become possessed of the meadow within legal memory.

RICHARDS, Chief Baron. This is an application of rather a singular nature. At first the motion was put on the ground of a mis-direction; now it is admitted that the law was correctly stated, but it is contended that the direction was not sufficiently

explained, whereby the Jury were misled (His Lordship commented on the terms of the direction with approbation, and then went through all the terriers, observing, that the remark made on the first terrier was obvious, and that it went far to destroy the presumption of a modus.) On the whole, (continued his Lordship,) I think the Jury would have been much more misled if they had found a verdict, on this evidence, for the plaintiff: for as to the non-payment of the tithes alone, that would be of no weight when the proof of the equivalent fails.

GRAHAM, Baron. This was originally a proper question for a Jury, and I think that they have not drawn a false conclusion. This motion was not made on the ground of its being a verdict against evidence; and the direction of the learned Judge I think quite unexceptionable, in explaining to the Jury that the term immemorial signified beyond legal memory,—a more remote period than beyond living memory.

[19] WOOD, Baron, could not concur. (His Lordship stated the issue.) I admit that the burthen of proof lay on the plaintiff, that the substitution was immemorial. There is no plea or allegation that this was a composition, therefore we have nothing to do with that. I hold that there is no difference in the mode of proof of a modus, or any other prescription pleaded. Now what was the proof in this case? It is not pretended that tithes have ever been paid for this township within the memory of man; and had this been the case of ecclesiastical persons, who alone may prescribe in non decimando, this would undoubtedly have been sufficient, unless rebutted by other evidence.

Then this meadow is stated to have been given to the vicar as an equivalent; and what proof is there that it has not been enjoyed from time immemorial? That it has been enjoyed from 1612, there can be no doubt. The terrier does not say, “in lieu of tithes,” it is true; but if it had not been given in lieu of tithe of hay, is it probable that the clergy would at that time have abandoned their rights? In 1701, however, there is a terrier which expresses that it was given in lieu of tithe hay, and surely that, at least, is good evidence. As to the word given, on which a stress has been laid, there could have been no other used. The word given does not necessarily import any thing modern; and the subsequent terriers are declaratory of the foundation of the gift. The dispute mentioned in the terrier of 1726, could only be as to whether the [20] land was held in lieu of tithes or not; and of course the origin of the gift might have been ascertained, if it were even then a recent gift, but the result of that suit was, that the vicar gave it up. All the other terriers have the same declaration, of the meadow being held in lieu of tithes from thence down to the time of filing this bill.

The nature of a prescription (and so it is described by Lord Coke) is this:—By proving usage as far back as living memory can reach, the opposite party is called on to rebut the presumption arising from it by contradictory evidence: that is what we call establishing a *prima facie* case; but it is nevertheless actual proof, as far as it goes, and must be answered. I should be sorry to say any thing in disapprobation of the learned Judge's direction, whose abilities we all well know: but he must have been misunderstood by the Jury, who must have thought that positive proof was necessary, to shew that the origin of the gift was 600 years old, and it is that which should have been explained to them.

As to reputation, that is not essential or necessary to support a prescription. Reputation is certainly a strong circumstance of confirmation, but a prescription may be well proved without. But in fact there is evidence of reputation here: for some of the witnesses say, that they have heard from old people that the meadow was held in lieu of tithes. If they had said more it would have been suspicious. There was therefore more evidence than is neces[21]sary, to prove that this was not a modern gift: and I am of opinion, that the case ought to undergo another investigation, but which of course will not now be ordered.

Rule discharged.

[23] 29th April.

The Lord Chief Baron sat apart from the rest of the Court in the Exchequer Chamber this day, for the first time, under the late Act of Parliament.

PHELIPS, ESQ. v. BARRETT. (Demurrer.) Friday, 2d May 1817.—A sheriff is not authorized by the 23d H. VI. cap. 10, to let out of custody on bail, a defendant taken under an attachment, issuing out of Courts of law for non-payment of costs, because such a process is in the nature of, and in effect, an execution.—Plea to an action of debt, on such a bail-bond,—that it was given to the sheriff under such circumstances, held good on general demurrer.

[Commented on, *Lewis v. Morland*, 1818, 2 B. & Ald. 63.]

The plaintiff declared in debt on bond. Plea, (setting out the bond on Oyer, which was in fact a bail-bond given by one Thomas Dunster, and three persons his sureties, (of whom the defendant was one,) to the plaintiff as sheriff of the county of Somerset, in the sum of 47l. 4s. (dated 15 May 1815,) conditioned for the appearance of the principal (Dunster) before the Barons, &c. on the morrow, &c. to answer his Majesty concerning divers trespasses, contempts, and offences by him lately done and committed,)—onerari non, because before the sealing, &c. a certain writ of our said Lord the King, called an attachment, was sued and prosecuted out of the said Court before the Barons, &c. directed to the sheriff of Somersetshire, by which he was commanded to attach the said Dunster and John Doe, by their bodies, wheresoever, &c. and them safely keep, so that he might have them before the Barons, &c. on the morrow of the Holy Trinity then next coming, to answer our said Lord the King concerning divers trespasses, contempts, and [24] offences by them lately done and committed: and that the said sheriff should have then there that writ, which writ was endorsed as follows: “By rule of Court made the 12th day of April 1815, in a cause, *Blinman and Another* against *Dunster*, for non payment of 23l. 12s. with costs of attachment;” which said writ, so endorsed as aforesaid, being an attachment for a contempt for non-payment of the said costs endorsed on the said writ, was afterwards, &c. delivered to, &c. (the said sheriff;)—that the said Dunster was thereon arrested by the sheriff, and that he, by colour of his office, took bail for the appearance of the said Dunster at the return of the writ. To that plea there was a general demurrer and joinder.

[On the original action being commenced against Dunster, he paid money into Court, which the plaintiff took out; and having got his costs taxed, and a rule for payment served, issued the attachment for contempt on non-payment.]

Moore, in support of the demurrer, contended, that the bond which had been taken was valid on the construction of the statute 23 H. VI. c. 10;—that the defendant in the former action was in custody in consequence of an action personal (in the words of the statute) against him;—that by the writ of attachment a day was given him to appear and answer generally;—that an attachment was not an execution within the exception of the act, which was made in favour of liberty,—and that an action would lie against a sheriff for refusing bail in such a case. And he [25] cited the case of *Lawson v. Haddock* (2 Ventr. 237), where it was recognized as being the constant practice for sheriffs to take bail-bonds in such cases. In *Equity Cases abridged* (p. 351, pl. 3 & 4), it is said, that “if one be taken up on an attachment, either in process, or in execution after a decree, yet in both cases, on his appearing before the Register, he is to be discharged, and to answer the interrogatories at large, not in custody;” and in Pl. 4,—“So if the sheriff take one up on attachment in process, he is to give a bond of 40l. penalty to the sheriff to appear and answer: but for one taken up in execution after a decree, the sheriff may insist on security proportionable to his duty: but in both cases, on the Register’s certificate that the party has appeared, the sheriff is to deliver up the bond;” for which is cited there, *Danby v. Lawson*, Hil. 1700, and 1 Prec. in Chanc. 100. He cited also *Rex v. Dawes* (1 Id. Raym. 722), *Burton v. Low* (2 Salk. 608), *Lawson v. Haddock* (Style, 212, 234), an *Anonymous case* in *Atkyns* (2 Vent. 237), and *Rex v. Aglett* (vol. ii. p. 507), cited in *Tidd’s Practice* (Tidd. Pr. 220), whence (it is there said) it seems that the sheriff may take bail where the attachment is for non-payment of money;—and, finally, the more recent case of *Morris v. Hayward* (2 Marsh. 280, and 6 Taunt. 569), where, after much argument and time taken to consider the point, it was held, that a sheriff might recover on a bail-bond taken for the appearance of a person against whom [26] an attachment had issued out of Chancery, and that such a bond was wholly untouched by the statute 23 H. VI. c. 10.

Gaselee, contra, submitted, that as the attachment, in the present instance, was not merely for non-appearance to mesne process, or other contempt, which might be

subsequently cleared, but was, in effect, in the nature of an execution for a certain sum of money, it was within the exception in the statute 23 H. VI. c. 9*, and was therefore not bail-[27]-able by virtue of that act. In the case of *Bland v. Riccards* (3 Leon. 208), a bond taken merely for an appearance to an attachment out of Chancery had been held void, the defendant not being bailable; and he cited Viner's Abr. p. 459, tit. Bail, to the same point. In an *Anonymous case* in Strange (l), it was resolved that a sheriff could not take bail on an attachment. And in *Studd v. Acton* (1 H. Bl. 468), the Court of Common Pleas held, that an action would not lie against the sheriff, for not taking bail on an attachment out of Chancery; which shewed that such a proceeding was not considered as within the statute. An attachment is in the nature of a criminal proceeding, and a bond taken on an arrest, under a bench-warrant issued by the Quarter Sessions, on an indictment, was held void in the case of *Bengough v. Rossiter* (4 T. R. 505; and 2 H. Bl. 418).

Moore replied; submitting, that if the sheriff were not compellable to take bail in such a case, as being one within the exception in the statute, or not punishable by action or indictment for refusing to do so, yet there could be no reason why, if he should take a bond, he might not recover on it for a breach of the condition; for that taking such bonds was not prohibited by the statute, and that they were therefore not illegal, as had been clearly shewn by the cases already cited to have been frequently held, and [28] that even where taken on an attachment in execution after a decree.

GRAHAM, Baron. I certainly felt a degree of doubt in my mind on the cases which have been cited in support of the demurrer; particularly those from Precedents in Chancery, and Equity Cases abridged, and which appear to have been followed in the case of *Morris v. Hayward*, where the Chief Justice seems to have taken it up as if there was no objection to such bonds, when given on an attachment in execution after a decree.

But in neither of the cases cited, does there appear to be any thing applying to cases like the present. We were also referred to Tidd's Practice, but what is said there appears to be merely a dictum. The sum which was required by the order to be paid, was awarded as taxed costs. The sheriff takes upon himself, on executing the attachment for non-payment, to take a bail bond. Now the whole argument on the part of the sheriff goes to admit, that the statute only allows him to grant ease and favour in particular cases; but there is an express exception of executions, and other final process.

The question then is, whether this process is not in the nature of an execution; for if it be, the sheriff was not warranted in taking bail by this act of parliament. If the statute has excepted this process, the sheriff acted contrary to his duty; and if so, without saying that an indictment would lie, he [29] has at least done what he was not warranted in doing, and what he must not be permitted to do. Notwithstanding the cases which have been cited, therefore, where it has been done on attachments issuing out of courts of equity, it is not going too far to say, that bail

* And that the said sheriffs, and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them or any of them arrested, or being in their custody, by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprise, to keep their days in such place as the said writs, bills, or warrants shall require. Such person or persons which be or shall be in their ward by condemnation, execution, Capias Utlagat' or Excommunicatum, surety of the peace, and all such persons which be or shall be committed to ward by special commandment of any justice, and vagabonds refusing to serve according to the form of the statute of labourers only except. And that no sheriff, nor any of the officers or ministers aforesaid, shall take or cause to be taken, or make, any obligation for any cause aforesaid, or by colour of their office, but only to themselves, or any person, nor by any person which shall be in their ward by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants shall require. And if any of the said sheriffs, or other officers or ministers aforesaid, take any obligation in other form by colour of their offices, that it shall be void.

(l) Vol. i. 479; and *Field v. Workhouse*, Com. Rep. 264.

may not be taken on arrests under attachments issuing out of courts of law, and under attachments for non-payment of costs especially, because they are to all intents and purposes executions. Where they are issued for mere contempts in not appearing, they are on a very different footing, for as soon as the party appears and clears his contempts, the object is answered, and the whole is at an end.

Wood, Baron, of the same opinion. The question is, whether the sheriff is authorized to take a bond in such a case as this, under the statute of the 23 H. VI. ch. 10. [Here his Lordship read the clause of the Act.] The defendant in this case was taken on an attachment, to answer for a contempt in not paying the sum of 23l. 10s. which he had been ordered to pay for costs. That was no doubt, in effect, an execution. It was not a process, by which he was ordered to appear, to shew cause why he should not pay the money: but the order was absolute on him to pay it, and if he had come in, he could have given no answer, and therefore he must have remained in prison till it was paid. The statute applies to persons arrested and in custody on mesne process, and there is good reason for such a provision: but if it were extended to executions, [30] a man could not be compelled to pay, and it is admitted by the plaintiff's counsel, that in cases of a common law execution, a sheriff is not empowered to take a bond. It was equally the sheriff's duty, in this case, to have taken the money, and not a bond. As to proceedings in courts of equity, they appear to be regulated by analogy with the equity of this statute. Some loose expressions have been alluded to, as applying to attachments issued on decrees, but they must be taken to have relation to decrees in equity, whereby certain duties are required to be performed. But a sheriff cannot bail a defendant taken on an attachment for non-payment of costs, and in practice it is never done, nor do the words of the statute warrant it. Then it is said, that if he does take a bond in such a case, that it does not follow that the bond would be necessarily void, but that he might recover on it. I, however, think otherwise: for it is contrary to law to take such a bond, and therefore it would not be right to permit him to do it.

Judgment for the Defendant.

[31] **BODENHAM AND OTHERS v. BENNETT AND OTHERS.** Wednesday, 7th May 1817.—Where a valuable bank parcel sent by a stage coach is lost, and it is proved that on the arrival of the coach, the driver was in liquor, and that the bookkeeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it, or look into the coach for it:—held to be a loss arising from gross negligence, and that the proprietors were liable as carriers for the value, notwithstanding they had put up the usual notice in their office, disclaiming liability to make good losses beyond £5.

Case against common carriers, for losing a parcel.—Plea, Not guilty. At the trial at the last Hereford summer assizes, before Richards, Baron, and a special jury, a verdict was found for the plaintiffs, for 347l. 11s. The case was thus:—

The defendants were proprietors of a coach which ran from Hereford to Brecon, and thence to Carmarthen, and had given the usual notice that they would not be liable for parcels above 5l. unless insured and paid for accordingly. The plaintiffs were bankers at Hereford, and were in the habit of sending parcels of Welch notes to Messrs. Wilkins, bankers at Brecon. These parcels were always sealed in a particular manner; and the bookkeeper knew that they contained Welch notes. On the 17th August 1815 the plaintiffs' clerk took a parcel, sealed in the usual manner, containing notes to the amount of 347l. 11s., to the coach-office, to go by the coach to Brecon on the following morning. He paid a halfpenny for carriage and booking: no insurance was demanded, or paid. On the following morning the parcel was entered in the way-bill, and put in the back seat of the coach. There were two other parcels also entered in the way-bill. There were no inside passengers when the coach left Hereford. When the coach arrived at Brecon, the bookkeeper there, who usually unloaded the coach, received the way-bill, and took the two other parcels [32] out of the front seat of the coach; he did not look for the bank parcel, because the coachman usually carried it in his side-pocket. The coachman, on that day, was intoxicated, but not so as to be unable to attend to his business. After waiting a quarter of an hour at Brecon, the coach proceeded on to Carmarthen.

The learned Judge stated to the jury the common-law liability of carriers, and that they might stipulate to restrain it by notice. That they had given such a notice in this case, and therefore the question was, whether there had been gross negligence in the carrying of this parcel. He then detailed the evidence to the jury, who found for the plaintiff to the amount of the notes.

Taunton moved for a new trial.

Dauncey, and Peake, shewed cause; and cited *Ellis v. Turner* (8 T. R. 532).

Taunton, Owen, and Puller, supported the rule, and cited *Tyly v. Morris* (Carth. 485), *Gibson v. Paynton* (4 Burr. 2298), *Harris v. Packwood* (3 Taunt. 264), *Nicholson v. Willan* (5 East, 507), *Beck v. Evans* (16 East, 244), *Lee v. Waterhouse* (1 Price, 280).

GRAHAM, Baron. I do not think there is much [33] difficulty in this case, as the law now stands. By the old law, the carrier was bound to take the strictest care of the property entrusted to him; but of late it has been conceded, particularly in *Nicholson v. Willan*, where Lord Ellenborough gave up his former opinion, that the liability of the carrier may be qualified, and that he may require an additional premium for the risk he runs; but yet he must take due care of parcels, and if he neglects them, he is still liable. But supposing he is only chargeable for gross negligence: let us see in this case whether there has been that gross negligence. Observe the nature of the parcel sent from Bodenham to Wilkins; such parcels had been often sent, and the moment the parcel was delivered, all persons in the defendant's employ must have known that it was a parcel of value. But when the coachman comes to Brecon, he gives the way-bill to Peters, who sees from the bill that it is a package sent in the usual way of such valuables, and directed to the bankers. Peters says, "I took two parcels out of the coach; I did not look for the other parcel." Why not?—"I concluded it was carried by the coachman, as he usually carried such parcels." Now it is clear the coachman was not in a situation to take care of it; and Peters says he was a drunken man. He ought to have asked the coachman for it, when he saw he was in liquor. So strongly am I of opinion that this was gross negligence, that I think it was the very way to facilitate theft. I do not say it was done for that purpose; but I cannot help thinking that the parcel was stolen between Brecon and Carmarthen. I agree with the defendants' counsel, [34] that the defendants would not have been liable if ordinary diligence had been used; but being strongly of opinion there was gross negligence in this case, I think the verdict was right.

WOOD, Baron. I am of the same opinion. I see no ground to disturb the verdict. By the common law, the carrier was liable for losses arising from accident or robbery; nay, from irresistible force. The case of *Morse v. Shree* (1 Ventr. 23) pressed extremely hard on common carriers. Then special conditions were introduced, for the purpose of protecting carriers from extraordinary events; but they were not meant to exempt them from due and ordinary care. It cannot be supposed that people would entrust their goods to carriers on such terms. It only means, that they will not be answerable for extraordinary events: but we need not, in this case, lay down that rule. Here has been gross negligence, and in all cases of that sort carriers are liable. The parcel was delivered at Hereford; it was entered in the way-bill; for any thing that appears, it gets to Brecon, where it ought to have been delivered. The carrier does not merely engage safely to carry and convey; he also engages safely to deliver. Have they taken care to deliver? Nobody looks for it. The bookkeeper saw it down in the way-bill: he knew it was to be delivered at Brecon, but never looks for it, not the least in the world. He says, "I trusted to the coachman:" he, I suppose, would say, "I trusted to the bookkeeper." It is plain [35] they never cared any thing about it. What can be grosser negligence! In all probability the parcel was left in the coach and went on to Carmarthen, and was lost there or in its passage. If the defendants let it go further than Brecon, according to *Ellis v. Turner*, they are liable. Put it any way, I see no ground for disturbing the verdict.

GARROW, Baron. This is a case of considerable importance to the public. I entirely agree with the law as laid down by my learned brothers, and it is unnecessary for me to add any thing to it. Every body who has had any thing to do with carriers, must know, that if this case had received a contrary decision they would have had no security whatever. The carriers would have said, "You may enter into my lottery of a common carrier, where there are a hundred blanks to a prize, where it is a hundred to one if your parcel arrives safe." But this case will teach them that it is their interest to employ persons capable of attending to their duty. I think the law

was distinctly laid down to the jury, and that it was a question of fact proper for their consideration. Had I been one of the jury, I should have found that there was gross negligence,—extreme negligence. If the verdict had been the other way, I should certainly have been of opinion that there ought to have been a new trial.

Rule discharged.

[36] IN THE EXCHEQUER CHAMBER. (In Error.)

DEFFELL v. BROCKLEBANK. Thursday, 8th May 1817.—In an action on a covenant, (that on the arrival of the plaintiff's ship at a certain port, where he undertook to receive the defendant's cargo, and sail for England therewith with the next June convoy, provided the ship arrived and was ready to load 65 running days before the sailing of such convoy,) the defendant would provide a cargo of produce in time for her to load the same, and join the June convoy for England, provided she arrived out and was ready to load, and notice thereof was given to the agents of the plaintiff in error 65 running days previous to the sailing of the said convoy, and on her arrival, &c. receive the said cargo and pay the current freight :—it is not a condition precedent to the defendant's part of the contract, that the ship should so arrive, but he is still bound to supply a cargo, though not in time to enable the plaintiff to sail with that convoy.—And to a breach assigned, that though, &c. (averring the arrival and being ready to load) the defendant did not provide a sufficient cargo in time to enable her to sail with that convoy, but detained the ship for a certain time after the sailing of the convoy, whereby, &c. : it is no answer to plead that the defendant did not so detain the said ship, &c. the gist of the action being the not loading her, &c.

The declaration (covenant) stated,—that the plaintiff (in error) on the 13th of January 1812, by a certain charter-party of affreightment made between the defendant (in error) as part and managing owner of the ship “Balfour,” then lying at Whitehaven, whereof James Gunson was master, of the one part, and the said plaintiff of the other part, it was witnessed, that the said defendant had let, and the said plaintiff had hired, the said ship, to freight for the voyage, upon the terms and conditions therein-after mentioned : whereupon the said defendant did thereby covenant, promise, and agree with the said plaintiff, that the said ship should proceed from Whitehaven (with liberty to call at Cork if required) to Montego Bay, and upon arrival there, she should be made tight, &c. and be well manned, victualled, equipped, provided and furnished with all things necessary for the voyage, [37] and should thereupon take and receive on board from the agents or assigns of the said plaintiff in Montego Bay, from and out of the usual barquadiers, with the assistance of the ship's boats, &c. and at the ship's expense and risk (unless any part of the cargo should be shipped from Little River, in which case it was understood that the draggerage attending the shipment of such part of the cargo, which was not to exceed 120 casks of produce, was to be borne by the said parties in equal moieties,) the quantity of 450 casks of sugar and 200 puncheons of rum, and such a quantity of wood as might be necessary to stow the cargo, (provided the agents of the said plaintiff gave notice to the said master of such their intention within ten days after his arrival,) for which the said master should and would sign the accustomary bills of lading ; and that the said ship being therewith dispatched, should set sail with the convoy that should depart from Jamaica for England in the month of June then next, provided the said ship arrived out, and was ready to load, sixty-five running days previous to the sailing of such convoy : which days were to be accounted from the day of her arrival in Montego Bay aforesaid, and being reported ready to receive goods and proceed under sailing instructions from the said convoy back to the said port of London, and upon her arrival there, deliver her said cargo in the West India Docks, &c. In consideration whereof the said plaintiff covenanted not only to provide 650 casks of produce, as above stated, &c. but also to pay a certain freight.

[38] Averment,—that the ship sailed on the 30th January from Whitehaven, and arrived in Montego Bay 26th April, and was ready to receive on board a cargo of sugar, &c. according, &c. whereof notice was given to the agents of the said freighter ; —and that the said ship did at Montego Bay receive, take, and load on board such

a cargo of sugar, &c. as the agents of the said plaintiff thought fit to load on board ; -and that in all other respects the defendant fulfilled the said agreement on his part.

The first breach alleged, - that the said plaintiff did not provide the said 650 casks of produce, as, &c. but loaded on board a much smaller quantity, (viz. 156 hogsheads of sugar, and 24 puncheons of rum,) the same being a very insufficient and incomplete cargo for the said ship, and contrary, &c. to the damage of said defendant of 2500l.

The second breach alleged, -that although the said ship arrived out at Montego Bay, and was ready, &c. and notice was given to the agent of the said plaintiff sixty-five running days previous to the sailing of the said June convoy from Jamaica for England, yet the said plaintiff did not provide, or cause to be provided, a sufficient cargo of produce, according to the terms and stipulations of the said charter-party, to be laden on board the said ship at the usual barquadiers in Montego Bay aforesaid, in time sufficient for the said ship to join the said June convoy from Jamaica to England, on her homeward-bound voyage to the port of London [39] aforesaid ; but the said plaintiff detained the said ship at Montego Bay aforesaid, for a further long space of time, to wit, for the further space of thirty days after the sailing of the said June convoy, contrary, &c. : whereby the said defendant, during all that time, not only lost the use and benefit of the said ship, but was also put to great expense in and about the maintaining and paying the crew thereof, and was likewise prevented from earning and recovering so much freight and primage as he otherwise might and ought to have done, to a large amount, to wit, to the amount of 2500l. And so, &c.

Plea 1st, Non est factum. 2d plea to 1st breach : That defendant ought not, &c. because the said ship, upon her arrival at Montego Bay, was loaded with a cargo, to wit, 250 ton of coals : which said cargo of coals was not discharged from the said ship for a long space of time, to wit, for the space of one month from the time of her arrival there : and that there did not elapse sixty-five running days from the time when the said ship had discharged the said cargo of coals, and was ready to receive a cargo of sugar, &c. to the time of the sailing of the June convoy from, &c. 3d plea to 1st breach : That at the time said ship was reported ready to receive goods at Montego Bay, to wit, 27th April, the said June convoy stood appointed to sail on 20th June following, whereof, &c. ; and inasmuch as sixty-five running days could not elapse between, &c. the said charter-party became void. 4th, That such ships and vessels of June convoy as departed and sailed from Montego [40] Bay, departed and sailed on the 29th June, and within the period of sixty-five days from the day ship reported ready, &c. ; whereby said plaintiff was discharged from his covenant, &c. 5th, That said ship was not reported ready, &c. sixty-five running days before the June convoy was appointed to sail and depart. 6th plea to both breaches : That the ship was not reported ready, &c. sixty-five running days before the said ships and vessels of the said June convoy at Montego Bay departed and sailed from thence, by reason whereof the said charter-party became void. 7th to 2d breach : That the ship was not reported ready to receive goods sixty-five running days before said June convoy was appointed to sail, or before the ships and vessels of said June convoy did depart and set sail from thence ; and that the master of said ship in said charter-party mentioned, voluntarily and of his own accord, without being required thereto by said plaintiff, or detained by him, remained at Montego Bay after the sailing of the said June convoy. 8th, Protesting, &c. that the ship did not arrive out, and was not ready to load at Montego Bay, sixty five running days previous to the sailing of the June convoy ; averred that the said plaintiff did not detain the said ship at Montego Bay for any time whatever after the sailing, &c. in manner and form, &c. 9th, That after receiving the goods mentioned in the declaration, and before the residue, &c. were or could be procured, the master voluntarily sailed with such incomplete cargo. 10th, That said plaintiff was not bound to provide the cargo in the said declaration mentioned, for the said ship to be laden at the [41] usual barquadiers in Montego Bay, in time to load the same and join the June convoy, &c. unless the said ship should arrive at Montego Bay, and be there reported ready to load, in sufficient time before the sailing of the said convoy, to be and remain in Montego Bay, for the purpose of loading there sixty five running days before the said ship should be obliged to leave that place in order to join the said convoy. Last plea : That plaintiff did not detain the said ship at Montego Bay for any space of time whatever after the sailing of the said June convoy, in manner, &c.

Replication to 1st plea : Similiter added, and issue joined. Demurrer to 2d, 3d,

4th, 5th, 6th, 8th, 10th, and last pleas. Replication to 7th plea: Precludi non; because the said ship was reported ready, &c. sixty-five days before the said June convoy actually did depart, &c. To 9th plea: That after said ship was ready, &c. and before the said master of the said ship set sail and departed from Montego Bay, as in the said 9th plea alleged, a reasonable time elapsed for the said plaintiff to deliver and cause to be delivered 650 casks of produce, as above stated, for the said ship to be laden at the usual barquadiers, in Montego Bay aforesaid, and such a quantity of wood as was requisite to stow the cargo for the said port of London; and that before the said ship set sail and departed, &c. said plaintiff did not, &c. Rejoinder. Judgment on demurrer, that said pleas, 2, 3, 4, 5, 6, 8, 10, and last, are not sufficient in law to bar said defendant (in error) from having and maintaining, &c.

[42] Parke, in support of the errors assigned, submitted, as to the 1st breach,—that the plaintiff was discharged from the covenant to load the ship, because 65 days could not elapse between the time of the arrival of the ship, and the sailing of the June convoy; for, as that was a condition precedent to the whole contract, on which the plaintiff had agreed to freight the vessel, the charter-party became void by the ship's not arriving out 65 days before the sailing of the convoy. And he cited the case of *Shadforth v. Higgin* (3 Camp. 385), where Lord Ellenborough held, that a similar provision not having been complied with, discharged the freighter. That as to the second breach, (he submitted,) that it was sufficiently answered by the pleas denying the detention of the ship; because the introduction of the word but, in the assignment of that breach, makes the detention the substantial part of the breach, and narrows the allegation, as was held in *Harris v. Mantle* (3 T. Rep. 307), so as to render proof of the detention necessary in order to support the action on that ground. This being an action for damages on the whole declaration, if any breach is bad, or answered, the judgment must be reversed.

Gaselee, for the defendant in error, submitted,—that the proviso in the covenant did not go to the whole contract, but was meant for the protection of the ship-owner, on the one hand, in case the vessel should not arrive so long before the sailing of the convoy as 65 days, from any liability in consequence of [43] not sailing with the convoy; and of the freighter, on the other, for not loading her in time to do so, unless she arrived so many days before;—and that it was not applicable to the covenant to load the vessel generally, which the plaintiff was bound to do in all events; but merely to the time of doing so, as that, if the ship arrived in time, he was then only to load her by a particular period: and that is the true construction of the covenant. As to the case which had been cited from Campbell, he submitted, that the proviso in that case was attached wholly and distinctly to the freighter's part of the contract; and that the doctrine of the decisions collected in the note to that case, was more in point on the present question, which went to shew, that this part of the covenant ought not to be considered as a condition precedent to the whole contract. With respect to the 8th, 10th, and last pleas, being an answer to the 2d breach: he contended, that the gravamen of that breach being the not loading the vessel, the detention was merely in aggravation of the damages sustained thereby, and that the denial of the detention merely, was no answer.

Parke, in reply, pressed,—that the case cited had not been distinguished from the present;—that the repetition of the proviso made it a condition precedent to the whole engagement of the plaintiff, and the time of the arrival of the ship was thereby made the criterion which was to create the obligation on his part, or to discharge him; for that that circum-[44]-stance would make a material difference to the trader, as to the advantages of freighting the vessel with produce, and he was not to be considered bound to keep his cargo until any indefinite time at which the ship might arrive. And he insisted, that the last breach was answered fully by the pleas thereto.

GIBBS, Chief Justice. The amount of the damages recovered, renders it very important to the plaintiff that our judgment should be given immediately; and as the case has been so well argued on both sides, and with such close adherence to the points as to obviate any misconception, we have no difficulty in doing so.

There have been two points raised. The first arises on the general construction of the covenant:—and the other on the pleas to the 2d breach.

On the first point it was contended, by the plaintiff in error, that the arrival of the ship, and her being ready to load 65 days previous to the sailing of the convoy, was a condition precedent to every thing else which was to be done: and that there-

fore, if the ship did not arrive, and was not so ready to load, the charter-party must be considered as at an end.

On the other hand it was argued, that that proviso had nothing to do with the breach, and that [45] the plaintiff in error was bound, at all events, to load the vessel within a reasonable time. (His Lordship read the words of the covenant.) Now that proviso only applies to the obligation on the master to sail for England with the June convoy, if he should arrive 65 days before it should sail; but if he did not, then the general obligation to load still remained binding on him, although the ship should not have arrived out 65 days before the sailing of the June convoy. And that puts an end to the objection on the first breach, of the want of the necessary allegation of the arrival of the ship, and of her being ready to load; for we think that that part of the covenant is not a condition precedent to the general obligation to load, but that it has relation only to the time of the loading with respect to the ship's sailing.

The next objection is to the pleas to the second breach, complaining, that the ship having arrived out of time, (that is 65 days previous to the sailing of the convoy), was not dispatched with a cargo. It was necessary to state that the ship had arrived, and we accordingly find that allegation in the breach. Then it is also stated that the plaintiff detained the vessel for a further space of time after the sailing of the convoy; and supposing she was not ready to depart on the sailing of the convoy, by reason of her not having been loaded, the damages would be to be measured by the time she had been delayed. But the substance of the breach is, that the plaintiff in error did not load the vessel in time to allow her to sail with the convoy. The further allegations in that breach relate only to the sort of damages to [46] which the defendant would be entitled. The defendant is not the subject matter of the action, for that is set out before; and therefore these pleas denying the intention only, are insufficient, because they do not go to the denial of the right of action.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER. (IN ERROR.)

HARRISON v. KING. 8th May 1817. —These words, "I will take him to Bow-street on a charge of forgery," are not actionable, because they do not amount to charge the person of whom they are spoken with felony.—This Court will not reverse a judgment of the Courts below, merely on the ground of the defendant in error not appearing, without going into the errors assigned.

The plaintiff below had recovered a verdict in the Court of King's Bench, in an action for words. The defendant (in error, an attorney) in his declaration stated, that the plaintiff (in error) in a certain conversation, held in the presence and hearing of a third person, (then and still being a client of the defendant,) falsely and maliciously spoke, &c. the false, scandalous, and defamatory words following: "I will take him to Bow-street upon a charge of forgery," (innuendo, that the defendant had been and was guilty of forgery). The defendant (plaintiff below) had obtained a verdict, with entire damages (1500*l.*) and judgment. One of the errors assigned was, that the words did not import [47] any express or precise imputation of the defendant having committed forgery, (it was not said for what purpose, or to what place there, or on what charge, or against whom it was to be preferred,) but only an intention of the plaintiff to take the defendant to Bow-street upon a charge of forgery: which words of themselves constituted no cause of action, although laid in a separate Court, as a separate cause of action, without any special damage.

[Lawes, E. for the plaintiff, moved, that the judgment might be reversed, no one appearing on the part of the defendant]

Gibbs, C. J. We cannot reverse a judgment on that ground alone. Some reason must be shewn.]

Lawes then stated the error assigned as above.

[Gibbs, C. J. Have you looked into the cases of *Wood v. Merrick* (Ro. Abr. p. 73, pl. 21, l. 50), and *Poland v. Mason* (Hob. 305, 326), where it was held, that the words should affirm the plaintiff to be a felon: for that a mere assertion that the defendant charged him on suspicion of felony, is not of itself actionable.]

That was stated to be the precise objection intended to be made to the present judgment. On which the Court pronounced the Judgment reversed.

[48] IN THE EXCHEQUER CHAMBER. (IN ERROR.)

STONE v. M'NAIR. Same day.—In an action of assumpsit, brought against a defendant for money lent to his wife, it must be alleged to have been lent at his request, or it will be insufficient: and that even after a judgment has been suffered by default. Nor is it cured by a count for money lent to the defendant and his wife, at the request of him and his wife;—although it is stated in both counts that the husband promised to pay.

Chitty stated,—that the judgment on which this writ of error was brought, had been suffered to pass by default on the whole declaration, which consisted of the common counts, in assumpsit:—that the objections arose on the 5th and 7th counts, which were for money lent to the defendant below and to his wife, at the request of him and his wife:—and for money paid for the use of the wife of the defendant below, at the request of the wife;—and in both counts it was stated, that the husband promised to pay. They were, 1st, That there was no allegation to shew that the money had been lent to the defendant's wife at his request, or expended for her at the request of her husband. And, secondly, that there was no legal consideration precedent stated for the promise by the husband. Both these points were elaborately considered in the note of Mr. Serjeant Williams to the case of *Osborne v. Rogers* (Saund. 264, n. 1), and the other authorities there cited. If it should not be considered that a request by the wife was insufficient to raise an assumpsit on the part of the husband, another [49] objection would arise, that it was not stated. Nor did it sufficiently appear, that at the time of the supposed contract she was his wife; and if the debt was contracted before marriage, the husband could not be sued alone for it, *Mitchinson v. Hewson* (7 T. Rep. 348). And even if the debt were contracted after marriage, unless it appear that the credit was given to her husband, and not to her, he is not liable, *Bentley v. Griffin* (5 Taunt. 356). The case of *Stephenson v. Hardy* (3 Wils. 388) may be cited for the defendant; but that is distinguishable from this, because there there was an express allegation that the money was lent to the wife at the special instance and request of the husband.

Tindal, for the defendant in error, admitted that the declaration was not strictly technical: but contended, that after judgment by default, enough appeared on the pleadings to satisfy the Court that the judgment ought to stand. The fifth count was certainly the most difficult to support: but not as against the objection—that it does not appear that she was the wife of the defendant (in error) at the time of the contract, for that is most clearly expressed. In *Butcher v. Andrews* (Salk. 23) it was held, that a man promising to repay money lent to a stranger, was not liable to an indebitatus, but to a special assumpsit; because the same money could not be lent to two. But that does not apply to the case of money lent to a wife, for which clearly the husband may be sued. So it was decided in [50] *Stephenson v. Hardy*. There is nothing to exempt a husband eo nomine from liability for money lent to his wife and non constat, but she might have borrowed the money acting as the agent of her husband; or at least, a judgment having been suffered to go by default, may be considered as curing such an objection as the present, on the part of the husband.

GIBBS, Chief Justice. Your difficulty, certainly, is the want of an averment that the money was lent to the wife at the request of the husband: and that omission is not to be got over.

BURROUGH, J. There is another count for work and labour, also, which cannot be sustained.

Judgment reversed.

THE KING v. RIDGE. Saturday, 10th May 1817.—If the drawer of a bill of exchange (which has been accepted by the drawee) made payable to his own order, and endorsed by him, gets another person to procure cash for it, who does so by allowing more than the legal discount to be taken on it, it is usurious: for not

being drawn for the benefit of such third person, but of the drawer himself, it is not a sale of the bill by such third person, but an advance of money by way of discount to the person making it, and on his credit.—Such a bill getting into the hands of the Crown, under an Extent against the party who discounted it, is equally invalid as if it were still in his possession.

A scire facias having issued against the defendant, as the acceptor of three several bills of [51] exchange, dated 12th April 1813, payable twelve months after date, drawn by the Earl of Moira, whereby he (Ridge) became indebted to Austen (the holder) in that sum and interest, as found by an Inquisition, under a commission on an Extent against him, as Receiver General for the county of Oxford,—the defendant pleaded a general traverse: and the case coming on to be tried before the Lord Chief Baron, at the sittings after Trinity Term, the jury found a verdict for the Crown.

In Michaelmas Term, Clarke obtained a rule to shew cause why a verdict should not be entered for the defendant, or a new trial granted.

From the report of the evidence given on the trial, it appeared to have been proved, that a little before Lord Moira's departure for India, his lordship had drawn four bills for 1000*l.* each, payable to his own order twelve months after date, which were accepted by Ridge, his lordship's regimental agent. That they were then handed over, endorsed by Lord Moira generally, to Major James, his lordship's confidential friend, and who had been employed in obtaining money for his lordship, through the medium of such bills, ever since the year 1802, by getting them discounted for that purpose, and often at the house of Austen and Maunde, but more particularly with Austen, who usually furnished cash for them. That Major James (having previously had a communication with Maunde on the subject of getting the bills negotiated,) took them himself to the banking-house of Austen, Maunde [52] and Co., in Henrietta-street; where, after several interviews with Maunde, (without seeing Austen on the business,) he at length received from Maunde 3600*l.* for the four bills, which he immediately gave to Lord Moira. Major James was known to Austen and Co. to be the agent of Lord Moira, and to be procuring the money for him. It was also in evidence, that Lord Moira's bills, so drawn and accepted, had become much depreciated in the market; which was explained to mean, that they were not negotiable for so much in value as they purported to be drawn for, and that 15*l.* per cent. per annum, was commonly required and received for discounting them. Major James had himself no interest in the bills, but was merely the agent of Lord Moira; and had not endorsed them, nor was there any other endorsement on them but that of Lord Moira. On that evidence, the counsel for the defendant objected that the transaction was usurious; for that it was quite clear, that the money given for the bills in question, was in the way of discounting them for Lord Moira, and not as buying them of Major James. His lordship left it to the jury to say whether the transaction before them was merely colourable on the part of the house of Austen and Maunde, and was a discounting of the bills; or whether it was a fair and bona fide purchase of the bills by them. If the former, directing them to find for the defendant; if the latter, for the Crown: when the jury found a verdict for the Crown.

Dauncey, and Nolan, shewed cause; contending, that what had been done in respect of the bills, [53] was on the face of the transaction a mere sale, and not a discount: when the Court calling on the counsel who were to support the rule,—

Clarke, and Peake, submitted,—that the transaction was a discounting, and not a purchase of the bills, and therefore usurious:—that the money given for them was a personal advance to Lord Moira himself alone, on his credit, at a premium of 15*l.* per cent. being considerably above the usual discount. Major James was not a third person holding the bill for his own benefit, as having received it for money due to him from Lord Moira, nor does he endorse it, or make himself liable:—if he had, it would have been a loan to him, and therefore equally usurious;—but he is identified with Lord Moira, who was at the time distressed for money, and was precisely one of the persons meant to be protected by the statute (12 Anne, cap. 16) against the mischievous consequences of their necessities, and the language of the act is most general; or if transactions of this sort may be legalized as a sale, the beneficial provisions of that act will be frustrated. A party selling a bill is released from all responsibility on it. Not so here, Lord Moira: whose sale it was, if the bill was sold, for it was sold for his benefit, and in fact by himself: for the mere agency of a third person can make

no sort of difference in the act itself, which was, a discounting of these bills at more than five per cent.

Dauncey, and Nolan, contra, contended, that [54] it was a mere question of fact for the jury, whether this was a sale by Major James, or a discounting for Lord Moira; and their finding ought to be conclusive. It was in evidence that no one would take these bills for their full amount, therefore they were sent into the market to be sold to any one who would purchase them on speculation. They had in the market a specific value assigned them, and the house of Austen and Co. had given for them all that they were considered to be worth. This is an instrument on which any one, becoming legally possessed of it, might sue, and therefore may be the subject-matter of sale. If the issue of the bill was fair at first, subsequent usury does not vitiate it. If Austen and Maunde had endorsed these bills over to a third person, they would have been available in his hands; so also are they in the hands of the Crown.

RICHARDS, Chief Baron. This is certainly a case of very singular circumstances. (Stating the transaction and the connection between the parties, and observing particularly on the communication between James and Maunde, before the bills were produced.) It is said that this transaction was usurious; and if it were, we are bound here to decide according to the law.

Now I confess, on re-consideration, that I think this was an usurious transaction, and that the usury affects the Crown in the same manner as it would the assignees of Austen and Maunde, if they had become bankrupt. Without entering into all the circumstances, the simple fact is, that Lord Moira [55] and Major James were, as to this transaction, one and the same person. If Lord Moira had gone to Austen and Maunde, and said, "Lend me 3400l. and I will give you bills for 4000l." no doubt that would have invalidated the bills; and I do not see how we can distinguish between the facts of the bills being signed before or after the negotiation, or whether they were taken to Austen and Maunde in an issuable state or not. Major James does not effect to be more than a mere messenger in the business. It was argued, that if the bills were good in their inception, subsequent usury would not make them bad. I think, however, that it would. Then it was contended, that in the hands of the Crown, as of an innocent holder, the vice of the bills was removed; but I think that the Crown must stand in the place of an assignee, and I think it is clear, that in case of bankruptcy an assignee could not have recovered on the bills: and I see no difference, for they both become possessed by act of law.

It has been put also, that the question was fairly left to the jury as a question of fact, whether this negotiation was a loan or a sale; they being told that in the one case the bills would be bad: in the other they would be good. The effect of that direction would be, to leave the question of law to them. Now I think that the person who tried this cause ought to have told the jury, that under the circumstances of this case the transaction was usurious. It did not occur to me then, as it does now, that this negotiation was tainted with usury; but [56] I should certainly now direct, if the cause were trying before me, that Lord Moira could not be sued on these bills, because they are bad in point of law: and therefore I think there should be a new trial.

GRAHAM, Baron. The arguments of the defendant's counsel have relieved me from many considerable difficulties; and I think the question was, ultimately, not one of fact. If Major James had received these bills from Lord Moira on his own account, as security for a debt, and had then sold them, the direction would have been right; but James was Lord Moira's confidential agent. (Adverts to the evidence.) This, therefore, being clearly a loan to Lord Moira, and not a purchase in the market, it was not a question for the jury: that the Judge should have told them, that it was a transaction which the law did not allow. Then the bills getting into the hands of the Crown, under this extent against its debtor, does not remove the usurious quality; for that is certainly a very different thing from a bill originally good having got into the possession of a bonâ fide holder for a valuable consideration.

WOOD, Baron, absent.

GARROW, Baron. The confusion which has got into this case proceeds from its having been at one time considered, that these bills were sent about the town to be sold for what could be got for them; but the fact is, that this paper was sent by the [57] maker to those who well knew its precise value, to get that value for it, which was done. Nothing had been given by Major James for it; and whether the trans-

action was originally good, it is not necessary to inquire: but that this transaction, as between Major James, the acknowledged agent of Lord Moira, and Austen and Maunde, was usurious, there can be no doubt.

It was ingeniously argued, that the bills, by getting into the hands of the Crown, made a difference as between the Crown and the party: but it would be most unfortunate if that were so; for then the grossest usurer would have nothing to do but to get his bills seized under an extent, and then all his illegal transactions would be rendered available in the hands of the Crown. That is too monstrous a proposition for serious consideration, and would require to be supported by undoubted authority.

Per Curiam. Rule absolute.

[58] BROADHURST, Clerk, v. BALDWIN. Monday, 12th May 1817. —After payment of money into Court by a defendant, in an action brought against him on the 2d and 3d Edw. VI. by a farmer of tithes, he cannot object to the plaintiff's title to the tithes: because he has admitted the plaintiff's right generally, and has reduced the cause to a mere question of the amount of the damages.

The plaintiff had recovered a verdict at the last Suffolk Lent Assizes, in an action of debt under the 2d and 3d Edward VI. cap. 13, for treble the value of tithes of corn and grain taken and carried away by the defendant without setting out the tithe.

The declaration contained six counts. The first count (under the statute) stated plaintiff to be entitled to the tithes, in the parish of Brandleston, as the farmer thereof; and that the defendant, as an occupier of land within, &c. having cut down and reaped certain corn and grain, to wit, &c. the tithe whereof did of right belong, &c. and ought to have been yielded, &c.; but defendant, not regarding, &c. did take and carry away the said corn and grain from said land where the same had so grown, without dividing or setting forth for the tithe thereof, the tenth part of the said corn and grain from the other nine parts thereof, and without any agreement or composition, &c. value 100l.; whereby, &c. actio accrevit for 300l. being, &c. The 2d count stated, that defendant was indebted to plaintiff 100l. for the use, perception, and enjoyment of the tithes of corn and grain of certain lands by defendant, at his request, and by the permission and sufferance of the said plaintiff, for a long time then elapsed, perceived, and enjoyed, which, &c.; whereby, &c. [59] The 3d count, that in consideration of defendant's perception and enjoyment of divers other tithes, &c. the defendant undertook and agreed, &c. quantum valebant, viz. 100l. The 4th and 5th, the common money counts. 6th, Account stated; breach; damage 10l.

The defendant paid 22l. into Court on the 2d, 3d and last counts, and pleaded the general issue.

The plaintiff, on the trial, proved that he was lessee of these tithes under trustees, and that he had received payments from other occupiers. The defendant had been accustomed to pay a certain yearly composition for his great tithes to a former lessee; and one of the questions in the cause was, whether that composition had been put an end to, and whether the plaintiff, the present lessee, was entitled to recover more.

The defendant's counsel objected, that the plaintiff had not made out a sufficient title to the tithes to enable him to support the present action: for that there could not legally be a lease of tithes by parol without deed.

On the other hand it was contended, that the defendant having paid money into Court, had admitted the plaintiff's title; and could not, therefore, afterwards take any objection to it.

Graham, Baron, who tried the cause, ruled that the plaintiff had made out a right to the tithes [60] for one year at least, by his contract, fortified by perception under it; and observed, that that title was admitted on the record, and more particularly as the counts on which the money was paid into Court were special: but that as to the count for treble value, that was out of the question; because it was clear that the plaintiff had never called on the defendant to set out the tithes, and that he never meant to do so.

Hart obtained a rule to shew cause why the verdict should not be set aside and entered for the defendant, or a new trial granted, on the objection taken at the trial now supported by the authorities;—he submitted, that the plaintiff, having declared as farmer of the tithes, was bound to produce a lease: for that there could be no

transfer of tithes to a stranger by parol, whatever there might be as between the person entitled and the person who was to pay them by way of retainer, *Hauke v. Brayfield*, (Cro. Jac. 137), *Kedlington v. Bridgman* (b). That in the latter case it was held that such an agreement operated by way of forbearance and waiver, as between persons who were privy to the original compact; but in no case could it apply to a third person or stranger.

As to the objection of their being precluded from going into the title of the plaintiff after paying money into Court, they relied on the distinction [61] taken by Ashurst, J. in *Cor v. Parry* (1 T. R. 464), that it was only an admission that the plaintiff was entitled to maintain his action for the amount of the sum paid in; leaving all points open as to any further demand, as if the plaintiff had discontinued and proceeded *de novo*.

Blosset, Serj., and Storks, now shewed cause; submitting, that the plaintiff had proved a sufficient title, independently of the admission by payment of money into Court; and if not, that the defendant was precluded thereby from taking the objection.

As to the objection itself, they contended, that although there were cases apparently somewhat contradictory as to the right mode of acquiring a title to tithes, and raising a doubt whether a lease of them for a year, as an incorporeal hereditament, could be by parol; yet it had been held that such a transfer, if not good as a lease, was good as a mutual agreement (d), and that would be sufficient to sustain this verdict, if accompanied by enjoyment. In *Schwin v. Baldy* (e), it was held sufficient, on the part of a plaintiff declaring as farmer, that he proved himself to have been in receipt of tithes as lessee of J. S., who was lessee of the rector, without producing the lease from the rector to J. S. And in *Hartridge v. Gibbs* (B. N. P. 188) it [62] was not required of the plaintiff, who declared as farmer, to produce any lease after proving perception; and that would be sufficient to entitle a plaintiff to call on defendant to make out his case (B. N. P. 188). And they cited also *Saunders v. Sandford* (Cro. Jac. 437), *Arnold v. Bidgool* (Cro. Jac. 318), and *Moyle v. Ever* (ib. 362).

On the other point they submitted, that the case of *Cor v. Parry* was against the proposition in support of which it was cited. And they cited further, the case of *Bennett v. Francis* (2 B. & B. 550), where the Court of Common Pleas expressly held, that payment of money into Court on a declaration in contract, was an admission of the contract, to the full extent of the terms laid in the declaration. This also is laid as a special contract, and is equally admitted by the payment of money into Court; and the question was reduced to one of the amount of damages, and the jury found that the plaintiff was entitled to more than had been so paid in by the defendant. They also cited, to the same point, *Yates v. Willan* (2 East, 128).

Hart, B. and Jamieson, in support of the rule, contended, that payment of money into Court did not merely confine the question in this cause to the amount of the ulterior damages to be recovered; but that it still left the right of action open to any objection, and did not preclude the defendant from the benefit of any thing which should occur on the [63] trial destructive of the plaintiff's case: as if, in an action by one of several partners for a partnership debt, the defendant, having paid money into Court, and not having pleaded in abatement, might still take advantage of the plaintiff's shewing himself out of Court, by betraying, in the course of the cause, that there were other persons who ought to have been joined with him in the action. A defendant might pay money into Court on other grounds than that of admission of the plaintiff's right even so far; and it would be hard to say that if a defendant should erroneously pay money into Court, that should give a plaintiff a right to proceed in a suit for which he had originally no foundation. And he cited *Hutton v. Bolton* (1 H. Bl. 499).

GRAHAM, Baron. I am of opinion that the plaintiff is not entitled to any further inquiry: though, if my brother Garrow should think otherwise, I shall concede my opinion. I must observe, however, that the case which has been cited for the defendant, of *Cor v. Parry*, in my view of it, is precisely against the proposition that the payment of money into Court on a declaration, upon a special contract, is not conclusive

(b) Bunb. 2, and cases in the margin.

(d) *Eaton v. Sherwin*, Skin. 113.

(e) B. N. P. 188, and *Nelson v. Woodward*, Cro. Eliz. 249; Owen, 103; 1 Brownlow, 354; and *Sorrell v. Groce*, 1 Ro. R. 174.

on the defendant. The defendant, in that case, was precluded from admission of the plaintiff's right of action, because he could not admit such a right against the positive effect of an act of parliament: or that the plaintiffs were entitled to proceed on a policy against one whose name was not inserted in the instrument, as was [64] required by the 25th Geo. III. c. 44. And in the case of *Hutton v. Bolton*, the defendant did not wish to contest his liability as to the 21l.; yet he admitted nothing by paying that money into Court, but denied that any thing more was recoverable. In this case, where the declaration was special, the money which was paid into Court was an acknowledgment of the specialties of that declaration, and was an admission of the plaintiff's right to sue: and that something, at least, was due to him from the defendant.

WOOD, Baron, absent.

GARROW, Baron. I entirely concur in the opinion which has been given. It appears to be admitted that the verdict was right, if the payment of money into Court was an admission of the plaintiff's right of action. Now the parties could only have gone on to trial afterwards, to ascertain whether there was or was not any thing more due to the plaintiff than the sum so paid into Court; and if not, there could have been nothing to try. In so doing they proceeded at their peril, and must abide by the result. The prudence of paying money into Court, is one of the most anxious points on which counsel can be asked to advise: between the care lest the party should admit the terms of a special contract, on the one hand: or on the other, lest he should proceed with a consciousness that something must ultimately be recovered: but, whatever course be adopted, it must be followed by all its legal consequences. In the present case the Jury have found that more than the sum paid in by the defendant was due to the plaintiff; and there has been no good ground urged for any further inquiry.

[65] As to the other question, it is unnecessary to decide that point: but I should certainly say, that the tithes might have been so let to the plaintiff, as it has been alleged they were, for a year. The verdict, therefore, must stand.

Rule discharged.

IN THE EXCHEQUER CHAMBER. (IN EQUITY, CORAM RICHARDS,
LORD CHIEF BARON.)

THE WARDEN AND MINOR CANONS OF ST. PAUL'S, AND THEIR LESSEE, v. THE BISHOP OF LINCOLN, AS DEAN OF ST. PAUL'S. Tuesday, 13th May 1817.—The dwelling-house, &c. of the deanery of St. Paul's in London, is not exempt from the payment of tithes to the Warden and Minor Canons under the 37 H. VIII. c. 12. — The rate, according to the amount of which, the payment for such tithes is to be computed, is 2s. 9d. in the pound, on the fair yearly rent, or actual annual value of the premises to be let, as in the case of all other houses paying tithes. The maxim *ecclesia ecclesie decimasolvere non debet*, does not apply to the circumstances under which the dean of St. Paul's is connected with the warden and minor canons as parson of St. Gregory. It is confined to the clergy of the same church.—The dean is not, within the meaning of the exemption in the act, a great man. Where there has been no new lease granted for many years, the clergy of London are to be paid for their tithes, on the expiration of the old one, according to the improved annual value: and when any fine is paid on taking a new lease, in consideration of which the annual rent is reduced, the amount of such fine is to be taken into the calculation of the estimate of the yearly value. New houses on old sites are liable according to the actual annual value. Where a general act of parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law: *expressio unius est exclusio alterius*.

This was a suit instituted for an account and payment of tithes, after the rate of 2s. 9d. in the [66] pound, for the dwelling-house, &c. in the occupation of the defendant, computed on the full value, to be let by the year. The bill stated, (after deducing the title of the plaintiffs, as parson and proprietors of the church of St.

Gregory, to the tithes, as conferred on them by the appropriation of the Dean and Chapter of the cathedral church of St. Paul's, under the authority of letters patent of the 24th Hen. VI.), that by a decree (a) dated 23d February 1545, made in pursuance of the act of parliament (37 Hen. VIII.) "for tithes in London," it was ordained, that the citizens and inhabitants should yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars and curates for the time being, after the rate therein mentioned: viz. for every ten shillings rent by the year, of all houses, shops, &c. 1s. 4½d.:—twenty shillings, 2s. 9d.: and so in proportion for every 10s. increase of rent, payable quarterly, with an exception in favour of any houses, &c. accustomed to pay less. Then (noticing the acts of 22d Cha. II. for rebuilding the city of London, as having united other parishes with St. Gregory, and the 22d and 23d Cha. II. as confirming the right of the plaintiffs to their tithes as formerly,) it charged the possession of the defendant, and his non-payment of tithes, and that the said dwelling house, &c. ought to be computed, with respect to the tithes payable therefore, at the present improved yearly rent or value.—And prayed, &c.

The defendant, by his answer, having premised that [67] in 1670 the then Dean rebuilt the mansion-house, &c. on part of the scite of the old deanery, as set out by an adjudication under the hands and seals of the then Lord Keeper and Bishop of London, under the authority of an act of parliament, on consideration of being entitled to demise the residue for a term of 60 years, set up the following defences:

1st, That from time whereof, &c. no tithes, or any pecuniary payments whatsoever in the nature or in lieu of tithes, were ever made and paid, or were of right due or payable to the plaintiffs, for or in respect of the said deanery-house, &c. so long as the same remained in tenure and occupation of the Dean, (stating his own constant occupation, and that the said deanery consisted of the same premises so set out, &c. :) but that such part of the garden of the present deanery as thereafter mentioned, formerly belonged to a certain dwelling-house or tavern called the Feathers, and which the defendant believed was added to the old garden soon after the rebuilding of the deanery; and that part of the present court-yard and garden of the said deanery consisted of the former sites of four shops or sheds, and of three houses in Scollop-court, added at the same time.

2dly, Reciting the purchase and conveyance of the site of the Feathers, in 1683, which was added to the garden of the deanery, —the answer stated, that from that time down to the year 1779, the sum of 12s. 6d. had been paid by the defendant's predecessors to the plaintiffs, in lieu of tithes for the said ground; and submitted, that such annual pay-[68]-ment could not now be increased. It then referred to certain entries in the plaintiffs' book, where the payment of 12s. 6d. was described as being paid for the tithes of "the deanery," but which, it insisted, were payable only for that part of the garden added in 1683; and therefore protested against such entries concluding the defendant. It then stated,—that shortly after the year 1769, the tithes due to plaintiffs, of four shops or sheds adjoining and occupied with the said deanery, were first charged and collected after the rate of 1s. 4d. per annum for each, making, together with the 12s. 6d. the entire sum of 17s. 10d.:—that in 1776, the tithes due for three houses in Scollop court, also taken into the occupation of the then Dean, were first charged and collected after the rate of 2s. for each house, making, with the other sums, 11. 3s. 10d. which was also paid down to 1779; from which period down to 1792, it was alleged, that from mistake or accident, a sum of 11. 5s. had been improperly collected on behalf of the plaintiffs, instead of the said sum of 12s. 6d.:—and insisted, that the Deans of the said church were entitled to hold the premises which were part of the scite of the ancient deanery, free of all tithes, and payments in lieu thereof.

3dly, The answer next (adverting to that part of the decree which orders that the owners of dwelling houses, &c. inhabiting or occupying the same themselves, should pay a rate of tithes proportionable only to the quantity of such yearly rent as the same were last letten for,) insisted, that from long previous to the year 1779, the payment of 12s. 6d. [69] for the scite of the Feathers, added to the deanery, and the other sums before mentioned, for the other additions, was the only sum ever paid in respect of the said premises, (except the sum of 11. 5s. paid from 1779 to 1792, instead of the 12s. 6d. by mistake); and that none of such premises, so added, had ever been letten since they were added to the deanery; and that as the said premises must be

(a) This decree is set out at length in 3 Burn's Ecclesiastical Law, p. 555.

presumed to have been then assessed at the rent for which they were then last letten, they could not, therefore, be raised till they should be next letten.

4thly. The defendant (adverting to the words of the statute, that the dues should not extend to the houses of great men, or noblemen, or noble-women, when in their own hands,) submitted that the Dean was a great man, within the meaning of the act, and that therefore the ancient site of the deanery was exempt; or, if not, that still the customary payment of the sum of 12s. 6d., assessed upon the said deanery, was the only payment to which it was liable for the said ancient site of the deanery, including the site of the Feathers, unless it should be again let.

The 5th, and last ground of defence, was (insisting still on the annual payments,) that, in all events, the plaintiffs were not entitled to demand more than 1l. 5s. for the said deanery, exclusive of the additions: and that, if they were, they were not entitled to more than for six years before the filing of this bill.

[70] The answer concluded, by denying that any improvements had been made since the re-building, &c.: and that defendant had not, (as was charged,) any other documents in his possession, except as set forth in his schedule.

Wetherell, and Hall, for the plaintiffs, contended, that they were entitled to an account of the tithes, at a rate according to the present annual value of the premises subject thereto, to be let. And they submitted, that the decided cases of *The Minor Canons of St. Paul's v. Morris* (9 Ves. 155), and *Antrobus v. The East India Company* (13 Ves. 9), had furnished the principle which ought to govern the present: that the plaintiffs having once proved by evidence, that a sum of money had been always paid for the tithes of these premises, the only defence on which the defendant could succeed would be, that that sum was a customary payment: and they submitted, that that customary payment, if pleaded, should be stated with the same precision as is required in pleading a modus: but no such defence (they observed) was set up by the defendant's answer: or if it were, that it could not be noticed by the Court, because it was not well pleaded. But there are other defences set up, clashing with, and contradictory to each other. One is, that the sum of 12s. 6d., which has been paid for the tithes, has been paid for other premises added to the deanery: whereby they would put it, that the corpus of the deanery has never paid tithes: suggesting rather than insisting on a defence on that ground. But if that sum [71] should be proved to have been paid, and payable, for the deanery, the defendant must get rid of it by shewing it to be a customary payment: and it was at least doubtful, whether a customary payment would be good for a single house in a parish. The object of the statute was, to put the tithes payable to the clergy in London, on a footing with the predial tithes paid to a rector in other cases. There is no exemption in the statute in favour of the defendant, and all intended exemptions are expressly provided for therein. The deanery of St. Paul's cannot be said to be within the exemption in the 16th section of the act, as the house of a great man. It is clear, that he is not a nobleman: and the expression great men, (magnates,) taking precedence of noblemen in the order of the words, must have been used as with reference to persons of even greater popular consequence than noblemen. But a Dean (although the present Dean be a great man) was not then, nor is now, as Dean, a great man in point of right, whatever the courtesy of society may consider him. A dean is not mentioned in the 2d Rich. II. cap. 5 (de scan. mag.), or in the 31 Hen. VIII. c. 10: nor is there any notice taken of a dean, in the table of precedence in Blackstone's Commentaries, (p. 405). And as to all other common-law grounds of exemption, ecclesiastical or otherwise, this statute has virtually excluded them: and even an abbey would be liable to pay tithes under this act of parliament. So it was held in the case of *Green v. Piper* (Gw. 164. Cro. Eliz. 276). They then adverted to the fact of the payment of 12s. 6d. for [72] the deanery, and to the circumstance of its having been doubled of late years: submitting, that the less sum, even, was much too large a payment to be attributable to the small spot of ground on which the Feathers had stood: that its having been increased destroyed the defence of a customary payment altogether: and that if the deanery itself was not protected, the new building was liable to pay tithes according to its improved value. That was decided by the case of *Williamson v. Goshing* (Moor. 912). And they contended, that that value was not to be estimated merely by the rent paid, but by the actual yearly value, or what it would now be fairly worth to be let by the year: and they cited *Teall v. Warren* (3 Gw. 902), and *Antrobus v. The East India Company* (3 Gw. 1054).

Duncey, and Spranger, for the defendant, contended, that the payment of tithes for the city of London was merely intended to be a charge on lay property of a nature purely religious; and that they had always been paid such on the vigils of feasts, to the clergy, and so paid by the laity only; that the clergy had never been considered liable to those payments; that they were, for that reason, not named in the act of the 31 Hen. VIII. which mentioned only the citizens and inhabitants. and therefore the provision must be construed as confined to the laity alone, as the payment itself had always been before the passing of the act; that the 12s. 6d. (the earliest payment of which was in 1763) was a payment in respect of the Feathers (which had been a house used as a tavern,) having been purchased and [73] added to the deanery, and therefore previously liable to pay tithes, and thus a legal origin was shewn as to that payment, which must destroy the presumption of an illegal one. With respect to the entry of the payment, as for "the deanery," they submitted, that it was not surprising that, by way of brevity, a payment for any part of the deanery should be entered shortly in the plaintiffs' books as a payment for the deanery generally, and not for the precise part only which was liable in point of fact; an entry, besides, which the defendant's predecessors could have had no opportunity of knowing, still less of objecting to. The subsequent increase of the amount, they contended, was attributable solely to accident and inadvertence; and certainly no reason is given for it by those who claim it.

As to the argument that the defendant could not bring himself within any of the exemptions in the act, they urged, that his claim was not founded on an exemption, by way of discharge, from payment of tithe at any time due, but on the ground that the premises never had been chargeable. They urged that it was an established maxim, that *ecclesia ecclesie decimas solvere non debet*; and they cited for that *Blinco v. Marston* (Cro. Eliz. 479), and *Blinco v. Barksdale* (ib. 578. Gw. 197). And as to any doubt which might be raised of the deanery being built on the ancient site, that must be out of the question, because it is expressly so charged by the plaintiff's bill.

[74] [Richards, Chief Baron. The maxim of *ecclesia decimas non, &c.* is not so general as to extend to ecclesiastical persons not belonging to the same church.]

But these premises, (it was submitted,) are church land, and are holden by this ecclesiastical person in respect of his deanery, which is within the parish.

It was then contended, that if the defendant was not to be considered exempt from the payment of tithes as an ecclesiastical person, he was within the express exemption of this act as a great man, according to the meaning of those words, which were clearly contra-distinguished from noblemen, and must be applied to persons of wealth and consequence, or dignity, who were not ennobled. Of that description was the Dean of St. Paul's. A dean is styled in Burn's Eccles. Law (vol. 2, p. 76), "a governor over the prebendaries and canons:" he is therefore a great man in the church, and as such he no doubt was in the contemplation of the legislature, when passing this act. The meaning of the term greatness, is still further elucidated by the subsequent words of the exemption, including therein persons who were great in trade, as all companies having halls, &c. (who could have had no assigned rank,) which is strongly conclusive of the intention of the framers of this act.

They ultimately contended, that in all events, the payment, if chargeable, ought to be restricted to the amount hitherto paid.

[75] Wetherell, in reply, submitted, that the first ground of exemption from payment of tithes, was wholly unsupported by evidence; and that this statute had precluded all presumption of satisfaction by payment to a third person. He denied that the payments were of a religious nature; insisting that they were merely civil, and to be considered as predial tithes; not as offerings on the altar, or for prayers, or in any way connected with the rites of religion; and therefore did not come within the ecclesiastical exemption, which was confined to the case of a rector and vicar of the same parish; and such was the result of the cases of *Blinco v. Marston*, and *Blinco v. Barksdale*,—that tithes in London were a civil right to a civil payment, in respect of the houses, and not in respect of the persons occupying them, as offerings at festivals are; and therefore, even if before the act a clergyman was not liable to pay tithes, he became liable as soon as the act passed. And he repeated, that the Dean could not be considered as a great man, within the words of the statute; and concluded with submitting, that the payment proved, of the two sums of money for the deanery, had not been explained, or the arguments deducible from it answered.

RICHARDS, Chief Baron, now delivered judgment. (Having adverted to the nature of the suit, as founded on the statute of 31 Hen. VIII. c. 10.)

It is admitted (said his Lordship) that that statute is general, and that it gives the parson a right to tithes for every house in the parish not expressly [76] excepted. It is therefore incumbent on the person disputing the plaintiff's claim to tithes, to shew either that he comes within some exemption in the statute;—or that he is protected by some customary payment. It is admitted that the deanery of St. Paul's is within the parish of St. Gregory: and it follows, therefore, that the dwelling-house of the deanery is titheable, unless some legal exemption can be shewn.

The defences which have been set up to this bill are several, and for the most part inconsistent.

The first defence is independent of the statute, and is founded solely on general non-payment of tithes. It appears that the parsonage of the church of St. Gregory was once in the patronage of the dean and chapter of St. Paul's, and that it was by them appropriated to the use of the warden and minor canons of St. Paul's, under the authority conferred on them by King Henry VI. And that former connection between them was pressed, as argument that a presumption might fairly be raised that by some contract then entered into between them, the dean might have stipulated for a discharge from the payment of tithes, in consideration of the benefice so granted: but no trace has been shewn of the existence of such a contract, and therefore that defence fails: so that the dean must be considered, in that respect, as if he were any other person.

The next defence is also independent of the statute. It is, that the defendant is an eccle-[77]-siastical person, and that the deanery being part of his possessions as such, he is protected from the payment of tithes by the maxim that *Ecclesia ecclesie decimas solvere non debet*. But the answer to that is, that here, there is an express act of parliament charging every house generally in the parish except certain houses which are expressly exempted: and that view of the act of parliament was acted on in a very early case,—*Green v. Piper* (Cro. Eliz. 276),—where a house in London, which was part of the possessions of a priory, was held chargeable with tithes, according to the ordinance there, because only noblemen's houses are excepted. Giving full weight, therefore, to all the circumstances as yet relied on by the answer of the defendant, the act of parliament not having expressly discharged him, the dean is liable, notwithstanding, to the payment of tithes. It may be matter of curiosity, but it can be of no use, since the statute, in the elucidation of the present question, to inquire how tithes were payable before the passing of that act of parliament, which is the *Magna Charta* of the clergy of London: or what privileges ecclesiastical persons previously enjoyed: but the maxim of *ecclesia decimas solvere ecclesie non debet* having been said to apply here, I am called upon to give it as my opinion that this case is clearly not within the general application of that maxim, which, as I take it, merely applies to the case of a rector and vicar of the same church and parish, where the ecclesia would be paying tithes to itself: as, where the rector or vicar is in possession of glebe, neither shall pay tithe to the other in respect of such [78] occupation. In other cases of an ecclesiastical person claiming exemption, he must prescribe in *non decimando*. The case of *Blinco v. Barksdale* (Cro. Eliz. 578) was that of a rector and vicar of the same parsonage: and of the same nature are all the other authorities. In *Watson's Clergyman* (p. 513,) it is said, "though glebe land, in itself considered, be all titheable as other lands be, yet that no tithes shall be paid of the glebe by the parson of a church to the vicar of the same church, whilst they are in the hands of the parson himself:" and that is the true rule. But there is no doubt, that when the glebe of one clergyman is in the parish of another, it must pay tithe; for that sort of privilege is confined to the clergy of the same parish. But that question cannot arise here, as I have before intimated, because the maxim itself, even if it had applied, is contravened by the express words of an act of parliament containing distinct exemptions, the introduction of which is necessarily exclusive of all other independent extrinsic exceptions. There is also another answer to be given to it, arising out of the pleadings and proofs, which is quite decisive: for this is a claim of a total exemption, (as it must be if the deanery be exempted at all,) whereas it is clearly in evidence, and it is admitted, that tithes have been paid in respect of the deanery. So much for the defences which are independent of the statute.

Then a defence is set up, grounded on an exemption by the terms of the statute, which, if made out, would dispose of the question. It is founded on the provisions [79] of the 156th section, exempting the houses of great men. (His Lordship read

the section.) In the first place, to support that defence by evidence, it would be necessary to prove that no tithes had ever been paid by the defendant's predecessors formerly: but the contrary is actually in evidence. And besides, another point must be made out to support that defence,—that the dean is a great man within the meaning of the act. No case has been found as to the precise meaning of those words, or the extent of their application, but all the instances of exemption on that ground which can be furnished are instances of noblemen; and I incline to think with Mr. Hall, that the order of the words (which is, by the rules of grammar, a criterion of construction) imports, that great men must mean persons superior, in certain respects, to noblemen and noblewomen, of which description there are certainly persons in this country. These are the only three classes of persons whose houses or buildings are exempt from tithes, in respect of the occupiers, by the act,—great men,—noblemen, and noblewomen, (and it was no uncommon thing for the nobility to reside in the city in those days.)—and (in favour of commerce)—corporations, crafts, or companies, who have halls. Now, this defendant is certainly not one of either class of those privileged persons.

Thus the two first grounds of defence insisted on are quite independent of the act of parliament, that the defendant is exempt from payment of tithes, and (he says) that accordingly none have ever been paid for the deanery. Then he sets up a defence [80] of total exemption under the act: and afterwards, again abandoning that ground, he pleads that he has always paid a sum certain, and therefore he is within the provision of the act, which directs the assessment to be made on the rent at which the premises were then last letten. Each of those defences are severally thus met by the evidence:—On the ground of exemption from non-payment raising presumption of a contract, he fails: for it is quite clear that he has, in point of fact, paid tithes. The same objection is opposed to his claim, either as an ecclesiastical person without the statute, or as a great man within it. Whether or not he may have paid tithes in his own wrong, is a question on which there is no evidence: but as far as the evidence given goes, the defendant and his predecessors have constantly paid tithes in respect of the deanery, and as for the deanery expressly in terms, independent of the other payments for what has been separately charged, and that for a great length of time. And what is still more extraordinary, as opposed to the argument of a customary payment, the sum which has been proved to have been paid in respect of the deanery has in later times been doubled: and therefore there is no fixed payment to which we can refer. I ought to notice the suggestion, that the 12s. 6d. was paid for the site of the Feathers public-house, which was bought, and added to the deanery. The answer to that is, that it is not supported by evidence: on the contrary, the evidence is, that it has been paid for the deanery as “the deanery,” (and it is so charged in the old rate-book:) and that that [81] part of the premises forms only a very small part of the garden, and yet the payment for the tithes of it (before comparatively large) is in after-times doubled: that, therefore, must come under the effect of the objection founded on the evidence offered to prove that that payment for tithes has always been made in respect of the deanery.

Then we come to the question, whether the dean is to pay tithes now? It is candidly stated, that the defendant does not rely on a customary payment. There has been, in fact, no total exemption in his favour, on any ground, proved: on the contrary, 12s. 6d. has been for a very long time paid, and then that payment is doubled. It is clear, therefore, that he is liable to some payment.

Then the next question to be considered is, whether that sum so doubled, of 11. 5s., is to be the fixed rate of satisfaction for the tithes payable to the plaintiffs as parson, or whether it is to be proportioned to the improved value? I see no ground for so restraining the plaintiffs. The object of the statute was to give them the tithes according to the rent or full yearly value. If the premises are fairly leased (and it is to be presumed that they are, because landlords take as much rent as they can get upon their leases,) the minor canons take 2s. 9d. in the pound upon that rent. In the present case there has been no letting at all, and therefore there is no practical standard, either of rent or value, to which the payment of 12s. 6d. is referrible as a criterion for determining the due rate of tithes: nor can it be considered as being in effect a customary payment under a per-[82]-petual agreement; for it is proved that that payment was considered to be too small, and therefore it was increased to double the amount; and we find, in consequence, that 11. 5s. was afterwards demanded and

paid. Now it is quite clear that the object of this act of parliament was, that the rectors of London should have the same advantages as are enjoyed by rectors in the country. The 20th section (which his Lordship read,) gives a privilege, to any person taking a tenement at a less rent than had been accustomed to be paid for it, by reason of any misfortune, to pay tithes only after the rate of the rent reserved in his lease, as long as the same should endure: so that that clause is only binding till the end of the lease, and at that time, if the value of the property be advanced, either by the improvement of the premises or by the depreciation of money, then the clergyman is to be paid his tithes according to the improved value. Were it otherwise, indeed, if a proprietor should not let his premises at all, the clergyman would lose his tithes.

On the whole, this appears to me to be a case coming within the principle of all the decisions which have proceeded upon this act of parliament. In the case of *Iratt v. Warren* (3 Gw. 1057), the Court held the meaning of the act of parliament to be, that the inhabitants within the city and liberties of London should pay tithes after the rate of 2s. 9d. in the pound, according to the true value, "as the same were worth to be letten per annum; and that if the same had been a shed, as was pretended, yet ought the same to be discharged of [83] tithes no longer than it was continued a shed; for, being converted into a dwelling-house, the same ought to pay tithes according to the true value." In that case, too, fines paid on leases, whereby the rent was diminished, were not considered as governing the clergyman; for in cases of fines paid on the lease, in consideration of which the rent is reduced, the amount of the fine must be considered in estimating the true yearly value. And it is the true construction of the act, that the clergyman should have tithes according to the full yearly value, though perhaps, where rent comes fairly near the annual value, a further claim would not be encouraged. In the case of *Ward v. Hilber* (2 Gw. 538), the defendant admitted having paid tithes at a rate of 1l. 16s. assessed upon him for his premises; but when he brought the question of his liability to pay so much before the Court, the Court decreed that notwithstanding he had paid at that rate for a long period, that of right he ought to have paid at the rate of 2s. 9d. in the pound on the yearly rent or annual value of the premises, which was proved to be 40l. The plaintiffs, it seems, having thus established their right, submitted to continue to accept the former payment of 1l. 16s. if the defendant would continue to pay it: but he having refused to do so, the Court made a decree, "that he should pay the tithes after the rate of 2s. 9d. in the pound rent or value of the premises; the same to be rated at and after the rate of 30l. per annum for the yearly rent or value of the said house and premises, which amounted at that rate to 4l. 2s. 6d." [84] and that sum he was decreed to pay. In *Williamson v. Gasling* (3 Gw. 902) there were customary payments set up by the defendant, and proved as to some of the houses for which tithes were paid; but where no such payment was in proof, the Court decreed him to pay 2s. 9d. in the pound. And such also was the decree in *Bramston v. Heron* (4 Gw. 1314). In the report of the two last mentioned cases, I observe that the words, "according to the annual value," which should follow the amount of the rate, are omitted. Now those words certainly are a strong expression of the meaning of the decree itself, and are to be found in it, and are therefore worthy of observation. In *Kynaston v. The East India Company**, which is [85] noticed in *Antrobus v. The East India Company* (13 Ves.

* That case was ultimately decided in the House of Lords.

Kynaston v. The East India Company. February 1803.

The short statement of it is this. On a bill filed in January 1800, by the impropriate Rector of St. Botolph against certain occupiers of houses and warehouses, for the tithes thereof, according to the then improved annual value: the defendants pleaded, that they, as owners of the buildings in question, had never paid any rent for their occupation;—that formerly there were some obscure buildings on the same site, which most probably never paid any rent; but they admitted having paid 1s. in the pound to the plaintiff for tithes, after a rate of 300l. a year, (the proportion of the land tax,) from the year 1776 to Midsummer then last, insisting it was in their own wrong. The cause was heard in February 1803; Plumer, Richards, Stanley, and Kynaston, for the plaintiff: and Pigott, Adams, and Wyatt, for the defendant: when

9), where all the cases are brought together, that precise [86] point is determined; and that case, I believe, was ultimately decided in the House of Lords, or if not, I would only cite it for the principle furnished by the opinion of the Court, for the construction of this act. The decision in the case of *Antebius v. The East India Company* was affirmed in the House of Lords, the principle of which is imperatively applicable, and must govern this case.

Under these circumstances, I am of opinion, that the plaintiffs ought to have a decree in their favour.

As to the time from whence the account must be decreed. Notwithstanding Courts of Equity are not bound in a tithe cause to any limitation of time,—(for it is a great mistake to consider the usual period of six years, to which the Court generally confines itself for its own convenience and that of the parties, and I should always consider myself bound to observe that limitation, unless I saw some reason to the contrary:)—yet, as I do not see any such reason in the present case, I shall confine the decree for an account, to the period of six years before the filing of the bill. The Bishop, in his answer, has stated what he conceives to be the annual value of the premises: but if there should be any difficulty about that, it must be referred to the Deputy Remembrancer, in the usual manner.

Then as to costs.—In all cases of this kind I feel great reluctance to give costs, and notwithstanding I think myself that the principle of the decided cases completely govern this, yet it might [87] still be fairly thought by many to be a singular case. I shall however, be guided by what has hitherto been the practice in the other cases.

Account decreed (with Costs).

Macdonald, Chief Baron, gave judgment †¹. “This defence proceeds on the notion, that as no rent has ever been paid for these premises, there is no criterion by which they can be assessed under this statute (37 H. VIII. ch. 12): and it is therefore contended, on the authority of the case of *Skidmore v. Bell*, C. B.—M. 5 Jac. (2 Inst. 659),—where it was resolved that such houses as were never letten to farm, but inhabited by the owner, were *casus omissus*, and should pay tithes by the decree,—that these buildings are not liable. Looking into the decree book for the cases said to have decided that the tithes must be paid according to the rent or value, the words appear to be used synonymously, and so they are in the reports and schedules. Two decided cases which have been cited go home to this point: in *Bramston v. Heron* an exemption was claimed for a new-built house on the scite of old houses, because no rent had ever been paid; but the Court decreed that the defendant should pay tithes for the new house. There was no necessity to resort to value in that case, because there was a rent, but it shews that a new-built house ought to pay. Then the case of *Williamson v. Gosling* goes the whole length: there the claim of the rector was the same, and so was the situation of Gosling's two houses, which were built on the sites of four, three of which had paid ancient sums. The defendant said, he had himself occupied one of the houses of about the yearly value of 100l. Now that was the case of a house built on the scites of old houses, and the decree was, that in respect of the three they were protected by the ancient payment: but that, for the new house, the defendant should pay 2s. 9d. in the pound, according to the yearly value, which was the value stated, or thereabouts †². Then compare the cases: this is that of a warehouse built on scites of houses which had never paid rent, and it runs therefore on all fours with the case cited: therefore the decree must be, that the defendants shall pay according to the annual value, after the rate of 2s. 9d. in the pound: but as the case is entangled no costs will be given.”

The defendants appealed to the House of Lords, who, on the 25th February 1813, affirmed the decree.

†¹ Taken from a very full note on the brief of a gentleman who was of counsel in the cause.

†² The reports of these two cases as given in Gw. vol. iv. p. 1314, and vol. iii. p. 902, do not go far enough to furnish several particulars in those cases which are here noticed and acted on.

IN THE EXCHEQUER CHAMBER. (IN EQUITY.) (CORAM RICHARDS, CHIEF BARON.)

JEE v. HOCKLEY AND OTHERS. [Same day.]—The amount of money-payments laid as moduses in answer to a vicar's claim, being totally inconsistent with the value of the vicarage as estimated by the ancient documents usually put in evidence, is not sufficient (where the payments have been uniform and uninterrupted) to induce the Court to dispense with an issue.—It seems to be no objection to the laying a modus that it excepts articles of modern introduction, *speciatim*.

The plaintiff filed this bill, as vicar of Thaxsted, (Essex,) for an account of all tithes, except hay, calves, and milk. The defendants pleaded farm moduses.

Hockley (for the farm called Blunts) set up a modus of 12s. 6d. for the tithes of hay, calves and milk, and all other titheable matters claimed by the bill, except turnips, potatoes, clover-seed, cole-seed, and other small seeds *; and other moduses of different sums, in the same terms, for various other farms, amounting together to 13l. 18s. 7d. And they proved the money-payments to have been uniformly made during living memory.

[88] Martin, and Shadwell, for the plaintiff.

Dauncey, and Boteler, for the defendants.

For the plaintiff it was contended,—that the value of the vicarage itself was estimated at so low a rate, by the ancient documents put in, (the Nona Rolls, A.D. 1342, rectory and vicarage together, 38l.; the Ecclesiastical Survey, 26 Hen. VIII. A.D. 1535, 20l.; Pope Nicholas's Taxation, 38l., rectory 50 marks, (33l. 6s. 8d.), vicarage 7 marks, (4l. 13s. 4d.); Parliamentary Survey, 70l.), that it was impossible the payments relied on could be so ancient as to be entitled to be considered by the Court as moduses.

On the other hand, it was insisted, that the usage proved, opposed to those documents, was sufficient to raise such a doubt as to make a further inquiry necessary.

RICHARDS, Chief Baron. These ancient documents have never been considered as conclusive, in any case that I have ever met with. And when I see an uniform money-payment, proved to have been constantly paid for so many years, I cannot take upon myself to say that evidence which is anterior, shall, on that account alone, destroy evidence which is posterior in point of time. And however desirous I may be, (as I always shall,) to save to parties the expense of issues, I must, in such a case as this, direct a further inquiry as to these payments, if required: and if issues are taken, it must be for each farm.

[89] HARRY, Administrator, v. ELIZ. JONES, Widow and Administratrix of Daniel Jones. (Demurrer.) Tuesday, 13th May 1817.—An administratrix claiming under a marriage settlement to retain her debt, need not, in pleading the articles to an action brought against her for a simple contract debt, due from the intestate, state that they were in writing or under seal, or plead them with a proferet, or set out the consideration more particularly; the object of such a plea being merely to shew her right to retain a debt accruing to her thereby, against other creditors of equal degree, and to let in evidence in support of such retainer, on the plea of *plene administravit*.

The plaintiff declared in special assumpsit as administrator on a joint and several promissory note, given by Daniel Jones, and two other persons, to the intestate David Harry. The defendant pleaded non assumpsit—*plene administravit*—and *actionem non*: because, she says, that by certain articles of agreement and marriage settlement, made and agreed upon heretofore, in the life time of the said Daniel Jones, deceased, to wit the 11th day of May, in the year of our Lord 1802, between one John Jones of the first part; the said Elizabeth, administratrix as aforesaid, of the second; the said Daniel, deceased, of the third part; and one David Jones of the fourth part, the said Daniel Jones, deceased, for the considerations in the said articles of agreement and marriage settlement mentioned, and for making a provision for the said Elizabeth,

* This was adverted to by the plaintiff's counsel as an objection in point of form of pleading, but the defendants were permitted to go into the evidence.

administratrix as aforesaid, his intended wife, and for other good and valuable considerations him thereunto especially moving, did thereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said David Jones his executors and administrators, in manner following: (that is to say,) That in case the said marriage should take effect, and the said Daniel Jones, deceased, should happen to die in the life-time of the said Elizabeth, his said intended wife, [90] then that the executors or administrators of the said Daniel Jones, deceased, should and would well and truly pay or cause to be paid to the said David Jones, his executors, administrators or assigns, the sum of 400l. of lawful money of the united kingdom of Great Britain and Ireland current in England: and also should and would deliver unto the said David Jones, his executors or administrators, all the household goods and furniture, of what kind or nature soever the same might be, which the said Daniel Jones, deceased, should die possessed of, in trust, nevertheless, to and for the only use and benefit of the said Elizabeth, administratrix as aforesaid, her executors, administrators and assigns, in lieu of, and in bar of all her claim of dower, or thirds of, in, to, or out of the real and personal estate of which he the said Daniel Jones, deceased, then was, or at the time of his decease might be seised or possessed of, or entitled unto. And the said Elizabeth, as administratrix as aforesaid, in fact saith, that afterwards, and after the making of the said articles of agreement or marriage settlement, to wit, on the day and year aforesaid, at Llandilo aforesaid, in the county aforesaid, the said marriage, between the said Daniel Jones, deceased, and the said Elizabeth, administratrix as aforesaid, was duly had and solemnized: and the said Elizabeth, administratrix as aforesaid, hath survived the said Daniel Jones, deceased, and the said sum of 400l. in the said articles of agreement and marriage settlement still remains wholly in arrear and unpaid to the said David Jones, to wit, at Llandilo aforesaid, in the county aforesaid: and the said Elizabeth, as administratrix as aforesaid, further saith, that she hath fully administered all and singular the goods and chattels which were of the said Daniel Jones, deceased, at the time of his death, and which have ever come to the hands of her the said Elizabeth as administratrix as aforesaid to be administered, except goods and chattels of small value, to wit, of the value of 10l. and except the household goods and furniture which the said Daniel died possessed of at the time of his decease, and that she hath not, nor on the day of exhibiting the bill aforesaid, or at any time afterwards, had any goods or chattels which were of the said Daniel Jones, deceased, at the time of his death, except the said first mentioned goods and chattels of the value aforesaid, and the said household goods and furniture aforesaid, which are not sufficient to pay or satisfy the monies due and owing to the said David Jones as aforesaid, in trust to and for the only use and benefit of the said Elizabeth, administratrix as aforesaid and which she the said Elizabeth, as administratrix as aforesaid, retains in her own hands towards and in part satisfaction and payment thereof: and this she the said Elizabeth, administratrix as aforesaid, is ready to verify: Wherefore she prays judgment if the said John, administrator as aforesaid, ought to have or maintain his aforesaid action thereof against her, &c.

To that plea there was a demurrer, for the following causes:— that it is not stated or shewn in or by the said last plea, that the said supposed articles of agreement and marriage settlement, in that plea mentioned, were sealed with the seal of the said [92] Daniel Jones, deceased, or signed by him, nor is there any profert in the said plea, of the said supposed articles of agreement and marriage settlement: and also, for that the full considerations for the said Daniel Jones making the supposed articles of agreement and marriage settlement, are not stated or shewn in the said last plea, but, contrary to the rules of pleading, it is stated and alleged in the said last plea, that the said Daniel Jones, for the considerations in the said articles of agreement and marriage settlement mentioned, and for making a provision for the said Elizabeth, and for other good and valuable considerations him thereunto especially moving, did make the said supposed covenant, promise and agreement in the said last plea mentioned: and also, for that it is not stated or alleged in the said last plea, that the said supposed articles of agreement and marriage settlement were made by the said Daniel Jones for or in consideration of marriage, or any other valuable consideration, so as to authorize the said Elizabeth to retain any part of the goods and chattels of the said Daniel Jones, in satisfaction of the said covenant, promise and agreement, in the said last plea mentioned: and also, for that it is not stated or alleged in the said last

plea, that the said Elizabeth, or the said David Jones, by the said articles of agreement, covenanted or agreed with the said Daniel Jones, that the said Elizabeth should marry the said Daniel Jones; and for that it does not appear that there was any mutuality in the said supposed articles of agreement and marriage settlement, or any valuable or sufficient consideration for the said Daniel [93] Jones making the said supposed covenant, promise and agreement, in the said last plea mentioned: and also, for that although by law no covenant or agreement of a person can pass or convey an interest in, or right to goods and chattels, the property wherein such person afterwards acquires: yet nevertheless, the said Elizabeth hath in and by her said last plea alleged, that the household goods and furniture which the said Daniel Jones died possessed of, became and were the specific property of the said David Jones, in trust for the use and benefit of the said Elizabeth; and also, for that the said Elizabeth hath not stated and shewn in and by her said last plea, what was or is the value of the said household goods and furniture, whereof the said Daniel Jones so died possessed as aforesaid: and also, for that the said last plea is in other respects uncertain, informal and insufficient, &c.

Chitty, in support of the demurrer, submitted, first, that the articles of agreement and marriage settlement ought to have been stated in the plea to be in writing, and sealed and signed: and he cited the case of *Duppa v. Mayo* (1 Saund. 272, n. 2), where those requisites are said to be indispensable in a plea, though not in a declaration; and the more so as it is required by the statute of frauds, that all agreements made upon consideration of marriage shall be in writing, and signed by the party to be charged therewith, and without that it does not appear to be such a contract as could be enforced:—2dly, that it was also necessary that the full consideration [94] should be stated, *Clarke v. Gray* (6 East, 568), *Miles v. Sheward* (8 ib. 7), *Andrew v. Whitehead* (13 ib. 102); whereas all that is stated in the plea is, that by reference to the articles, of which there is no proof, nor does there appear by the articles, as pleaded, to have been any mutuality of benefit:—3dly, that the covenant, as stated in the plea, was objectionable, because it would go to convey all the interest of the husband, in whatever property he might at any time afterwards acquire, to any amount, which could not be done by law, *Reed v. Blades* (5 Taunt. 222); and lastly, that it would also give the person, so conveying such after acquired property, the undue advantage of a false credit.

Peake, in support of the plea, contended, —that as this was merely a question of the administratrix's right to retain her debt, it was not necessary to plead that the articles under which she claimed were sealed, because the plaintiff's demand being on simple contract, it was sufficient that her's should be shewn to be a debt of equal degree; that the articles were in writing (he submitted) clearly appeared from the language of the plea, although there was no express averment to that effect: and that that is matter of evidence, if the statute of frauds is objected to it.

In the case of *Plumber v. Marchant* (3 Bur. 1380), it was held that, under circumstances very like the pre-[95]-sent, an administrator might give retainer under such a covenant in evidence, on plene administravit, without pleading the special matter of the settlement under which he was entitled; and that an action of covenant was as much a lien on assets as an action of debt. The agreement in that case was to pay and deliver, either in money, goods, chattels or effects, out of the intestate's personal estate, the sum of 700l. to the defendant and another trustee, within six months after his death,—the interest to be paid to his wife during her life.

The case of *Jarman v. Woolton* (3 T. R. 618) has established, that a woman may, before marriage, convey her stock in trade and furniture to trustees, by which they become not subject to his debts, —and that, although there was no inventory of what that stock and furniture consisted. And it is determined in the case of *Cudgoin v. Kennell* (Cowp. 432), that such a settlement of household furniture is good against creditors, even for debts due at the time, although it remained, after marriage, in the possession of the husband. Those cases furnish an answer also to the objection of a false credit being given: besides that this is not a question in a case of bankruptcy.

As to the want of consideration being stated, there can be no doubt on this plea that the consideration was the marriage; which, there is also no [96] doubt, is a valuable one; and the widow stands in the place of any other creditor of equal degree, and may, as administratrix, prefer her own debt. This plea does not insist on the settlement being good as a transfer of subsequently acquired property, but merely as giving her a right to retain her debt out of the intestate's effects.

The case cited from Saunders does not go the whole length contended for, and no prudent pleader ever states a contract to be in writing; but from the whole tenor of the plea, that is sufficiently obvious, even if it had been necessary that that should appear.

Chitty, in reply, observed, that the case of *Jarmyn v. Woolton* was distinguishable from the present; because there the goods settled were originally the property of the wife, and they remained after marriage in her possession while she carried on a separate trade. In the other cases, cited from Burrow and Cowper, there was a consideration stated of a large sum of money received with the wife on the marriage; and here, as the defendant has professed to set out the consideration in the plea, it should have been done fully: but from what appears on the face of this plea, if it can be supported, creditors may be continually defeated under similar circumstances.

GRAHAM, Baron. Of the various objections which have been made to this plea, the most consi-[97]-derable is, that the articles are not stated to be in writing, or signed and sealed: but that has been well answered, notwithstanding the authority of *Dappa v. Mayo*, by the argument that that would be matter of evidence on such a plea, and need not be averred on a mere question of a right to retain a debt by an administratrix. It would, however, have been more technical to have stated it. It is impossible to contend, that it does not appear by this plea that the articles were in writing; for it admits of no doubt, because the whole is set out. As to there being no consideration stated, it is said, in express terms, to be for making a provision for the wife; and the words "and for other considerations," meaning any thing or nothing, cannot destroy the effect of this plea. There is no necessity to cite cases to shew that such an instrument as this need not be set out verbatim. If, indeed, the essential part of the contract be not pleaded, it might be demurrable; but here a sufficient consideration appears, and that the intended marriage took effect: and that is an answer to the objection of there being no mutuality.

Then the question is, whether the defendant had a right to retain to the amount of her claim; and on that point the case of *Plumer v. Marchant* is decisive. It was there held, that the plea of plene administravit would let in evidence to justify a retainer, and what was said by the Court there is equally applicable in this case; and the covenant there was like the present agreement, and only [98] sounded in damages. The sole difference in the cases is the degree of the debt. It would have been most idle in the administratrix to have procured an action to have been brought against her for her own debt; but she has properly avoided such a circuitous mode, and therefore this demurrer ought to be overruled.

GARROW, Baron, of the same opinion. If I had the least doubt on this case, I should wish it to stand over till the Court should be full. It is quite sufficient for this plea to shew there was a legal contract, and that it has done; and as to the consideration, the articles are expressly stated to be made for a provision for the wife, and in bar of dower. However striking the argument may be that this was a secret deed, giving a false credit, it is now much too late to raise such an objection to instruments of this kind between husband and wife, however hard it may be as against creditors.

Judgment for the defendant.

[99] PRIOR, AND H. PENPRAZE, AND JAMES PENPRAZE, v. WM. PENPRAZE AND WILLIAMS. (Demurrer.) Tuesday, 13th May 1817.—Demurrer by a judgment creditor to a bill, for an injunction to restrain him from taking out execution on his judgment, against an estate sold before he obtained judgment, and ineffectually conveyed to the purchaser (the plaintiff),—whereby the legal estate descended, since the date of his judgment, to the heir at law,—overruled.

This Bill was filed against the defendants, one of whom was the heir at law, and the other a judgment creditor of Henry Penpraze, deceased. It charged,—that Henry Penpraze had in his lifetime, (in March 1809,) sold a freehold lease of certain premises granted to him for the lives of himself, and of Henry and James, his sons, and other premises held by him under a lease for ninety-nine years, to the plaintiff, Prior, and John Treloar (since deceased,) in consideration of 120*l*., and a conveyance thereof was executed, with a covenant for further assurance:—that in the following March, Prior and Treloar demised all the said premises to plaintiffs, H. (the younger) and J.

Penpraze: that Henry Penpraze died, leaving defendant, W. Penpraze, his eldest son and heir at law; that plaintiffs had lately discovered that, in consequence of a mistake in the conveyance (which was dated 10th March 1809,) it did not operate to convey the freehold, because it was not to take effect, by the terms of the conveyance, till the 25th March. But that defendants, William Penpraze, combining with William Williams, &c. not only refused to execute a proper conveyance of the said premises to plaintiff, but was colluding with Williams, who had sued out a writ of seire facias, for the [100] purpose of reviving a judgment on a verdict, recovered by him in an action at law which had been brought against him by Henry Penpraze, deceased, by means of which, the defendant, Williams, threatened, if the plaintiffs should succeed in getting a valid re-conveyance of the premises, to harass them by proceedings at law.—Prayed decree that such error in the conveyance might be corrected, and a good conveyance executed; and that Williams might be restrained, by injunction, from proceeding by writ of elegit or otherwise at law.

Demurrer, by William Williams, that the bill contained no matter of equity whereon to ground a decree against him.

Roupell stated, that the facts of this case, as they concerned the defendant Williams, were,—that the deed of 10th of March 1809 was fraudulent, and without consideration; that in the year 1807, Henry Penpraze, deceased, brought an action of trespass against Williams, to ascertain a disputed right of way, which was tried at the Assizes for the county of Cornwall in March 1809, when a verdict was found for the defendant. Costs were taxed, and judgment signed in Easter Term following, and execution taken out for 130l. That the pretended sale of the premises in question to plaintiffs, Prior and Treloar, who was the father-in-law of plaintiff, H. Penpraze, was a mere pretence for defrauding the defendant of the fruits of his said judgment; and that the pretended consi-[101]deration of 120l. had not been in fact, and bona fide, paid with the proper monies of the plaintiffs. He contended, therefore, in support of the demurrer,—that whatever Equity the plaintiffs might have against the defendant, Penpraze, there was nothing in the bill which could affect the right of a third person, who was a judgment creditor, to revive his judgment against any assets which had descended; nor was there any thing stated to affect the conscience of William Williams, who had no notice of the purchase, except a very general and common charge of collusion, which could not have the effect of precluding him from taking advantage of a want of equity by demurrer.

Martin, and Richards, for the bill, submitted, —that at the time when the conveyance in question was executed, there was no debt of the judgment creditor in existence which could affect the lands of the debtor. If H. Penpraze, deceased, had at the time only agreed to convey the premises, the purchaser might have compelled a specific performance in Equity; but his having actually executed the deed, turns him into a trustee for the plaintiffs, in whose hands, as such, creditors under a commission of bankruptcy could not take the lands. He had then only the legal estate in the lands, and the plaintiffs, who had the equitable interest, could at any time have compelled him to convey them; and a creditor has no right to take advantage of a trustee, not having clothed a purchaser with the legal title before he obtained his judgment.

[102] Roupell, contra. The defendant Williams had nothing to do with any equity of the plaintiffs against the defendant Penpraze. He is a legal, not an equitable claimant; and such a contract cannot protect the premises from judgments. It is incumbent on a purchaser to search for judgment, not only when he contracts for his purchase, but up to the last moment before it is finally completed.

GRAHAM, Baron. I was much struck with the objection to this bill at first, but on further consideration, I think it must be answered; for the bill was properly filed against William Penpraze, calling on him to confirm the plaintiffs' title: because, if the facts alleged in the bill are true, as the demurrer admits, he can only be considered as a mere trustee for the plaintiffs. He is only entitled at all by reason of a defect in the conveyance. The charge of collusion might have been made in broader terms; but independently of that, there is enough to shew that the plaintiffs have a right to restrain the operation of the seire facias; and a Court of Equity has the means of enforcing from him an account of the rent and profits received by the trustee, unless the defendant could put himself into the situation of a purchaser for a valuable consideration without notice. Here Williams has only an equitable,

not a legal lien, and one which is not in any respect preferable to the plaintiffs'. I think, therefore, that the plaintiffs have a right to the relief sought by this bill, and to have a re-conveyance from William Penpraze: [103] and, ultimately, an injunction against Williams, to restrain him from suing out execution against these lands.

Demurrer overruled.

MILNES v. COWLEY AND OTHERS. 14th May 1817.—The Statute of Limitations cannot be pleaded by trustees, in answer to a charge of breach of trust, to defend them from the consequences of neglecting their duty in having sold an estate charged with the payment of a sum of money, without satisfying that demand.

The Bill stated,—that in consideration of an intended marriage between the plaintiff and Margaret Marples, the daughter of John Marples, deceased, the following agreement was entered into between Robert Milnes, the father of the plaintiff, and the said John Marples, dated 12th November 1778: "That Robert Milnes would for himself, before or upon John Milnes' day of marriage with Margaret Marples, give in lands, goods, money, or securities, the sum of 500*l.* unto John Milnes his son. And that John Marples would, before or upon Margaret Marples' day of marriage with John Milnes, give in lands, goods, money, or securities, the sum of 250*l.* unto Margaret Marples. And Robert Milnes further agrees, that he and his wife will resign up all the house and lands they now rent, unto John Milnes; and if they cannot agree to live together, the said Robert Milnes will take another place, or live separate in the said house." That the marriage [104] took place shortly after the agreement, and Robert Milnes, the plaintiff's father, performed his part of the agreement; but John Marples never performed his part. That Margaret Milnes, the wife of the plaintiff, was dead; and that John Marples also died the 9th December 1808, having by his will devised his real estate to Leonard Cowley and John Foulds, two of the defendants, upon certain trusts; and the residue of his estate and effects he directed to be divided among his children (who were also defendants) in the manner stated in the will. That Cowley and Foulds administered to his will, and became his personal representatives, and as such possessed his personal estate, and entered as his devisees into possession of his real estates. That some difficulty arose with respect to the mode of payment of the said 250*l.*, and as to the dower of the testator's widow; and in consequence thereof a meeting of all the parties, interested under the will, took place on the 19th March 1810, when an agreement was entered into for the purpose of authorizing the trustees to sell and convey certain parts of the said testator's real estates, and out of the produce thereof to pay a certain sum to the said testator's widow, in lieu of her dower; and also to pay to the plaintiff the sum of 250*l.* in satisfaction and discharge of the marriage portion, agreed by the said John Marples to be paid to the said plaintiff, on his marriage with Margaret his late wife, upon his executing a proper release and discharge for the same. That such last-mentioned agreement was signed by John Dob Marples and Robert Marples, two of the said testator's chil-[105]-dren, and by the plaintiff, but was never carried into effect. That the plaintiff had frequently applied to the said defendants, Cowley and Foulds, as such trustees, to pay the said 250*l.*

And it charged, that the defendants, Cowley and Foulds, had in various instances admitted the validity of the agreement, and acted on the same; and, as evidence thereof, charged,—that previous to 19th March 1809, they had sold part of the testator's estate to Robert Marples, one of the defendants, and that on such occasion the said defendant, Robert Marples, applied to the persons beneficially interested in the money arising from the sale of such premises, and represented that he had paid much more than the worth, and requested them to abate 5*l.* each out of their respective shares. And thereupon the following agreement was prepared by John Bower, the attorney of Cowley and Foulds: "We, whose names are underwritten, do hereby agree to allow our brother, John Marples, 5*l.* a-piece, out of the purchase-money for the house and premises at Apperknowle, out of the shares coming to us under the will of our father, John Marples:" and which agreement was signed by the said John Dob Marples, and by two other of the defendants, John Rikney and William Syddale, the husbands of two of the said testator's daughters. And the said John Bower also wrote as follows at the foot of the agreement: "I agree to allow according to my

share," which he tendered for the adoption and signature of the plaintiff, [106] who agreed to make such allowance, and signed the same.

And the bill prayed, that the agreement might be established, and that the defendants, Cowley and Foulds, might, out of the personal estate and effects of the testator, John Marples, pay and satisfy the said 250*l.* and interest; and in case the personal estate should be insufficient, then that such deficiency might be supplied by a sale of the real estate.

To this agreement the defendants, Cowley and Foulds, pleaded the Statute of Limitations.

Phillimore, in support of the plea, submitted,—that the statute of limitations was well pleaded to a bill seeking to carry into effect an agreement for payment of a sum of money of nearly forty years standing, without any reason having been given why the claim had lain so long dormant;—and that, if it was intended to be argued that the subsequent agreement of 1810 had destroyed the operation of the statute, the answer to that would be, that it was not signed by the trustees, against whom this bill was filed.

Roots, *contra*, contended,—that the marriage having been carried into effect, the right of the plaintiff became absolute;—that it was very natural that during the life of the testator the plaintiff should not have pressed for payment;—that the [107] plaintiff had performed his part of the agreement, and therefore the statute of limitations could not apply, particularly when pleaded by trustees, who were mere conduit-pipes, and had no interest, and were, in fact, themselves neglectful of their duty in not having paid the money;—and that as, at the meeting of all the parties really and beneficially interested, they had, by the agreement of 1810, recognized the plaintiff's claim, and engaged to satisfy it, the trustees could not now plead the statute in bar to it.

Phillimore, in reply, cited a case from Viner's *Abr. tit. Statute Limitations*, p. 124, (citing Nels. *Abr.* 1125,) where it was held that, on a bill filed, on a note given to assure lands upon marriage, twenty years after it was given, the claim was barred by the statute.

GRAHAM, Baron. In the view that I have taken of this case, I am of opinion that the plea cannot stand as a bar to the plaintiff's suit. The case which has been cited from Viner stands nakedly, and, for any thing that appears, the promissory note in that case might have been given by a stranger; nor does it enable us at all to see the nature of the transaction. As to the demand not having been made for so long a time, nothing is more common than to postpone such a claim during the life of the parties connected in blood. The agreement of 1810 rebuts the presumption of the money having been previously paid. But, independent of the [108] question of the operation of the statute of limitations on trusts, in ordinary cases, the trustees in the present instance have been guilty of a breach of trust, in having omitted to do their duty in the first instance; for, on the death of John Marples the father, this covenant was a lien on his estate, both real and personal, and ought to have been satisfied. It is extremely clear that the testator's estate was affected by the trusts when the property was sold. On that ground, therefore, the plea must be overruled; but it may stand for an answer, with liberty to the plaintiff to except.

WOOD, Baron, absent.

GARROW, Baron, concurred. These defendants, who are trustees, were stakeholders of a fund, with knowledge of the claims which existed against it; and that is averred in the bill, as well as that they recognized the plaintiff's claim by the agreement of 1810. It was their duty, on the death of the testator, to have applied his estates to the purposes for which they had been so marked by him in his lifetime. It appears that, on the part of the plaintiff, all that he had engaged for was done, and that raised a competent consideration for the fulfilment of the agreement, on the part of John Marples.

I am therefore of opinion, that this is not a case where the statute of limitations may be pleaded in bar of the plaintiff's claim. It might perhaps have [109] been fair enough as an experiment, but nothing more; for the last ground stated by my brother Graham is quite conclusive against it.

Plea overruled; but ordered to stand as an answer, with liberty for the plaintiff to except.

IN THE EXCHEQUER CHAMBER. (CORAM RICHARDS, LORD CHIEF BARON.)

DORMAN AND OTHERS v. CURRY AND OTHERS. Wednesday, 14th May 1817.—

A rector—claiming tithe of seeds against a vicar, endowed of all small tithes except hay, on the ground of a presumption, that as the former has had perception of the tithe of seeds, notwithstanding the terms of the endowment of the latter, who had also had immemorial perception of the tithe of corn of certain lands, ultra his endowment, an ancient exchange must be presumed of vicarial for rectorial tithes—will be held to strict proof of his title to the tithes sought: and he must shew, by satisfactory evidence, that the vicar has granted them back to him, or made the alleged exchange. Nor is his perception of the tithe in question available against perception by the vicar, if the subject-matter of dispute be one of those which were formerly doubtful, as to their being a rectorial or vicarial tithe.—Nor can the rector insist on an issue in such a case: for no presumption will be raised in his favour, because he is in the situation of a claimant contesting his own grant, and has clothed the vicar whom he has endowed, with his inherent common-law right.—Note. Such a bill dismissed, with costs.

The plaintiffs, who were lessees of the rectory of Dartford in Kent, claimed by the present bill, from the defendant Curry, (the vicar of the parish,) and from all the defendants except Warde, (from whom they claimed only the tithe of seeds,) the tithe of [110] green fodder and clover seeds. The claim of the tithe of seeds (on which alone the judgment of the Court proceeded at present) lay, in point of fact, between the rector and vicar, and was founded on the part of the former, as appeared by the bill, on the ground that a partial exchange of the rectorial and vicarial tithes was to be presumed, from perception, to have been effected before time of memory: for that the vicarage was endowed with the tithe of hay on certain lands called Dartford Salt Marsh, and not of corn: yet the vicar, it was alleged, had constantly received the tithe of corn from the same lands: whereas, on the other hand, the lessees of the rectory had always received the tithes of artificial grasses and seeds from the other lands in the parish.

The principal defendant, Curry, admitting the perception of the tithe of corn, insisted, that if his right to it accrued by virtue of any exchange which had ever taken place between some former rector and vicar, it must have been given to him in lieu of the tithe of hay of certain lands called King's Marsh, of which the vicar had been endowed between the years 1291 and 1316, but which were always received, notwithstanding, by the lessees of the rector: and he denied that the lessees of the rector had had perception of the tithe of seeds on the other lands of the parish, except by usurpation, in some few instances where the vicar had not been apprised of their having been produced: insisting on his title, in virtue of his endowment, to the seeds [111] of clover and other artificial grasses, and all other small tithes.

The documentary evidence produced by the plaintiffs consisted of various receipts for tithes, memoranda from vicar's books, and agreements for compositions. The first of the former, in point of time, was a receipt of one Tasker, lessee of the then rector, dated 4 July 1721, for 5l. 2s. 6d. "for the tithes of ten acres of peas, and the tithes of three acres of cinquefoil seed last year." (Q. the place.) A receipt, dated 4th December 1734, from the same person, "for 11s. 3d. for the tithe of 15 bushels of clover seed, sold Mr. Allen: for 4½ acres of peas, and 3 ditto." Another, dated 21st July 1770, from Edmund Williams to John Dorman, (as agent for the then lessee of the rectory,) for 14s. 6d. in full, for tithe of clover seed. A copy of the following entry in the vicar's books:—"1734 to 1735, Mr. Vaux. Feb. 21, eight acres of clover, fed the first part of the year, and after for seed. The seed pays tithe to Mr. Tasker." An agreement, dated April 4, 1775, signed by the said Edmund Williams, and several occupiers of lands in the parish of Dartford, whereby he let to them their tithes for their farms in the parish of Dartford, which concluded with this memorandum: "Clover seed, cinquefoil seed, turnip seed, in kind as usual." Another agreement, dated July 15, 1776, whereby John Powell, an occupier, agreed to pay to Edmund Williams, for the tithe of his farm in the parish of Dartford, the following sums, for certain titheable matters: "Peas 6s. an acre: cinquefoil and

[112] clover 5s. 6d. : clover seed, after thrashing, to account for, and expenses allowed for thrashing, carrying and cleaning, turnip seed, or any seed, to account for, after cleaning and allowing for, as clover." In a subsequent agreement, dated January 1, 1780, between the then lessee of the rectory and an occupier, for certain rates or compositions by the year in lieu of the great tithes, was the following item: "For clover seed and turnip seed, one tenth part of the net profit, after all charges deducted, and rateably and proportionably for a less quantity, &c." They also produced an account, delivered by the defendant Curry to the plaintiffs as occupiers of lands in the parish, containing an item (which appeared to have been afterwards struck out,)—"Clover seed 12 bushels, omitted last year by mistake."

For the defendant Curry was produced his endowment:—29th July 1315—"in minutis decimis excepto feno." It recited a former endowment and confirmation, with an augmentation of a house in Dartford, "unā cum decimā feni viginti & unius aerarum prati vocati Kynge's Marsh, in parochia de Dertforde, prædictā:"—and, by the present instrument, he was also to have "totam decimam feni provenientem de magno prato salso;"—and he put in various agreements for compositions, and extracts from pertinent documents, in some of which seeds were mentioned, and in others not.

Martin, and Roupell, on the part of the plaintiffs, relied on the usage as proved by the evidence of perception; which, they contended, was satisfactorily shewn, and well supported by the documents; on all of which they commented on, as affording evidence of the rector's right, and of his enjoyment of it.

Dauncey, Hall, and Abercromby, for the defendants, opposed to those documents the vicar's admitted right to small tithes: and they contended, on the authority of the cases of *Clarke v. Staplin* (3 Gw. 926), *Cartwright v. Baily* (3 ib. 938), and *Jeremy v. Strangerways* (4 ib. 1173), that the seeds of artificial grasses were a small tithe, and within such an endowment:—and that those grasses being of modern introduction, a title in the rector, by perception, could not be supported by evidence of usage. The case of *The Vicar of Kellington v. Trinity College, Cambridge* (2 ib. 799. 1 Wilson, 170.) shews that the Court will protect the right of the vicar against an usurpation of fifty years, where it has been proved that before that time the vicar had received the tithe claimed by him.

Martin, in reply, contended, that an endowment, unsupported by usage, would not support a vicar's claim against a rector's common-law right. And, in answer to the cases cited, to shew that seeds of artificial grasses were held to be a small tithe, observed, that that tithe was claimed by the plaintiffs, not as a rectorial but a vicarial tithe; and he submitted, that at all events the rector was entitled to an issue.

[114] RICHARDS, Chief Baron. The real question, on this bill, is between the rector and the vicar: and between such parties the rector is certainly not entitled to an issue of course, and as a matter of right. Such questions must always depend altogether on the instrument by which the vicar is endowed, or the proof adduced by him of perception, as founding a presumption of an anterior endowment.

It is clear that the vicar has received out of this parsonage, from time to time, the tithe of all seeds. Then it is contended, that it is to be presumed from the usage that there must have been, formerly, an exchange effected between the rector and vicar, by which the tithes of corn were given up for those of green fodder and seeds: but there is no evidence offered of the existence of such an exchange, nor is there any ground laid for supposing that it ever took place. Now the insisting on the presumption of such an exchange, on the part of the rector, is in itself an admission that the vicar was formerly entitled to the tithe of those articles which he is said to have so given up in exchange. Then the rector comes here to affect his own grant: and the only foundation for his claiming these tithes is really (the supposed exchange being out of the question) nothing more or less than that he once had them, and granted them to the person from whom he now demands them,

To enable the rector to support his present claim, it is incumbent on him to make out his case by most satisfactory proof.

[115] Now, what are his proofs? He produces certain receipts: the earliest is in 1721, and is given to Tasker (a lessee of the then rector,) for 5l. 2s. 6d. for the tithes of ten acres of peas and three acres of cinquefoil seed. Now that being an acknowledgment of having received the value of the tithes of peas, as well as of clover seed, that receipt proves too much; for on this record he sets up a right to the tithes of artificial seeds alone, admitting, therefore, that the vicar is entitled to the tithe of

peas. The next receipt is in 1731, and is for clover seed and for peas; peas, as I have observed, not being in dispute. There is next an agreement, dated 4th April 1775, whereby Williams, the agent of the lessee of the rectory, agrees to let to the occupiers the tithes of their farms, at the end of which is this memorandum; "Clover seed, cinquefoil seed, and turnip seed, in kind as usual." Now turnip seed is not claimed by the rector, therefore this evidence also proves too much. Another agreement in 1776 was put in, which has these words: "Any seed to account for, after cleaning and allowing for, as clover." Implying, that the agent of the lessee of the rector then claimed all seeds: and that again proves too much. Those instances of perception therefore are not to be relied on. And as to the paper delivered by Curry, which mentioned clover seed omitted, that item being afterwards struck out, proves nothing.

It is true that it was long very doubtful whether seeds were a great or small tithe, or belonged to the [116] rector or vicar: but there have been many cases since, wherein it has been clearly held, that proof of payment of tithes of seeds to the rector, shall not affect the right of the vicar: and the reason is, that the prevailing erroneous notion of seeds being a great tithe, destroys the usual effect of the evidence of its perception as such by a rector.

I repeat, that a rector, having once endowed a vicar of tithes, who comes to reclaim those tithes, is bound to make out his case by clear and satisfactory evidence, and there is none offered in this case to shew that the vicar ever granted them back to the rector. I therefore think that the case is in favour of the vicar. As against him, therefore, this bill must be dismissed to that extent; and also as against Ward, for the demand as to him is for the tithe of seed, and that tithe is certainly payable, not to the rector but the vicar, whose right to it is established by the result of this suit. As to them, therefore,

Bill dismissed, with costs.

[117] (CORAM RICHARDS, CHIEF BARON.)

SANDERS v. LONGDEN AND OTHERS. Thursday, 15th May 1817.—The Court will not make a decree in favour of a rector claiming tithes in kind of lands not within his parish, for which he has for many years received a money-payment by way of composition, which the defendant does not pretend to insist on as a modus: nor will they grant a commission, to ascertain the boundaries of such lands, without a previous inquiry whether the plaintiff is entitled to any, and what tithes on such lands, by a trial at law on an issue: because such a claim is not within the recognized common-law right of a rector.—Nor will a former decree in favour of a predecessor of the plaintiff, and a verdict obtained by him on an issue under it, assist his case, or preclude the necessity of a new trial at law, if, ever since that decree and verdict, the succeeding rectors have neglected to take advantage of the result of the former suit, and received the same payment as before.

The Plaintiff, who was rector of the parish of Wollaton, (Nottingham,) filed this bill against the defendants as occupiers of certain lands called Sempringham Lands, (being without the parish of Wollaton,) for an account and payment of tithes.

The bill, —after setting out the plaintiff's alleged title to a moiety of the tithes of corn, grain and hay of the said lands, formerly part of the possessions of the master prior and convent of the monastery of Sempringham, in the county of Lincoln, and stating, that on a suit (*Kendall v. Hardinge*) instituted by a former rector for the tithes of certain lands, &c within the manor of Bramcote, called the Sempringham Lands, and for the purpose of compelling the then defendant to set forth the bounds and limits of the said lands, an issue was directed to be tried by action of debt, under the 2d Edw. VI., whereon a verdict was recovered by the plaintiff (the then rector) for the sum of 5l. the treble value of the tithes:—and that, upon the further hearing, a decree was made against the defendant for the payment of the tithes demanded by the bill, (for the last four years;) and that a commission should issue, to set forth such of the said lands as should [118] be proved to have been in the defendant's occupation for such time, and to ascertain the value of the moiety of the tithes taken away by the defendant during that period; and further stating, that all matters in dispute touching the premises being afterwards referred between them, the commis-

sioners named in a certain commission for the examination of witnesses, &c. ultimately awarded, by their award dated 10 October 1672, the sum of 8*l.* to be paid to the then plaintiff on a day subsequent, for the said tithes; and that the defendant should also pay the plaintiff yearly thereafter the sum of 40*s.* during the continuance of the plaintiff's incumbency, in lieu of all tithes of the said lands; and that the now plaintiff had given the present defendant notice of determining the said composition of 40*s.* per annum: charged that the defendant pretended that the boundaries of the said lands had become so altered as not to be capable of being now specifically ascertained, and that the sum of 49*s.* a year paid by the defendant's predecessors for so long a period, was in its origin a charitable donation: whereas the defendant Longden had in his possession or power, documents from which the true boundaries and extent of the said lands might be made to appear, and the said sum of 40*s.* was a temporary composition paid in lieu of the said moiety of the tithes of the said lands.

Therefore the plaintiff now prayed, that the defendant Longden might produce and leave all such documents in the hands of his clerk in Court; and that he might set forth and discover the spe-[119]-cific lands or fields called or known (or formerly, &c.) by the name of Sempringham Lands, in Bramcote aforesaid, out of which the said tithes were thentofore taken; and (if they could not now be specifically ascertained, by reason of their having been suffered to become altered,) that a commission might be issued for the purpose of ascertaining and distinguishing the same, or of allotting a fair equivalent.

The defendant, by his answer, denied all knowledge of the lands called Sempringham Lands, and of the plaintiff's right to demand the portion of tithes claimed by him in respect of them; or that he knew whether the payment of the 40*s.* was a composition: or whether it had ever been paid to the plaintiff or his predecessors before the 10th October 1672; or when it was first paid; or from what origin it arose.

The plaintiff put in as evidence (besides the depositions of witnesses who spoke to the uniform payment of the 40*s.*) the Ecclesiastical Survey, 26th Hen. VIII. and the ministers accounts 32 Hen. VIII.; wherein, among the rectorial possessions of Wollaton, were noticed "tithes in Bramcote," and certain terriers from 1661 to 1781. By the first, plaintiff's predecessors were stated to be entitled to a portion of the tithes of Sempringham Lands in Bramcote; and, by the others, that that tithe had been compounded for for 40*s.*

Martin, and Dowdeswell, for the plaintiff, (hav-[120]-ing detailed the case, and commented on the evidence,) submitted, that the former decree and verdict had removed much of the plaintiff's difficulty in this case; and as the money-payment had been clearly proved, and there being no defence of modus set up, the right to tithes was established in the plaintiff, and he was therefore entitled to have a decree according to the prayer of the bill; or, at least, that the commission should be granted, and that the defendant might be decreed to furnish the documents required of him.

Clarke, for the defendant, contended, that the plaintiff had not sufficiently made out his case to sustain his present demand, or to call on the defendant to answer it; that the onus lay entirely on him, and until he had given some better evidence of his alleged right than he had done, the Court ought not to grant a commission on a speculative inquiry, which might eventually turn out to be nugatory. As to the former decree in favour of the plaintiff's predecessor, its not being acted on shews that it was not conclusive.

RICHARDS, Chief Baron, (dispensing with further argument on the part of the defendants).—I have long ago felt the difficulties in the way of the plaintiff to be so great, that I cannot bring myself to decree any part of the prayer of the bill without first directing an issue, for I feel that the intervention of a Jury is necessary here; and I cannot order a commission, unless I can consider the plaintiff entitled to an account of the tithes [121] sought on the lands in question, which at present I do not. I admit the effect of the former decree and judgment, and the parties themselves do not appear to have quarrelled with the verdict; but then I have no evidence before me, accounting for the long subsequent acquiescence in the payment of forty shillings. That alone is sufficient to render the decree and verdict inconclusive, whatever might have been the effect of them at the time; and I must now consider that the landowner has, notwithstanding, some defence to make. In the present instance, too, it is the business of the plaintiff to make out his case satisfactorily; for, as the lands are

not in his parish, he is not standing on his common-law right as rector. On the contrary, the common law is against him here, for he is himself only a portionist, even if he should substantiate this claim. Then, as to that, it is perfectly clear that the rectors have always been paid the sum of forty shillings, and that is admitted by the defendant. Now, if they had the power at any time of enlarging that payment, by treating it as a composition for the tithes, it is certainly very singular that they should never have done so, and particularly when the former rector might have had the tithes in kind, if he had chosen to follow up the decree. I expected, therefore, that that would have been accounted for, by the plaintiff shewing some subsequent agreement. He has not done so, however; and therefore I cannot decide conclusively on his rights without an issue, which I shall direct, as less expensive and hazardous than an action on the statute.

[122] It must be to try generally, whether the plaintiff is entitled to any and what tithes, arising out of any and what lands in the defendant's occupation: and the

Costs and further directions reserved.

THE ATTORNEY GENERAL v. FARR. Friday, 16th May 1817.—An Objection to a count in an information on the 8th Anne, cap. 7, sec. 17, charging that the defendant was assisting, or otherwise concerned in, the unshipping prohibited and unaccustomed goods,—that it is a charge of two distinct offences by the same count, and therefore bad, either for duplicity or uncertainty,—was not allowed by the Court; who held, that the words did not involve two distinct offences; and that it was the established and ancient practice, *curso Seacarii*, so to charge the offence in such informations.

Owen, Sir Wm. on a former day, obtained a rule to shew cause why the judgment on the verdict, which had been found for the Crown in this cause, should not be arrested. The objection on which the rule had been granted was, that the defendant was charged in the first count of the information on which the verdict had been taken, (which had been filed against him on the 8th Anne, ch. 7, sec. 17*, to recover the treble value of certain smuggled spirits alleged to have been imported by certain [123] merchants unknown,) with having been assisting, or otherwise concerned in unshipping thereof; and it was contended, that the imputed offence could not be so laid, because such a charge was double; or if it were not, that it was vague and uncertain, and therefore the count was bad.

Dauncey shewed cause. He submitted,—that the words “or otherwise concerned,” might be rejected, if injurious to the count; but which, he contended, it was not, because the words of the statute on which it had been framed created only one single offence; and the latter part of the description of it was only a modification of the former, (the assistance,) which alone was the object of the legislature; and that no other offence could be constituted by those latter words, which could not stand alone and preserve any meaning. “Otherwise” is a relative term; and being “otherwise concerned,” signifies being otherwise concerned in giving aid to the offender.

The same answer, he urged, might be given to the other objection, of the uncertainty of the charge; for that the language of the statute and the count could not be mistaken, and that it clearly and exclusively created in the one an offence, and in the other a charge of assisting in unshipping; and he cited a case from the Minute-book, of *The King v. Thomas Hare*, Easter Term, 1789, where, on the motion of Mr. Rouse in a case precisely similar, this Court ordered it to be referred to the Deputy Remembrancer, to inquire and report whether it [124] had been the constant and uniform practice so to lay the offence; and upon his having made his report, the Court discharged the order. The present form and words of the first count of the information was conformable to the most ancient precedents, and the constant practice of the Court.

The counsel for the defendant was here called on to support the rule; when

* Which enacts as follows:—“If any goods liable to payment of duties shall be unshipped, with intention to be laid on land, not only the said goods shall be forfeited, but also the persons who shall be assisting, or otherwise concerned in the unshipping of the said goods, or to whose hands the same shall knowingly come, shall forfeit treble value.”

He contended, that the section of the statute on which this information was founded had created three distinct offences in terms:—The first was, assisting in the unshipping of smuggled goods; the second, being otherwise concerned therein; and the third, knowingly coming thereby: each of which were kept distinct and apart in the act, by the same disjunctive “or.” It might perhaps have been the practice, as it is said, to charge the two first offences in one count; but, on the other hand, it has ever been the practice to charge the last offence in a separate count, which was called the *Devenerunt* count. The practice therefore was both ways; but practice was no reason for holding a count to be good, which was both formally and substantially bad. It is a well-founded rule in pleading, that duplicity in charging an offence is fatal to the count: for each distinct offence must be charged by distinct counts, that they may be met by distinct pleas. In the case of *Rex v. Storker* (5 Mod. 137. Salk. 342-371), an indictment for that the defendant *frabricavit seu fabricari causavit*, a bill [125] of lading was held naught on demurrer; and the reason given is, that an indictment ought to be certain and positive. So in *Rex v. Breerton* (8 Mod. 328), an indictment for a libel *publicavit seu publicari causavit*, was held ill, because, from its uncertainty, no proper defence could be made. And to the same point he cited *Rex v. Flint* (Cas. temp. Hard. 370, and 1 Sess. Ca. 307), *Smith v. Mall* (2 Roll. Rep. 262), *Rex v. Stoughton* (2 Str. 900), 3 Bac. Abr. Indictment, 555; Hawk. b. 2, c. 25, s. 58; Com. Dig. tit. Indictment, G. 3; *Davy v. Baker* (4 Bur. 2471),—where it was charged, in an action on the statute 2 Geo. II. cap. 24, that the defendant did receive a gift or reward, and the declaration was held bad for want of sufficient certainty; and the Court there said, that such an objection was not cured by verdict, and might be taken advantage of in arrest of judgment: in that case, too, the words of the statute, which were in the disjunctive had been adopted in the declaration; *Playter's case* (5 Co. 35); and *Wood v. Smith* (Cro. Eliz. 817). In all those cases, where the alternative is objected to, it still bears some analogy to the offence charged,—as of “forging or causing to be forged.” In the present instance it is not so; for to be “assisting” in an act, or “otherwise concerned” in it, mean necessarily, *ex vi termini*, very distinct things; and where the acts of offence are so, they cannot be blended in the same count, which would perplex and confuse a defendant in the [126] defence which he should make. That is the result of the case of *Young and Others v. The King* (3 T. R. 98), where, in overruling the objection that the defendant was charged with distinct offences in the same indictment, which was for a misdemeanor, the Court held that, in the same count, it would have been bad.

Then it is clear, that the assisting, and being otherwise concerned in the unshipping smuggled goods, are distinct offences, from the words of the act, taken in their common acceptation. There are, besides, two cases in Bunbury on that point, which arose on the very statute now in question, which shew that this Court has so decided. The first is, *The Attorney General v. Woodmass* (Bunb. 247): that was an information on this statute, and the evidence was, that sixty half-anchors were run and put into private houses, and from thence carried to the defendant's house; but it did not appear that the defendant was present, either at the time of running or removing the goods, but he afterwards paid the cobblemen for running them. Lord C. B. Pengelly was of opinion, that that was a being concerned within the statute, if the jury were of opinion that the defendant employed the persons to run the goods on his account, and paid them for that purpose: for that those words must have a reasonable effect and import, and must mean something distinct from assisting. In the other (*The Attorney General v. Lake* (Bunb. 277)), also, the offence laid in the information [127] was, that the defendant was *tempore exonerationis opitulator vel aliter particeps*; and, on the objection being taken that a personal presence was requisite, the Lord C. B. distinguished the case from the authority cited; for that, in the principal case, the evidence amounted to proof of the defendant's being otherwise concerned, within the meaning of the statute, which must intend something further than the assisting, or those words would be of no signification at all.

Against the weight of these authorities, and the rules and principles of pleading, the only answer that is set up is, that it has been the practice so to lay the offence,—an usage which at farthest can go no farther back than the 8th of Anne, and ought not to be permitted to countervail the established law of the land, and to introduce in practice, what is contrary to principle, that in charging a defendant with a statutable offence, it may be laid with duplicity and uncertainty. In this case too it is more

particularly objectionable: for nothing could be easier than to have set forth in terms the acts which constitute the offence, and, on the present occasion, the evidence would have admitted a verdict to have been taken on the *denerunt* count.

Dauncey, about to reply, was stopped by the Court.

RICHARDS, Chief Baron. The Court are clearly of opinion that the judgment ought not to be ar[128]-rested in this case. We do not deny the proposition, that two distinct offences cannot be joined in the same count. Then the question is, whether there are two distinct offences couched in these words or not. The cases cited from *Bunbury* shew that it was the practice in this Court so to lay the offence as in this information, at that time, and that these words of the statute were then considered as constituting one single distinct offence. It seems to me, therefore, that the statute merely contemplated various modifications of the same offence, differing perhaps in the act done, the object of it still being the assistance afforded; but if there were any doubt about it, the universal practice is the best proof of what has been the universal opinion. It is impossible to say that this judgment ought to be arrested on that ground; and, from the case that has been cited from the *minute-book*, the Court seem to have been heretofore of the same opinion.

GRAHAM, Baron. There is certainly great weight in the argument, that the long established practice of the Court ought to be considered as conclusive of their opinion as to the intention of the legislature. It is clear that it was the practice in Lord Chief Baron Pengelly's day, and he must have come into this Court about the time of passing the act. In a subsequent case, too, it seems that the Court directed a reference to be made to the Deputy Remembrancer, to inquire of and report the practice, which was held to be conclusive; and the court, after taking time, discharged their order.

[129] But the plain sense of the language satisfies me that there are not two distinct offences created by these words; and the same evidence would support the whole. It is quite otherwise in the cases and authorities which have been cited. Evidence of robbery would not support a count for murder, and certainly, wherever the offences are distinct, so should be the counts. In these words the leading charge is the assistance, and the latter member of the sentence would convey no meaning without the first; for "otherwise," being a word of reference merely, must have a precedent term: it alludes entirely and substantially to the different modes of doing the same thing,—the various ways of being concerned in rendering assistance.

WOOD, Baron, absent.

GARROW, Baron. If there had been any doubt on this case in the Court, I should have abstained from giving any opinion: but the rest of the Court are so decidedly of opinion that this information is right, that I shall express my entire concurrence.

The only plausible ground of objection is, the uncertainty of the offence charged, which, it is said, might embarrass the defendant in pleading; but in this case that objection does not arise, because no man can doubt that the party must know from the language of this charge, that the offence imputed is the rendering assistance in some way or other. That is the substance of the charge. This is very unlike the case of doing or causing to be done. [130] And the case of forgery, which has been alluded to, is quite different: this is a charge of being assisting in unshipping goods, which is capable of much more modification than forgery, of bank notes for instance, which is merely the making of the false paper.

And independent of the reason of the thing in this case, on which I have no doubt, after the long practice, and the discussion which took place on the same objection in 1789, the Court cannot now overturn the course of precedents.

Rule discharged*.

* In Lord Raymond's Reports† there is a case on the same point, which was decided in the Exchequer Chamber. It was an information in the Exchequer for selling live cattle, or causing them to be sold, &c. and judgment for the informer.

The error assigned was, that the information was uncertain, because in the disjunctive. And Holt, Chief Justice, was inclined that it was ill for that reason.

But, upon certificate by the Barons that the course was so in the Exchequer, and since the jury had found the defendant guilty as to one, judgment was affirmed.

The reporter in the margin notes, "*Sed vide Doug. 174 & Bl. 810.*" The latter

[131] REX (IN AID OF PARSONS) v. FEREDAY AND OTHERS. Monday, 19th May 1817. —Sheriff, claiming extra allowance, must apply to the Court, who will refer it to the Deputy Remembrancer to ascertain what he is entitled to.—It is a rule to shew cause.—If inefficient cause be shewn against such an application, and the Deputy Remembrancer be attended to resist or diminish the sheriff's claim, he is still not entitled to the costs of either the application or the reference. *Vide ante*, vol. i. 205.

Owen (Sir Wm.) applied in last Term on behalf of the Sheriff of Staffordshire, for an order to shew cause why it should not be referred to the Deputy Remembrancer to ascertain whether any, and if any, what allowance, beyond the poundage, should be paid by the prosecutor of this extent, for his extraordinary trouble in keeping possession of the defendant's goods, &c. seized by him, for a considerable length of time, and, in other respects, founded on the 3d Geo. I. cap. 15.

Cause was shewn by Trollope, at the sittings; when

The Court made the rule absolute.

The Deputy Remembrancer afterwards reported, that a sum of 21l. 13s. was due to the sheriff for extra costs. The Court was moved by Sir W. Owen to confirm that report, and that the sheriff should be paid his costs of the application for the allowance, and of the reference to the Deputy Remembrancer, which was opposed by Trollope: when the matter being ordered to stand over, was this day brought again before the Court.

[132] For the sheriff it was contended, that the prosecutor of the extent, having opposed the motion and attended the reference before the Deputy Remembrancer, had rendered himself liable, and virtually engaged to pay the sheriff's costs, (which by his doing so had been considerably increased,) if the report of the Deputy Remembrancer should be in his favour.

On the other side it was submitted, that the Court could not award the sheriff costs, and particularly as he had claimed more than he was reported to be entitled to.

The report was confirmed; but the Court said, that they did not consider themselves entitled to order the costs to be paid by the party resisting the claim, and refused that part of the motion.

Rule absolute, as to the confirming the Deputy Remembrancer's report only.

[133] CALVERT v. DIGNUM AND OTHERS. 1817.—A plaintiff is allowed the vacation of the term in which the decree is pronounced, and the following term, to draw up the decree; but not the vacation of that term.

Damecy, and Pepys, moved, pursuant to notice on the part of two of the defendants, that the decree drawn up by the clerk in Court for the said defendants, bearing date the 21st November 1816, might be forthwith passed.

The motion was opposed by Lovat, on behalf of the plaintiff; who, he stated, had served a warrant (dated 24th April) to pass the decree, and delivered a copy to the defendants' clerk in Court, when the defendants' solicitor stated that he intended to apply to the Court; and therefore the Deputy Remembrancer refused to sign the decree until the motion should be disposed of, otherwise it would have been passed and signed on the 24th. And he stated the practice of the office of this Court to be, to allow a plaintiff one entire term, including the vacation of that term, for preparing his decree; and if it is not then prepared, the defendant is at liberty in the next term to draw it up. In the present case, therefore, he submitted, the plaintiff was in time.

The Court, however, granted the motion: holding, that the plaintiff had one term and a vacation clear to draw up the decree; but that the vacation must be that of the term in which the decree is pronounced.

case so referred to is *Chamberlain v. Greenfield*, where the Court held, on demurrer, that a declaration in trespass for forcing open, or causing to be forced open, closets, &c. was sufficient, as one trespass was well alleged, which the jury might distinguish and give damages for alone.

[134] *BIGGS v. STEWART*. Same day. This Court will now order it to be referred to the Master to compute principal and interest on a promissory note or bill of exchange, &c. (as is the practice in the other Courts) on motion.

Jones, D. F. had obtained a rule to shew cause why it should not be referred to the Master, to see what was due for principal and interest upon the promissory note on which this action had been brought, and to tax the costs; and why the plaintiff should not be at liberty to sign final judgment without executing a writ of inquiry of damages; which was this day made absolute, no cause being shewn*.

End of Easter Term.

[135] SITTINGS AFTER EASTER TERM, 57 GEORGE III. GRAY'S-INN HALL.
(CORAM RICHARDS, LORD CHIEF BARON.)

HITCHCOCK v. GIDDINGS. Wednesday, 4th June 1817.—Where a purchaser buys the interest of a vendor in a remainder in fee, expectant on an estate tail: if, at the time of the contract, the tenant in tail had actually suffered a recovery, of which both parties were ignorant till after the conveyance had been executed, and an absolute bond given for securing payment of the purchase-money;—this Court will interfere to rescind the contract, on the equity that the vendor had no interest in the subject-matter at the time of the sale. And that on the ground of mistake, although there has been no fraud from knowledge, or concealment of the fact, on the part of the vendor.—And they will not only order such a bond to be delivered up to be cancelled, but that all interest paid on it shall be refunded.—Note, But the costs were not allowed on either side in such a case.

[S. C. Daniell, 1; Wils. Ex. Eq. 32. Discussed, *Clare v. Lamb*, 1875, L. R. 10 C. P. 339. Distinguished, *Joliffe v. Baker*, 1883, 11 Q. B. D. 272.]

The plaintiff by the present bill sought to be relieved, on the ground of fraud, against a bond given by him to the defendant for 5000*l.* as the consideration for the purchase of the defendant's interest in a remainder in the real estates of Thomas Millard, which he had devised by his will to Elizabeth Millard and Anne Wrentmore for life; remainder to Anne Wrentmore Colmer in tail, remainder to F. and T. Vowles in fee; and for an injunction to [136] restrain the defendant from putting the bond in suit in the mean time, under the following circumstances:—

The defendant, in 1805, had purchased that remainder in fee, of the persons then entitled to it. In 1810 he agreed to sell a moiety of his interest to the plaintiff for 5000*l.* who, though apprised by his professional adviser of the possibility of the devisee in tail suffering a recovery, which she might do, whereby the entail would be barred, and the remainder destroyed, still insisted on his purchase. (having in the mean time directed a search to be made, to assure himself that no recovery had been suffered,) expressing himself satisfied, and that he thought it worth 10,000*l.* The defendant, on the 10th May 1810, executed to him a proper conveyance of his interest: and the plaintiff at the same time signed the bond in question.

In the course of the next month, the plaintiff's solicitor discovered that a recovery had been duly suffered by Miss Colmer in Easter Term 1808, of which he soon afterwards informed the plaintiff.

The defendant, by his answer, denied all knowledge of the recovery having been suffered when he executed the conveyance; and he proved that the purchase had originated with the plaintiff, and that he had refused to sell him the other moiety on his request. The plaintiff had paid 250*l.* for interest on the bond; which he now prayed might be repaid to him.

[137] Fonblanque, and Wingfield, for the plaintiff, submitted that, if the plaintiff were not entitled to the relief sought by the bill, on the ground of fraud: he still had a right, on the ground of mistake, to the interference of the Court, to prevent the

* This motion is noticed here, because the proceeding which is the object of it, has not heretofore been permitted in this Court: and it has frequently been refused, as not being warranted by the former practice

ignorance of both parties at the time of this transaction from operating to the prejudice of either, where a contract has not been finally executed. In the present instance the contract has never been completed, for the purchase-money is not at this moment paid. The security which has been given does not conclude the party, or shut him out from relief: on the contrary, it suspends the execution of the contract, and keeps the whole transaction open to let in any equity which will entitle him to claim the protection of the Court. The foundation of the plaintiff's case is, that at the time of the purchase the defendant had nothing to sell.

Martin, and Heys, for the defendant, contended that the parties to a contract completed on both sides, as in this case, were bound by the transaction, unless fraud could be shewn, and in the present case it was clear that there was none. The parties were certainly under a mistake: but still, as no fraud or unfair advantage is imputable to the defendant, the Court will not interfere on that ground. If a remainder-man, whose interest is expectant on an entail, chuses to sell that interest to a purchaser, who is apprised that it is subject to the contingency of a common recovery being suffered by the tenant in tail before it vests in possession, he may do so. Such a contract is mere matter [138] of speculation between the parties: and if it is not shewn either by the inadequacy of price, (and here it appears the plaintiff himself thought it worth double the sum agreed for,) or other circumstances, that there had been unfair dealing, it would be good, and therefore ought not to be disturbed. The plaintiff, on the contrary, was anxious for the purchase, for he thought that he had the advantage of the defendant. He actually searched for a recovery, which shews that he knew of the possibility of the existence of the objection now taken, and therefore, though he found that none had been actually suffered at that time; he must have known that it might have been suffered the next hour: and he made no further search till after the contract was completed, and a security given by a bond, absolute for the security of the purchase-money that ought to have been paid at the time, which is tantamount to actual payment. The security was taken for his ease; not to enable him to come here, with such an application as this: nor was it conditioned to be void, in case a recovery had been suffered. A mere bargain for the sale of a chance must be taken subject to all possible disadvantages, and so little was the objectionable circumstance known to the defendant, that he refused to sell the other moiety on the same terms. That is also a strong argument to shew that the plaintiff was well satisfied with his purchase. And as the whole transaction originated with the plaintiff, he cannot be entitled to come into a Court of Equity to seek relief against his own inconsiderate folly, if there were any in the speculation, or to have a fair contract rescinded if it should turn out to be [139] disadvantageous, by which, if worth any thing, he would be a very considerable gainer.

It was then submitted, that, at all events, the defendant was entitled to costs.

Fonblanque, in reply, urged,—that whatever contingency there was in the bargain, it could only arise fairly on the chance of the tenant in tail suffering a recovery at any time after the purchase; and whatever advantage was to be gained by it could only accrue in the event of her not doing so; and that that, therefore, was a strong reason why, if the contingency did not exist at the time of the bargain, the contract ought not to stand, and both parties might be put in the same situation in which they were at the time, without real injury to either. He insisted, that a bond given to secure the payment of purchase-money was not a final closing of the contract, and that notwithstanding all that had been urged for the defendant, this was a proper case for relief.

RICHARDS, Chief Baron. This is certainly a charge of fraud: for it is, that the defendant, having no title to any interest in these estates at the time of the contract, bargained as if he had; and that thereby he prevailed on the plaintiff to give him this bond. That is, without doubt, what we call a fraud, in Courts of Equity.

Then it is put, that this transaction was an agreement for the purchase of a mere contingency; and [140] if the Court saw that it were, they might not be disposed to assist the plaintiff: for if a man should be foolish enough to make a purchase of such a chance, he must perhaps abide by the consequence of his rashness. But the fact was not so here. Under the will of the testator, the persons making title to the defendant had a vested remainder in fee simple, which would have vested in possession if it had not been in the mean time barred by a common recovery. Both parties, at the time of the contract, treated on the supposition that a recovery had not

then been suffered. The whole of the evidence shews that that was the object in contemplation of the purchaser. If no recovery had been then suffered, the defendant had a remainder: if there had, he had no sort of interest whatever. But they agreed for the sale of the remainder, subject to the subsequent possible contingency of there being no recovery suffered. Now, if a person sell any estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here. A contingency may certainly be sold on speculation, but not such as was sold here. Two parties are not to be allowed to enter into an agreement to deceive each other. But there was not even a contingency sold here: it was not selling an interest, subject to a chance, for the defendant had no interest at all to which a chance could attach.

[141] I must not be told that a Court of Equity cannot interfere where there is no fraud shewn. If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a Court of Equity: but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive 5000*l* and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land, so sold, to sell? That was precisely the case with the present defendant; and it would be hard, indeed, if a Court of Equity could not interfere to relieve the purchaser.

I am therefore clearly of opinion, that this bond must be relieved against. Bonds are not conclusive, as has been said, though they may be used to shew that the party had acted deliberately; but wherever it can be made appear that they were not fairly taken, or that the money was not satisfactorily due, Courts of Equity will order them to be cancelled: for they will not suffer a party to recover on a bond, against which a defendant has no defence at law, although it were given without such a consideration as would entitle the plaintiff at law to receive the money, the payment of which it is given to secure. That is, undoubtedly, the present case. And if more had been done here,—if the money had been paid into Court,—the defendant would not have been permitted to take it out, if the plaintiff could have [142] shewn, as he does now, that at the time of the sale the defendant had no interest.

Then as to the money which has been already paid;—the same equity which attaches to the bond, must also attach to the interest which has been paid on it; for if an application for an injunction had been made immediately, it must have been granted, and then no interest would have accrued.

As to the costs;—as both parties have acted very foolishly, and are equally to blame, I shall not give costs on either side; although the defendant may have been wrong in resisting so reasonable an application.

The bond must be delivered up to be cancelled; and the interest which has been paid on it by the plaintiff must be refunded by the defendant.

Decree.

[143] (CORAM RICHARDS, LORD CHIEF BARON.)

BENNETT v. SKEFFINGTON, Baronet, AND OTHERS. Thursday, 5th June 1817.—

To make out a defence to a bill for tithes, of a composition real, it is not enough to shew that the same money-payment has been constantly received in satisfaction of the tithes for a considerable period before the 13th Eliz.; but evidence must be given of the existence of an agreement in writing, and made between all the proper parties interested.—Nor will an issue be granted on such evidence; or costs allowed to those of the defendants, who are occupiers.

This was a bill filed by the Rector of Skeffington, in the county of Leicester, against the defendants, as owners and occupiers of lands, &c. within the parish, for an account and payment of tithes.

The defendants, by their answer, set up the defence,—that the lands were covered by a composition real of 40*l*. a year, payable half-yearly, from before the 13th Eliz. in lieu of all tithes.

That defence was, in effect, put on this record, to try the question of its validity in the present form: the defendants having failed before, in the case of *Bennett v.*

Neale (Wightw. 324), in establishing a defence founded on the same payment, which they set up as a modus. On that occasion (as appears by the report of the case in Wightwick,) the plaintiff destroyed the presumption of the payment having immemorially existed, by shewing the origin of the payment by evidence (laid before the Court by the plaintiff in that suit) in a cause between parties in the same character as these, and litigating the right to tithes in the same parish, which was brought to a hearing in the 10th of Anne, that one hundred and fifty years before that time, the then rector [144] made an agreement with the proprietors of a certain inclosure for a composition of 40l. a year, in lieu of all tithes.

The present defence was proposed to be supported by similar evidence, and other testimony of the existence of the same payment for so long a period, and of its having been considered as a composition real.

Fonblanque, Martin, and Dowdeswell, for the plaintiff, contended, that unless the defendants could carry their case further, and shew that such payment had been agreed on as a composition real, by giving in evidence at least some traces of the existence of such a deed, that, although on the former occasion (*Bennett v. Neale*) the Court did not actually decide the cause on the question of the defence of a composition real, yet, from what fell from the bench in the course of their delivering judgment, it was to be collected that that defence was untenable on such evidence.

[Richards, Chief Baron. That proposition is too clear for argument.]

Dauncey, and Boteler, for the defendants, distinguished the defence set up in the case of *Bennett v. Neale*, which was a modus, from the present, which was a composition real. They submitted, that the Court had, on that occasion, expressly guarded against being considered as having decided the question of the validity of the defence of a [145] composition real, and had confined themselves entirely to the question of - whether the payment could be set up as a modus, - which they held it could not, on the very ground on which it is now contended that it is a good composition real; namely, that the origin of the payment was proved to have been an agreement for a composition before the 13th Eliz. That being admitted, it must be now presumed to have had all the necessary requisites which go to effectuate such an agreement, although the deed cannot now be produced, or any evidence given of its specific contents.

At all events, the defendant will have laid sufficient before the Court to induce them to grant him an issue, to try the nature of a payment which has existed for more than three hundred years.

[Boteler proceeding to read the answer in *Bennett v. Neale*, as evidence in this suit, it was objected by Fonblanque, that only so much of it could be read as would be necessary to introduce the depositions of the witnesses in that cause as to the payment of 40l. a year. And the Court so confined it.]

RICHARDS, Chief Baron. It is impossible to carry this case far enough on the part of the defendants, by the evidence proposed to be read. It amounts only to oral testimony of a parol agreement; and even that is not stated to have been made between all the necessary parties. It is said to have been an agreement between the rector and parishioners [146] only. The patron and ordinary are not mentioned; so that it was merely personal, for any thing that appears.

But the broad ground on which I proceed is, that there is no evidence offered of any agreement in writing having ever existed. Nothing more is shewn than the commencement of this ancient payment, in point of time, and that it originated in an agreement which might have been by parol. Such evidence will not support the defence of a composition real. There must therefore be a

Decree for the plaintiff, with costs, (except as to Skeffington and another, the landlords of the occupiers.)

End of Sittings after Easter Term.

[147] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER. TRINITY TERM, 57 GEORGE III.

DALLY v. CATCHLOWE. Friday, 6th June 1817. - The Court will continue an injunction granted to restrain a defendant from proceeding at law, to enforce payment of a promissory note given to the defendant's testator, on the ground that that

testator had agreed to accept an annuity in satisfaction of it, and had received part of that annuity on account; although nothing more conclusive had been done by the parties, and no bond or other security given to the grantee, and the whole remained executory.—But they will impose on the party enjoining the action the terms of bringing the money into court.

Roupell moved to make absolute the order nisi for dissolving the injunction obtained in this cause on the merits.

[148] The plaintiff had filed the bill to restrain the defendant (an executrix) from proceeding in an action at law commenced against him for the sum of 100*l.* on his promissory note, given to the defendant's testatrix, and that it might be delivered up. The bill stated that the plaintiff having 100*l.* the property of the defendant's testatrix, in his hands, had given her the note, to secure that sum to her, with interest: that she and the plaintiff afterwards treated and agreed together, through the medium of one Cobby, her agent in the business, that the plaintiff should grant her an annuity of 2*l.* a year for her life, in consideration of the 100*l.*; that after such agreement had been made, and part of the said money had become due, she had requested and received from plaintiff the sum of 2*l.* on account of the said annuity, for which she had given him a receipt, as for so much money received in part of the annuity so agreed to be granted by him to her, and to be secured by his bond, and subsequently another sum of 2*l.*, giving a similar receipt; and that she soon afterwards died.

The answer stated, that the testatrix was very aged and infirm; that if she had received any money from the plaintiff, it must have been on account of interest due on the note; and that, if she had signed or put her mark to any such receipts, it must have been in ignorance of their tenor and contents; and that no bond was ever executed for securing the alleged annuity, nor was the treaty, if any, ever completed, either with the testatrix, or any person on her behalf.

[149] It was submitted, that the plaintiff was not entitled to the equitable interference of the Court in a case where the agreement, such as this was, was hitherto incomplete, and merely executory. This was a case very distinguishable from *Mortimer v. Capper* (1 Bro. Ch. Ca. 156), and *Jackson v. Lorr* (3 ib. 605): because here all was as yet in treaty, and not even reduced into writing, and nothing conclusive or binding had been done: for no bond had been given, whereas some such instrument should not only have been executed but enrolled: or if what had been done were sufficient, that would then be a good defence at law. Quæcumque viâ, therefore the plaintiff had no equity; and if this sort of executory agreement were sufficient ground for such an application as the present, the annuity acts, and all the formalities so strictly required by them, would be frustrated by being in all cases liable to be evaded by equitable construction of such transactions as these, and the admitting in evidence such receipts as were tendered to affect the testatrix, who might herself, if living still, have enforced payment of the note.

Newland, contra, contended that the agreement being merely executory, and nothing effective having been done under it, the plaintiff had no means of defending himself at law, whereas the transaction had gone far enough between the parties to entitle him to the interference of the Court on the equity of his case, as supplied by the circumstances brought forward in the bill, and not negatived by the owner.

[150] The Court, after expressing some doubt, ordered the injunction to be continued, on the terms of the plaintiff bringing the money into court.

Order nisi discharged.

THE KING v. HORTON. Saturday, 7th June 1817.—Rules at Nisi prius by the Lord Chief Baron, that a person having entered into a bond, with sureties to the Crown, is not an admissible witness in a *scire facias* against the surety, to prove that he had not broken the condition.—Sed quere! (the principal having been released by the surety).

Jervis obtained a rule to shew cause why the verdict which had been given for the Crown in this case, at the last sittings for Westminster, should not be entered for the defendant, or a new trial had. The proceedings were by *scire facias*, on a bond entered into by the defendant to the Crown, under the 38th Geo. III. ch. 89, as surety for one Garrett, a fish-curer, conditioned, that if the salt, which he should receive

free of duty, shall be really and truly employed, spent and consumed in curing and preserving fish, or delivered to some other fish-curer or fish-curers, for the purpose of curing and preserving fish, and if no such salt shall be employed, used or disposed of in any other manner or way; and also, if Garrett should yearly deliver to the proper officer of Excise whose duty it shall be to receive the same, a true and particular account specifying the exact and true quantity of salt which he shall have had or received in his custody, free of duty, then the bond to be void.

In the replication several breaches were assigned, [151] stating that Garrett had received into his custody and possession, free of duty, two thousand bushels of salt, for the purpose of preserving and curing fish, and that the said salt was not, nor was any part thereof really and truly employed, spent or consumed in curing or preserving fish, or delivered over to any other fish-curer or fish-curers for consuming part of such salt in another manner than, &c.—and for delivering part over to certain persons by name, not being, &c.—On which, issue was joined.

It was proved at the trial that some of the salt had been delivered over by Garrett, to one Hacker, a grocer, and to destroy that case Garrett himself was called by the defendant, by whom he had previously been duly released from any right which the defendant might have to recover against him the amount of the verdict which should be found for the Crown in the present case, to prove that he had duly accounted for all his duty-free fishery salt.

The counsel for the Crown objected to this man's evidence, on the ground of his being directly interested in the result of the trial, as he was the principal in the bond on which the defendant was proceeded against, as his surety, and on which he himself might still be sued. They also submitted, that a verdict in the present case for the defendant might be used in evidence in a similar proceeding against the proposed witness, and that therefore [152] he could not be admissible unless released by the Crown as well as by the defendant.

To that it was answered, that the release of the defendant removed the objection of interest, in the result of the present trial; and that a verdict for the defendant, in this case, would be *res inter alios acta*, and would not be used in any proceeding by the Crown against Garrett; and the case of *Bent v. Baker* (3 T. R. 27), was cited to the point; that Garrett having been released by Horton, had no interest in the result of this cause, and was therefore a competent witness for the defendant; but the Lord Chief Baron, after some consideration, rejected the witness.

Jervis now moved to enter the verdict for the defendant, or that there might be a new trial, on the ground of the testimony of that witness having been rejected.

The case of *Bent v. Baker* was again cited, and relied on as an authority directly bearing on the present, where one underwriter on a policy was admitted a witness in favour of other persons who had subscribed to the same policy; and that, because being released, he had no manner of interest in the cause. For the same reason, therefore, a principal in a bond may be called to prove the condition performed in favour of his surety, by whom he has been previously released, whereby all [153] right of action over against him is extinguished? The case of *Birt v. Kershaw* (2 East, 460), was also cited, as affording another instance somewhat analogous, in the decision that an indorser of a note is a competent witness in an action against the drawer, to prove that he (the indorser) had satisfied that note, having received money from the drawer for that purpose. And if it should be contended that that point has been otherwise ruled in the case of *Jones v. Brooke* (4 Taunt. 461), the circumstance of there having been no release given in that case would completely distinguish it from this.

The rule is, that the sort of interest which excludes a witness must be certain, direct, and immediate, in the event of the suit; for whatever contingent or collateral benefit may result to the witness from a verdict obtained on his testimony, it can only affect his credit, and affords no ground for rejecting his evidence altogether.

Then adverting to the principal objection taken to the witness at the trial, that by defeating this proceeding against the defendant he would be furnishing matter of proof for himself in any future proceeding against himself by the officers of the Crown on the same bond; it was submitted that that was not so; for as the record of a verdict recovered by the defendant, could not be used in evidence by the witness in any proceeding against himself, he was not furthering his own case by [154] giving his testimony in favour of the defendant; for it would, in such a case, be *res inter alios acta*.

On that point, a case of *Hart v. McNamara and Another**¹ : was mentioned, as one in which the Chief Justice of the Common Pleas had very recently so held at Guildhall. That objection being removed, there remains no reason why the evidence should not have been received, leaving it to the jury to give what credit to the witness they might think his testimony, as affected by the situation in which he stood, deserved.

Rule granted.

The rule was afterwards discharged without argument, no one appearing on the part of the [155] defendant to support it : but the Lord Chief Baron intimated, that he had not as yet been able to discover any ground for altering the opinion which he had formed at the trial.

MEMORANDUM. Tuesday, 10th June 1817.

The Court desired that it might be understood that the rule of Easter Term, 56 Geo. III. respecting the order of motions for justification of bail*² would in future be peremptorily enforced ; and they announced, that as very much inconvenience had been experienced by the desultory manner in which such motions had hitherto been made, they would not henceforth admit bail to justify, unless the justification were moved, in conformity with that order, at the sitting of the Court.

[156] IN THE EXCHEQUER CHAMBER. [CORAM RICHARDS, LORD CHIEF BARON.]

WILLIAMS, Clerk, v. PRICE AND OTHERS, AND THE DEAN AND CHAPTER OF WINCHESTER AND ANOTHER. Tuesday, 10th June 1817.—The word “gardens” in an endowment will not give a vicar the tithe of articles of modern introduction, although they might have been originally usually grown only in gardens.—So also the word curtilage.—“Alteragium” is a word explicable only by the usage shewn to have been established under it.—Usage is the broad ground of presumption in favour of the vicar’s endowment, and if there be an endowment in proof, expressing of what tithes his vicarage shall be endowed, if any tithes received by the vicar be not among them, a subsequent endowment will be presumed. Vide *Cunliffe v. Taylor*, ante, vol. ii. p. 329.—A rector is entitled to an issue as matter of right in cases where he sues only.—A rector ought not to be made a defendant in a vicar’s suit, for an account of small tithes charged to be withheld by occupiers, on a claim by the rector.

The plaintiff filed this bill as vicar of Romsey, Hants, against the defendants, occupiers of lands in the parish, and the improper rector, for an account of small tithes.

The subject of his claim was, the tithe of turnips and potatoes of field produce*³, as being included within the terms of his endowment, under some or other of the following words : “gardens, curtilages, and offerings and oblations at the altar of St. Lawrence.”—³ The endowment of 1322 (which was read) was special, giving the vicar tithe of flax, hemp, apples, pigs, geese, cows, milk, cheese, calves, pullen, honey, pigeons, [157] handicraft trades, gardens, curtilages, eggs, and also confessions, funerals, and legacies given by the dead, except only the legacies and heriots given to the

*¹ *Hart and Another v. McNamara and Another*.

[Tried before Gibbs, Chief Justice, in London, Sittings after Easter Term 1817.]

That was an action for the price of rum sold by plaintiff. The defence was, that the rum was adulterated. To prove the adulteration, the record of condemnation of the rum was offered in evidence ; and to connect the plaintiffs with the cause of condemnation, a record was offered in evidence of proceedings by the Crown against the defendant for penalties, in which defendant was convicted.

Gibbs, Chief Justice, held that the record of condemnation was admissible, being in rem, but he refused to admit the record of conviction for penalties, stating that, as it was in personam, it was not evidence in any case where the parties were different.

*² Vide ante, vol. ii. p. 327.

*³ Vide *Kennicot v. Watson*, ante, vol. ii. p. 250.

chancel and buildings of the same prebendal church, and also all that portion of tithe hay, viz. two cart-loads of hay out of the meadow called Small Mead, and also all offerings and oblations at the altar of St. Lawrence, or any where else in the same church.

[The cause came on upon admissions, and it was admitted that the vicar had for upwards of 50 years received money payments in lieu of tithe of hops, and had also received money payments for several years, in lieu of tithe of potatoes grown in fields: thus establishing perception of other tithes than were enumerated in the endowment.]

The defence set up by the answers was, in substance, that the impropriate rectors were entitled to the tithes of young trees and shrubs growing in nursery grounds, of ozier or withy beds, hops, turnips, seeds, clover, and other grass seeds growing in fields, and to the tithes of potatoes and turnips growing in fields.

The defendants denied that the vicars had ever been in receipt of all small tithes, but admitted perception of some small tithes in part.

5th June. — Martin and Wray, for the plaintiffs, submitted that the words of the endowment were sufficiently comprehensive to give the vicar all small tithes, or [158] at least that they were equivalent to a general endowment of pulse, and all articles of garden produce, wherever grown and in whatever quantity: and for that they cited the dictum of Lord Hardwicke, in *Smith v. Wyatt* (2 Atk. 364), and Burn's Ecclesiastical Law (vol. iii. 409). If, however, the endowment of gardens should fall short of an endowment of all garden-stuff properly so called, the word, curtilages—a word of more extensive signification (meaning fields adjoining the dwelling-house)—had been introduced into the endowment, which would supply that deficiency: and the import given to that word in Cowell's Interpreter, supports that suggestion. The word "alteragium" also may be called in aid of the proposition; for although it might have originally meant only offerings made by the communicant in consideration of altar duties, it has been held to cover various species of small tithes. Whenever any titheable article is given, all things ejusdem generis follow it: and they contended, that such a liberal construction of those words in this endowment was borne out by the usage in evidence in this suit.

Dauncey and Newland, for the defendants, relied on the common-law right of the rector, which, they insisted, was not infringed or diminished by any of the terms used in the present endowment. The word "gardens" can only give the tithe of things grown in gardens as gardens, and the same may be said of curtilages, whatever may be the meaning of that [159] word: and so of offerings at the altar. As to the usage, the perception of the articles in dispute, which had been offered in proof of it, was of very confined extent and recent date, and such as was most likely to have been had behind the back of the rector, and therefore cannot prejudice his claim.

Car. adv. vult.

RICHARDS, Chief Baron, now gave judgment. On consideration of this case, there must clearly be a decree against the defendant; for he admits that some indefinite titheable matters have been rightfully received by the plaintiff as vicar. Now, if those tithes were not mentioned in the original endowment, we must presume, from such perception having been acquiesced in, that there must have been a subsequent endowment of those articles. But I am not of opinion that the word "gardens" would of itself carry garden-stuff, or things originally grown in gardens, if grown elsewhere: and the same may be said of the word "curtilage." As to the precise meaning of the other word "alteragium," it cannot at this time be exactly defined, and we know not with any degree of certainty what it means; and therefore we must have recourse to the safest criterion, which is the usage in each particular instance.

Now the short ground on which I decide this case, whatever may be my opinion of the construction of the terms of this endowment, is the usage; for on evidence of usage the construction of endowments must often depend; and the Court is bound to presume, where usage is proved, that such usage [160] is founded on some subsequent endowment. That is the rule of law and the practice in these cases. I had at one time doubted whether I should not give the rector an issue, but there certainly must be a decree against him.

The evidence of usage calls for a decree against him: for the vicar is proved to have had perception of the small tithes now claimed, while on the other hand there is no countervailing evidence of any such perception by the rector. If I were on a jury, I

should feel myself bound to decide in favour of the vicar: and I am equally bound by my oath to do so on the evidence laid before me as Judge in a court of equity.

Account decreed.

It was then submitted, on the authority of *Garnons v. Barnard*, that the rector was in all events entitled to an issue; but by

THE LORD CHIEF BARON.—That is only where he sues; and in point of practice the rectors ought not to have been made a defendant party in this suit, nor could I make any decree against them. Therefore the bill must be dismissed as to them; but (it being suggested that the adverse claim set up by the rectors made it necessary to include them in the suit) let it be without costs.

[161] IN THE EXCHEQUER CHAMBER. [CORAM RICHARDS, LORD CHIEF BARON.]

HAMIL AND OTHERS v. STOKES AND OTHERS Tuesday, June 10, 1817.—In a case—where an attorney has prevailed on a young man, about to be admitted, to become his partner in business for a certain term, and to pay him, as a consideration, a considerable sum of money, a part to be paid on the execution of the articles, and the remainder by yearly instalments—if during the term the attorney sue out, in character of petitioning creditor, a commission of bankruptcy against the person so having become his partner, whereby, on his being declared bankrupt, the partnership is necessarily dissolved:—The Court will not only not permit him to sue for the instalments accruing due afterwards, but will order him to refund the money already received by him in consideration of the partnership, except as far as shall be commensurate with the period of the actual duration of the partnership.—So, also, if the attorney has himself since become bankrupt, and assignees chosen.—Nor will the Court allow a bona fide creditor, to whom the bond to pay the instalments has been assigned as a security for his debt, to put it in suit, because all equities follow the bond in such hands, and they will order the bond to be delivered up to be cancelled. In such a case, the Lord Chief Baron allowed the plaintiff costs, and refused them to all the parties actually defending the suit.

The plaintiffs in this case were, Hamil (a bankrupt), Roberts (his surety in a bond, which was the subject matter of the present suit), and Browne and Jane (the assignees of Hamil under his commission).

The defendants were, Stokes (also a bankrupt,) Biss, and Longmore, (the original assignees under his commission): Price (a creditor of Stokes, and assignee of the bond in question, for securing his own debt,) and Rossiter and Baker (the acting assignees under Stokes's commission).

The bill and answers stated and admitted the following facts:—That in January 1808, Stokes proposed to, and agreed with Hamil, a young man [162] about to be, but not then admitted an attorney, that he should become his partner in his profession of a solicitor and attorney, for a term of five years, in consideration of which, Hamil agreed to pay Stokes 1050l.: 500l. to be paid down, and the remainder by yearly instalments of 100l. with interest and to be secured by the joint bond of Hamil and plaintiff Roberts. Articles were executed between them accordingly, and Hamil procured himself to be admitted an attorney on the 4th May 1808, from which time the partnership commenced. On the 1st January 1809, Hamil paid Stokes the first instalment. On the 24th June following, Stokes issued a commission of bankruptcy against Hamil (Stokes himself being the petitioning creditor) for a debt of 188l. 6s. 7d. under which he was declared bankrupt, and the other plaintiffs were chosen assignees of his estate and effects, and the partnership was in consequence dissolved. Price, to whom the bond had been assigned, had commenced an action on the bond, in the name of Stokes, for the remaining instalments. Stokes was soon afterwards himself declared a bankrupt—the assignees under his commission had been removed, and the defendants, Rossiter and Baker, appointed in their stead.

The plaintiffs, therefore, prayed that the defendants, Rossiter and Baker, the new assignees, should be decreed to deliver up the said bond to be cancelled, and to pay back the said sums of 500l. and 100l. with interest,—that the plaintiffs might be admitted creditors, under the omission of [163] bankruptcy issued against Stokes, for the said sums, making such abatement as ought to be made therefrom, and for an injunction as to Price's action at law.

Danncey and Wyatt, for the plaintiffs, submitted that as Stokes had himself put an end to the partnership by his own act, he had no right to retain the consideration of that agreement, of the benefit of which he had thereby deprived the plaintiffs. By making the partner a bankrupt, the consequence of which was necessarily a dissolution of the partnership, so that he had himself put it out of his own power to perform his part of the contract, which was the sole consideration of the bond that had been entered into by the plaintiffs. If the effect of the dissolution of the partnership should be held to operate against Hamil, it ought also to operate against Stokes. It was submitted that the present case was analogous with that of master and apprentice, where a master, who should vacate the indentures by his own act, would not be entitled to retain the premium.

Martin, J. Martin, Treslove, and Beames, for the defendants, contended that there was no analogy between the case of master and apprentice and that of partners, or if there were, it would be in favour of the defendants, according to what was said by the Master of the Rolls in the case of *Hall v. Webb* (2 Bro. C. C. 78), that gross misconduct would be a forfeiture of the premium by the apprentice. Their re-[164]-lative situation is however different, inasmuch as between partners there is neither submission due on one hand, or authority given on the other, for a man has not a controul over his partner as a master has over his apprentice—that the vice of the plaintiff's argument was, that the act which caused the dissolution of the partnership, was the act of Stokes in suing out the commission; whereas, in fact, it was the act of bankruptcy itself, and the insolvency of Hamil, which was properly the cause of that consequence. It was, therefore, his own act that produced the dissolution, by compelling Stokes to have recourse to the measure of resorting to the commission in self-defence; and there is nothing in the circumstance of Stokes's being his partner which should deprive him of the right of protecting himself against the ruinous conduct of Hamil, by taking such a step. A partnership does not preclude one partner from the right of suing out a commission against another; and it is the act of the law, and not of the petitioning creditor, which dissolves the partnership between parties in such a situation. To give the partner an equity in such a case, some fraudulent motive or conduct should be proved; but there has been no such thing here. The contract between the parties has been in no respect broken by Stokes; but Hamil himself has by his own improvident conduct alone, deprived himself of the benefit of the agreement, a conduct which Stokes had no power either to cause or check. It is probable even that Stokes's own bankruptcy might have been occasioned by the conduct of Hamil, who, during the partnership, had it in his power to have in-[165]-volved Stokes, but the law itself interferes to protect him by the effect which it has declared shall be the consequence of the bankruptcy of a partner. As well might it be said that a person who has committed a felony, for which his partner might have been compelled to prosecute, or give evidence against him, would be entitled to come into a court of equity and seek to be repaid the consideration money of his agreement, on the ground of the consequent dissolution of the partnership having been effected by the act of the partner so becoming prosecutor or witness. If, indeed, either party had died, his death might have given the plaintiff an equity to recover back the money which had been paid; but this case bears no resemblance to such a state of things.

Another difficulty arises from there being an apportionment required to be made (because during some part of the term the partnership subsisted) if there should be a decree for the plaintiff: for the Court have no means of ascertaining how much ought to be repaid, and how much retained, of the 600*l.* which has been paid; and at all events Stokes would be entitled to a set-off, as there cannot be a doubt that he had a right to receive the money originally.

On the whole, therefore, without proof of bad faith or fraudulent conduct on the part of the defendant Stokes, the plaintiffs cannot make out a case for the interference of a court of equity, and their bill must be dismissed.

[166] RICHARDS, Chief Baron. I see no reason for altering my original opinion in this case. If this had been a matter purely between the plaintiff and the defendant Stokes, there could not have existed the least doubt on the subject. It is on Stokes's solicitation that this young man, who was not at that time an attorney, agrees to enter into partnership with him as soon as he shall be admitted, and having so applied to him for that purpose, he prevails on him to pay him, as a consideration, 1050*l.*, 500*l.*

to be paid on the execution of the articles, and the remainder by yearly instalments. The partnership was to have continued for five years, but in fact, it lasts only thirteen months at the outside—the partnership is then dissolved by operation of the commission which was sued out by Stokes, and thereby all further benefit of the contract was entirely lost to the young man.

If that had been the effect of accident, it would have been much to be lamented; but here Stokes admits that he himself procured the commission to be sued out, and by that means he himself it was who put an end to the partnership. Now in morality such conduct amounts to a very grievous offence, and if Stokes had been the only party concerned, no honest man could hear the transaction stated without great indignation: but, however, as far as Stokes's creditors and assignees are concerned, they have certainly done no more than they were fairly entitled to do for the protection of their own interest. One of the creditors has set up an assignment for a previous debt due to him from Stokes: [167] but he must take it, subject to whatever equities would affect the original security in the hands of Stokes. On the whole, a court of equity, so far from being a benefit to the country, would be an enormous nuisance, if it could not give relief in such a case as this, to prevent a man from taking an unfair advantage of his own act, which, under pretence of being for the good of another, is made to operate to his prejudice.

The injunction must, therefore, be continued, and the bond delivered up to be cancelled; and it must be referred to the Deputy Remembrancer to enquire how much of the money received by Stokes ought to be refunded; on the other hand, the assignees of Stokes should be permitted to prove the debt due from Hamil to Stokes, on which the commission was founded, but an allowance ought to be made for the time of the actual duration of the partnership. The plaintiffs should be let in to prove the balance, and the amount of their costs under the commission: but the defendants, Longmore and Biss, Stokes's original assignees, must be allowed costs for the time of their removal to the hearing of the cause.

Decree accordingly,—concluding with declaring, that “the Court does not think fit to give any costs to the defendants, Stokes or Price, or Rossiter and Baker, in respect to their defence of this suit.”

[168] IN THE EXCHEQUER CHAMBER. (CORAM RICHARDS, LORD CHIEF BARON.)

HANSON v. HANSON. Wednesday, 11th June 1817.—It is not a good plea to a bill filed by one residuary legatee (to whom, with others, the debts due from a concern in which the testator had been a partner with one of his legatees, had been bequeathed,) against the others for an account of monies due from the partnership to the testator, charging the defendant with owing the concern various sums of money, having possession of the partnership books: that all the monies due from the partnership to the testator at the time of his death consisted wholly of money lent by him to the defendant: and that (as the fact was) the testator had by his will forgiven and released the defendant from all monies lent and advanced by him during his life-time, the release by the devise being treated as referring to specific sums advanced independently of the partnership debts.

This was a bill by one residuary legatee against the executors and the other residuary legatees, for the usual accounts, and to have the trusts of the testator's will carried into execution, under the decree of the Court; and also calling for an account of all monies due to the testator at the time of his decease, from the partnership which existed between him and the defendant Benjamin Hanson, or from the said defendant B. Hanson.

The bill, among other things, stated that the testator B. Hanson had for several years preceding his decease carried on the business of an orange merchant, with the defendant B. Hanson his son: that no final settlement of accounts ever took place between them, but the testator B. Hanson always had a considerable sum of money belonging to him remaining in the business up to his death, and that there were divers sums of money due to him from the partnership concern which had never been paid: and that the testator also lent and advanced [169] to the defendant B. Hanson divers sums of money for his own use, which remained due from the said defendant to his father at his decease.

The bill also stated the will of the said testator, whereby he gave to his executors the residue of his property to pay the interest to his wife for her life, and after her decease to transfer one-third of the residue to the said defendant B. Hanson; one other third to plaintiff, and the remaining third to plaintiff's children; and the testator by his said will also forgave and released unto his sons Benjamin Hanson (the defendant) and Joseph Hanson the plaintiff, all such sums of money as he had thencefore advanced or lent to them or either of them; and the bill, after calling upon the executors to set forth the usual accounts of the testator, charged the defendant B. Hanson with having possessed all the partnership books and accounts, &c. and called on them to set forth an account of all monies due to the said testator, at the time of his decease, from the partnership.

To this bill the defendant Benjamin Hanson put in a plea and answer: and as to so much of the bill as related to the said partnership, and as called for the partnership accounts, (except a sum of 174l. 0s. 6d. thereafter mentioned,) he pleaded that Benjamin Hanson the testator, in his life-time advanced and lent to the defendant all the money which at and before the date and execution of his will had become and was due to him from the partnership between the defendant [170] and the testator, and also all and every sum and sums of money which had become and were due to him from the defendant himself, and at the date and execution of his will: that the testator made his will, and thereby forgave and released unto the defendant all such sums of money as he had thencefore advanced or lent to him, and that he thereby appointed the defendant and Samuel Lomell executors. The plea then stated the death of testator, and that his will was proved by his executors, and that the defendant Hanson had duly assented to the release in the will contained of all sums of money advanced or lent to the defendant by the testator, as mentioned in the will. And then the plea averred, that there never was any sum of money advanced or lent to the defendant by the testator after the date and execution of his will, save the sum of 174l. 0s. 6d., being a sum received since the dissolution of the said partnership by the said defendant, for the use of the said testator, from the assignees of the said defendant's brother J. Hanson in the bill named; and that save and except the said sum of 174l. 0s. 6d. there never was any sum of money whatsoever due and owing to the said testator from him the defendant, or from the said partnership, or partnership concern, other than such as had been advanced or lent to him the defendant by the testator before the date and execution of his said will.

And as to the remainder of the bill he put in an answer.

[171] The Court were of opinion that the plea was bad: that the common understanding of the clause in the testator's will was, that he meant to limit it to certain specific sums advanced or lent by him to his sons, but that it could by no means be made to extend to all the monies arising from the partnership, and they overruled the plea.

Roots for the bill.

Sidebottom for the plea.

IN THE EXCHEQUER CHAMBER. (CORAM RICHARDS, LORD CHIEF BARON.)

WALTER, Clerk, v. HOLMAN AND OTHERS. Wednesday, 11th June 1817. Money payments in lieu of tithes, although made as far back as living memory can reach, held not to be moduses where many of the witnesses state that such payments were apportioned by reference to the poor's rates. — Nor will an issue be granted to try the character of such payments so described by the witnesses' depositions. — The vicar's books are evidence to shew, that the money payments received in lieu of tithes are founded on, and regulated by, a criterion not in existence beyond legal memory—e.g. the poor's rates.

The plaintiff in this suit was vicar of Abbotsham, in the county of Devon. The bill was filed against certain occupiers of lands in the parish, for an account of hay and small tithes.

[172] The defendants admitted the vicar's title, but set up a great number of money payments as farm moduses.

In support of that defence, evidence was given, that the vicarial tithes had been

accustomed to be paid in money for a great length of time, carrying it as far back as living memory ; but a great number of the witnesses stated that those payments were made in a proportion of 6s. in every 10l. according to the poor's rate charged upon the several farms and lands in the parish.

To meet the defendant's case, the plaintiff gave in evidence the usual ancient documents to prove that the payments set up could not be considered as moduses, consistently with the value of the vicarage, as estimated by those documents since legal memory, and produced the vicar's books to shew that the payment was not uniform, but regulated by the poor's rate.

[The production of these books for that purpose was objected to, as not being evidence either of the poor's rates being the criterion by which the money payments were regulated at any time, or of the amount of those rates ; but that objection was ultimately overruled.]

Dauncey and Boteler, for the plaintiff, contended, 1st, That the usage in evidence was insufficient to establish the defence of moduses, inasmuch as the payments were too rank to be [173] considered as having been made before legal memory ; and 2dly, That the fact of their being regulated by the criterion of the poor's rate, which was of comparatively modern origin, was absolutely conclusive against their existence as moduses. They cited the case of *Startup v. Doddridge* (2 Gw. 587), as establishing that payments regulated by rent or value cannot stand as moduses, much less could they, when regulated by a poor's rate, which may not perhaps be founded on the true value of the lands rated.

Martin, Wyatt and Roupell, for the defendants, submitted, that the objection taken on the ground of the poor's rate being unknown till after legal memory, went merely to the form of the testimony and the language of the witnesses, for that that was not the way in which the moduses had been put on the record : and they submitted that the testimony of the witnesses, (some of whom moreover had only referred it generally to "a rate" which might have been the church rate,) was wholly extrinsic to the fact, as stated in the answer, and ought not, in the first instance, to be allowed to defeat the defence pleaded ;—that it was common for witnesses to use, in words, modern criteria in proving the amount of an ancient payment,—and that these payments had been proved to have been uniform, whereas the poor's rates must necessarily have been fluctuating and variable. It may, after all, be only the understanding of those few witnesses who so state it, and in [174] that they may, in point of fact, be mistaken, and their mistake as to the supposed criterion by which, in their opinion, the payment had been regulated, ought not to prejudice the defendant's right to an issue,—that, at all events, the proof of these payments for so long a period, while no tithes have ever been paid in kind, would entitle the defendants to an issue, to try whether they were moduses or not. Against such proof of continued money payments having been for so long a time received and acquiesced in by successive vicars, the evidence of the ancient documents loses all weight. So it was held in the very recent case of *Jee v. Hookley* (ante, p. 87). The defendants, therefore, (they contended) were at least entitled to an issue, to try the real character of the money-payments : and they submitted that the Court should, in a case of this sort, direct a further inquiry.

RICHARDS, Lord Chief Baron. (Having stated the pleadings and commented on the evidence.) It is quite clear that the vicar is entitled to the tithes, either in kind or by a modus, and therefore the sole question here is, whether the sums which have been hitherto paid by the defendants in lieu of tithes are moduses ? If they can prove the immemoriality of the payments, they are entitled to succeed here and elsewhere : but that is incumbent on them. Thinking, however, as I do, that they have not done so, and that the plaintiff is therefore entitled to a decree, I give my opinion instantly.

[175] [His lordship then expressed himself in terms of disapprobation as to the mode in which the defence had been proceeded in, and of the great and unnecessary length of the depositions, the greater part of which, he said, were not evidence.]

I have attended the more carefully to those depositions lest my feelings should mislead me, and having said that the plaintiff is entitled to succeed unless the defendants can support their moduses by evidence, I am of opinion that they have produced nothing like evidence of the payments being of that nature ; on the contrary, such evidence as this, that the payments were in proportion of 6s. for every 10l. of the poor's rate, is direct proof that they were not moduses.

With respect to the acquiescence of the vicars, that does not weigh with me a feather against their right, under circumstances like those in evidence in this case, where it is proved that the last incumbent was disinclined to assert his claim when threatened with being harassed by the landed proprietors; no doubt many bad moduses have been established by reason of the vicar's inability to contest his claim.

Now the plaintiff's case here is founded upon the evidence that the payments made to him in lieu of tithes, were regulated by the poor's rates. The parol testimony proves that, and it is confirmed by the vicar's books, which for that purpose are undoubtedly evidence; they shew that the money-[176]-payments received in lieu of tithes are founded on the poor's rate, and it is notorious that poor's rates were instituted long subsequent to the time of legal memory, and that is quite sufficient to shew that these payments are not moduses. I must, therefore, either reject all the evidence, or decree for the plaintiff.

Account decreed, with Costs.

IN THE EXCHEQUER CHAMBER. (CORAM RICHARDS, LORD CHIEF BARON.)

DAVIES v. DODD. Thursday, 12th June 1817.—The indorsee of a bill of exchange which has been lost, has a remedy against the acceptor by bill in equity to compel payment, and that although he might have recovered on the bill at law, his equity being founded on the want of power in a court of law to impose terms on the plaintiff of giving the defendant security against the forth-coming of the bill, which would have been good ground for an injunction to restrain such an action.—Nor is it any answer to such a suit that the bill of exchange was a mere accommodation bill; that the plaintiff might have applied before; or that the drawer has since become insolvent.—The plaintiff is not bound in a court of equity to institute such a suit within any particular period.—It is not necessary to make the drawer a party.

This bill, which was filed in Easter Term 1813, prayed for relief, and that the defendant, who was the acceptor of a bill of exchange, dated 4th March 1812, might be decreed to pay to the [177] plaintiff (the indorsee) 96l. 9s. the amount of the bill.

It had been drawn by a person of the name of Allen, and made payable to his order, and he had endorsed it to the plaintiff for a valuable consideration. The bill stated that the plaintiff had proposed to give the defendant an indemnity against any demand which might be made on him in respect of the bill.

It was proved that the bill had been lost by the plaintiff's agent, and had been frequently advertised by the plaintiff, offering a reward for its recovery, without effect.

The defendant stated in his answer, that no other indemnity had been offered to him than the bond of the plaintiff, which he (the defendant) had rejected, as the plaintiff was in insolvent circumstances; but that, if a sufficient indemnity had been offered, he would have accepted it, and would have paid the bill.

Trollope, for the defendant, objected in limine that the drawer ought to have been made a party, more particularly as the defendant had accepted the bill solely for his accommodation, and without any consideration or value received, as was known to the plaintiff when he took it from the drawer, and that he had not kept any copy of it.

Martin and Parker, for the plaintiff, submitted [178] that Allen (the drawer) was not a necessary party, nor could the plaintiff have obtained any decree against him if he had made him a defendant, nor could the Court have made a decree in that case, as between Dodd and Allen (the indorsee and drawer). But the Chief Baron determined that the drawer was not, under the circumstances, a necessary party.

It was then contended that proof of the loss of the bill entitled the plaintiff to the relief prayed.

Trollope, on the other hand, insisted that the plaintiff's remedy was at law on the case made out by himself; for, from the decision in *Long v. Baulde* (2 Camp. 21), it was clear that he might have succeeded in an action to recover the amount of the

bill. He submitted, also, that the plaintiff was now too late in his application, for his laches had already shut out the defendant from any chance of recovering over against Allen the drawer (who had since become insolvent) as he might perhaps have done before. If, however, the plaintiff were entitled to the relief prayed, it could only be on his giving the defendant an efficient indemnity, by good security, against all future demands in respect of his acceptance of the bill, which the plaintiff had never yet offered to do, the only indemnity proposed being the single bond of the plaintiff himself, which, being his personal security merely, could not be considered sufficient, even if he were in [179] good circumstances. The plaintiff has, therefore, no remedy in equity, and if he had, he is bound to give the defendant ample security.

RICHARDS, Chief Baron. It does not become me to say whether the plaintiff has or has not any remedy at law: but even though he should have such a remedy, he has also a remedy here, and if he had commenced an action at law, the defendant might have restrained him, by injunction, from proceeding, and for this obvious reason, because a court of law could not compel him to give security, which a Court of Equity would hold that he was entitled to. And there are many cases of this nature, particularly where bonds have been lost, where the parties have come into Equity on that very ground: and the case of a negotiable bill is still stronger: therefore I am of opinion that this suit is proper.

As to the charge of laches on the part of the plaintiff, I do not think that any has been shewn which can prevent the plaintiff from succeeding: and the defendant has surely but little cause to complain in this case that the plaintiff has not proceeded sooner against him, or in any other way. At the same time, however, no blame is imputable to the defendant for not paying the amount of the bill on the indemnity proposed, for he is clearly not bound to accept whatever security the plaintiff might offer.

Then the plaintiff having an equitable remedy [180] in this case, there is no limitation in point of the period within which he must file his bill, for he is not bound to any given time in a Court of Equity.

It appears that the plaintiff had tendered the defendant some security, which was rejected: on that, the question now is, whether the security the plaintiff offered was such as the defendant ought to have accepted: The Court cannot decide that question, and it must therefore be referred to the Deputy Remembrancer to say whether the security offered was sufficient: and if that should be found to have been insufficient, it must be referred to him to settle what security would sufficiently indemnify the defendant. The question of costs must be reserved till further directions.

It is certainly much to be lamented that so small a sum as that in dispute should have driven the parties into a Court of Equity.

Decree as prayed.

[181] THE KING v. SCOTT. Saturday, 7th June 1817.—Where a scire facias, founded on an inquisition, misrecites the inquisition, and therefore fixes by such recital a day on which the debt had been found to be due, differing from the true day named as in the inquisition, the Court will give leave (on cause being shewn) to amend the writ, on payment of the costs, &c. even after the defendants have pleaded.

An order to shew cause had been obtained by Nolan, in last Easter Term, for liberty to amend the scire facias in this case. It appeared that the writ had recited, that by an inquisition taken on the 2nd July (56 Geo. III.) Bruce and Co. were found indebted, &c. to the king: that by another inquisition of the same date, John Cooke was found indebted, &c. to Bruce and Co.: and that by another inquisition, taken on the 27th July, Scott (the defendant) was, ^A on the day of taking the said inquisition, indebted to Cooke in, &c.

Scott had pleaded a set-off. The proposed amendment was the insertion of the words—"on the 2nd day of July," and in that part of the writ which related to the finding of Scott's debt [marked above with a caret]. It was moved, on payment of costs, the Crown undertaking to furnish the defendant with an office-copy of the scire facias and other proceedings, with liberty to plead de novo within eight days, or abide

by the plea pleaded, and the two MS. cases transcribed in the note below were cited as precedents *1.

[182] Richardson now shewed cause, submitting, that the amendment, as moved, could not now be permitted after the defendant had pleaded, particularly where it went to the alteration of the day recited by the writ to have been found by the inquisition as the day on which the defendant was indebted to the debtor of the Crown: but,

The Court having considered that the amendment could not operate to the prejudice of the defendant, and that it was in the delay of the Crown, made the

Rule absolute.

[183] ATTORNEY GENERAL v. SIR C. H. COOTE, BT. Friday, 13th June 1817.—

A statute imposing a duty on the property of persons residing in Great Britain, applies to persons residing there for any length of time, however short, although they may, at the same time, have a more permanent residence elsewhere.—An exemption of persons coming to reside “for some temporary purpose only, and not with any view or intent of establishing a residence therein, and who shall not have actually resided in Great Britain for the period of six successive calendar months,” does not include a person taking a house in London, and furnishing and residing in it for a less period than six months at any one time, and who then goes elsewhere with his establishment and resides for the remainder of the year there, leaving behind him some one merely to take care of the house.—Such a person is therefore within the act of the 46th Geo. III., ch. 65: but not within the exemption of the 51st section.

This was an information against the defendant for omitting to make a return of his property, as required by the Property Tax Act, (46 G. III. ch. 65 *2,) and the question was, on this application, to set aside the verdict found for the Crown, whether he was liable to the duties thereby imposed, under the following admitted circumstances:

[184] That the defendant was in receipt, in Great Britain, of profits and gains

*1 M. T. 1710.

Regina v. Hobbs.—Scire facias against Ann Henkinson, widow, amended by striking out the word “vidua,” she not being a widow. Ordered as of course.

Regina v. Peters (12th Anne).

Two extents had issued against the defendant, and two inquisitions were taken thereon; one in the 12th Anne, the other, 8th Geo. I. By the last inquisition, Huggins was found indebted to Peters in 1500l., and Hart was also found indebted to him in 83l. 14s. 3d. Two writs of scire facias were sued out against Huggins and Hart; one directed to the sheriff of Middlesex, the other to the sheriff of Herts. By mistake, the wrong inquisition was recited in each writ. Mr. Fenwick, on the part of the Crown, obtained an order as of course, that the two writs should be quashed.

*2 Sched. D. charges a duty of 1s. in the pound “on the annual profits or gains arising or accruing to any person or persons residing in Great Britain, from any kind of property whatever, whether situate in Great Britain or elsewhere.”

By sect. 51 it is enacted, “That no person who shall, on or after the passing of this act, actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his or her residence therein, and who shall not actually have resided in Great Britain for the period of six successive calendar months, shall be charged with the said duties mentioned to be charged in Sched. D. as a person residing in Great Britain, in respect of their profits or gains received from or out of any possessions in Ireland, or any other of His Majesty’s dominions or any foreign possessions, or from securities in (&c.): but nevertheless, every such person shall, after every such six months residence therein, be chargeable for the same from the commencement of the year in which such person shall have been resident in Great Britain, or if not so resident, then for the period of his or her having so come into Great Britain.”

arising from certain possessions in Ireland belonging to him, and was duly required by the assessor to make a return for 1814, as laid in the information, and incurred the penalties as claimed thereby, if the Court shall be of opinion that he was liable to make such return on the facts of this case.

That the defendant, who was born in Ireland, and resided while an infant with his mother Mrs. Cook, in Great Britain, where he was educated, came of age in December 1812, and continued to live with her until the 24th June 1813, when he bought and took possession of his present dwelling house in Connaught Place, which he furnished. That he had continued in possession thereof so furnished up to the present time : and had been assessed for the said house, to all rates and taxes for the year 1814, and subsequent years, but not for any establishment under the assessed taxes.

That during the period of his residence in Connaught Place, from the time of his purchase up to the present time, he never lived there, or elsewhere in Great Britain, for the period of six successive calendar months, but usually went to Ireland to his place of residence there, after residing for 10 weeks in Connaught Place, from whence he did not return for the space of nine months, leaving, during such his absence, a woman servant to take care of the house, the remainder of his establish-[185]-ment going with him to Ireland, and returning with him from thence, when he returned to his residence in Connaught Place.

Dauncey and Nolan now shewed cause, relying wholly on the construction of the words of the statute with reference to its object, and they cited the case of *The King v. Sargent* (5 T. R. 466), to shew that a residence of the shortest duration, where the house had been taken for a year, had been held to be such a residence as would qualify a party for an office required to be filled by a resident.

Martin and Maule in support of the rule, rested the defendant's case on the facts, which they contended brought him within the exemption of the 51st sect. : submitting, that the clause was not confined to a residence for a temporary purpose, but extended to all cases where the party resided here without intent of establishing a residence in Great Britain. They insisted, therefore, that to bring the defendant within the act, it was necessary to shew him domiciled in England and not in Ireland : whereas, there could be no doubt that, under the circumstances of this case, the defendant was domiciled in Ireland, and not in Great Britain : and they cited many authorities in support of that proposition, all of which are to be found in the case of *Somerville v. Somerville* : but the question of domicile, the Court afterwards said, did not apply in this case.

[186] They then submitted that the various sections of the act explained the meaning in which the legislature had used the terms "ordinary residence." Sect. 50, for instance, was the converse of sect. 51. There the act charged persons ordinarily residing in Great Britain, notwithstanding any temporary absence abroad, clearly marking the intention to fix ordinary established residents with the duty, and that however short their actual residence might be. So the 41st Geo. III. ch. 62, exempts persons ordinarily resident in Ireland from the income tax, (39th Geo. III. ch. 13,) as with relation to income in Ireland : and also from the duties on servants, &c. imposed by the 38th Geo. III. ch. 41, and so had various other statutes, thus furnishing a legislative exposition of the meaning of the act, shewing that time was not considered an ingredient in an ordinary residence : all the purposes of a person coming to reside in Great Britain for so short a time as the defendant resided here, must be of a temporary nature. *The King v. Sargent* was a case where the question was merely whether the residence was of such a particular nature as was sufficient to qualify a person for the office of bailiff : but such a residence as Sargent's would not have brought him within this act.

Dauncey, about to reply, was stopped by

RICHARDS, Chief Baron. The Court are of opinion that this verdict must stand. In considering this question, I shall give my opinion as if [187] I were one of a jury deciding according to the evidence before the Court, on the question, whether the defendant came to reside in London for a temporary purpose or not : and that question we must also consider with a view to the object of the act. The fact of the defendant's domicile has nothing to do with the question, nor has the time of his residence any effect on the construction of the words of the act : for if the defendant came here for the purpose of establishing a residence, it were enough, although he should reside

here only two weeks. The sole question is whether he came here to reside with such a view as exempts him. [His lordship detailed the facts of the case.] I am of opinion that the defendant is clearly within the act. *Primâ facie*, he is liable. Then it is incumbent on him to shew that he is within the exemption. I think he has not done so; and had I been one of the jurymen I should have given the same verdict as has been found, and therefore I think it ought to stand. It is a strong fact, that the same servants who lived with him in town went to Ireland, and returned with him.

GRAHAM, Baron. The verdict is found on very plain facts, and I think they shew that the defendant did not reside here for a temporary purpose. The question of domicile goes beyond the case. No doubt he was domiciled in Ireland, and so he might have been if he had resided here 20 years; but the question turns on the plain language of the act, and I think the intention of the legislature quite clear. If a man dies two days after forming [188] his establishment, is he not within the act? or may any man come here and stop till within a week of the six months, and then go to Ireland, and return for the purpose of avoiding the duty? Under the circumstances I think it is quite impossible to say that the residence of the defendant in England was occasional, or for a temporary purpose. At any period of the year he might have come to Connaught Place, where he would have found his house ready for him.

WOOD, Baron, of the same opinion. No doubt the defendant is liable under the act, unless he brings himself within the exemption. That, therefore, is the single question. If the defendant had come to reside in London for a temporary purpose, it might have been so stated; but it is clear that his residence here, while it continued, was for all manner of purposes. The difference in language between the 50th and 51st sections is very material to the consideration of this case. Had the words been "occasional residence," or had there been no other words, there might have been considerable doubt. It is no uncommon thing for a gentleman to have two permanent residences at the same time, in either of which he may establish his abode at any period, and for any length of time. This is just such a case: the defendant has two residences, and they are equally permanent. There is no pretence therefore for contending, that he comes within the exemption. If this were a temporary residence, he would probably change it sometimes, but in fact it is his own house.

[189] GARROW, Baron. Although the case has been argued with considerable ingenuity and ability, I have not been able to entertain a doubt on it for a moment. If it were a hard case, the Court could not take notice of that; but I think it is quite the other way. In the exigencies of the country this tax was imposed, and its object was to relieve the subject by throwing the great weight of it on those who were most capable of sustaining it. Is then a man, having a magnificent establishment, to be permitted to evade this tax on property, by continuing to reside on it just so long as may be sufficient to bring him within the case to which it is argued this exemption applies? And on the other hand, a person coming for a purpose really temporary, and is obliged from misfortune, perhaps, to remain over the period of six months, is to be compelled to pay! It would be defeating the very wholesome object of the act, to put such a construction on this clause. The preceding clause (sec. 50) is very explanatory of this section when the words are read with a regard to the object of the statute.

Rule discharged.

[190] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

PARSONS v. BELLAMY, CRIDLAND AND OTHERS. 17th June 1817. A vicar claiming tithe of hay, may establish his right by sufficient proof of perception during living memory, where none can be shewn to have been enjoyed by the rector, although his endowment actually negative his right to that tithe expressly, and state it to belong to the rector, on the presumption of a subsequent endowment, which the Court is bound to adopt.—[As to what evidence is sufficient to support such a claim, see the proofs as detailed in the case.]—Perception by means of a composition, which has always been understood by the parties to have been paid for tithe hay, is as strong evidence as if it had been paid in kind.—Perception of tithes by a vicar for any considerable number of years, where its inception cannot be shewn, and it is not met by perception by the rector or any other person, is a sufficient

proof of usage to ground a presumption of perception long anterior, and of its having been founded on subsequent endowment. Nor will the Court grant the rector an issue in such a case.—A receipt for payment (by a person sued by a vicar for tithes) of the plaintiff's bill of costs, is evidence of the suit having resulted in favour of the vicar.—So is an entry to that effect in a former vicar's books.

The plaintiff, as vicar of Wembdon (Somerset), instituted the present suit against the defendants, the occupiers of Sandford farm, and the inappropriate rector of the parish, for the tithes of hay, and grass made into hay, on that farm.

The answers of the Cridlands (the rector) admitted the plaintiff's right as vicar to the small tithes, but claimed the tithe of hay as inappropriate rector, and stated that they had permitted the defendant Bellamy to retain the tithe for the hay arising from Sandford farm, which he held of [191] them, (the Cridlands) and Bellamy relied on their title.

Very many witnesses examined on the part of the plaintiff, proved that they had paid to him and his predecessors, as vicars, for a long series of years, (as far back as living memory), the tithe of hay mown on meadow lands within the parish by a composition, and that they had only rendered to the rector the tithe of corn,—that the tithe of hay had always been paid by composition and never in kind, and that the tithe of corn had always been rendered in kind to the rector, and that he had never received tithe of hay in the parish by composition or otherwise,—and that there had formerly existed, (as they had heard) disputes between the rectors and vicars as to the right of tithe hay, but that the vicars had ever uniformly continued to receive it, and the plaintiff produced very strong and remote evidence of long perception and reputation.

The plaintiff's endowment * was also put in,—it was dated in 1304, and was of

* As the defence rested mainly on the terms of the endowment, it may be proper to give the exact words of the translation of the office-copy, extracted from the registry of the Bishop of Bath and Wells, intitled, "*Confirmatio Ordinationis Vicarie de Wembdon*;" which are as follows:

"In this instrument the ordination of the vicarage of the parish church of Wembdon, by W. formerly Bishop of Bath and Wells, dated 6th July 1304, is recited. The portion of the vicar, who for the time being should ministrate in the church aforesaid, was thereby ordained to consist of one manse, with a garden, curtilage, and all other the appurtenances which the vicars of the said church before held and were used to dwell in, and three acres and an half of arable land, and four acres of meadow, to the vicarage of old time assigned: and also all oblations arising to the aforesaid church: and also the visitations of infirm persons; all legacies, triennial payments, missals, with requests, anniversaries, and money given at confessions: and also with the whole wax arising to the church aforesaid, also the tithes of lambs and wool, and all other small tithes belonging to the church of Wembdon, by what name soever they might be known. It was also decreed that the said vicar and his successors should receive from the master and brethren of the hospital of St. John of Bridgwater, two quarters of wheat of good grain, two quarters of barley, two quarters of oats, and half a quarter of beans at the feast of St. Martin, in the winter, and the Ascension of our Lord, by equal portions to be divided; and that he should give the holy water to his clerks, who ought to carry it, and in the said church should ministrate and cause it to be decently served: and the master and brethren of the aforesaid hospital as rectors, the whole land and meadow of the demesne belonging to the said church, except three acres and a half of arable land, and four acres of meadow, the vicarage above assigned: and also the tithe of corn and hay of the whole parish of Wembdon entirely, should receive as before they were wont to do, to be deputed for the uses for which the appropriation was to them granted, into the portions of the vicarage of the church of Wembdon above assigned, Richard de Bridport, the then vicar, was instituted: and the same portions to the same (vicar) and to his successors, were assigned: and all ordinary charges the master and brethren of the hospital aforesaid, should support: and the extraordinary as to two parts: and the vicars for the time being, to sustain the third part: which said ordination above recited, was thereby confirmed."

"all small tithes, [192] but it recited the rectorial tithes to be corn and hay of the whole parish.

[193] The Ecclesiastical Survey, and the Minister's Accounts, (20th and 35th H. VIII.) stated the rector to be entitled to tithe of corn, making no mention of hay. Certain compositions were produced, made between former vicars and occupiers, for tithes of whole farms, with express abatements for corn, and none for hay. The contract of sale of this farm, with the tithes of corn and grain, from Lord Malmesbury to the Cridlands, not mentioning hay, was also given in evidence.

The plaintiff produced various extracts from vicar's books from 1757 to 1790, where memoranda of payments received for compositions for the tithe of hay had been entered, and an account of certain proceedings in the Ecclesiastical Court, in a cause of *St. Albyn* (a former vicar) *v. Stacey*, to recover the tithes of clover, which was afterwards compromised, the occupier agreeing to pay the tithes to the vicar as before, and to pay the costs of the suit.* [194] In corroboration of which, a receipt given by the defendant Stacey, for the plaintiff's taxed costs, was offered in evidence.

[To these it was objected, that they were not admissible as proof of payment of the particular tithe now sought to be recovered: for that the receipt was not sufficiently explained by the other documents to shew for what precise sum, and on account of what particular tithe it was given, the libel itself evidently relating to other titheable matters, and the entry in the vicar's book (if that were evidence at all in such a case) speaking of the vicar's demand generally. Non constat, therefore, that it might not have been given for money received on account of other tithes than that now sought to be recovered.

But the Lord Chief Baron was of opinion, that the suit being in evidence, and that it had been put an end to, and a receipt given on its termination, the vicar's memorandum was admissible to shew on what account it had been given, because it had altogether the effect of making the vicar charge himself with the receipt of so much money. And, therefore, his lordship admitted the evidence.]

[195] In the conveyances which were put in from Lord Malmesbury to the Cridlands the tithe of corn and grain was mentioned, and no other.

Dauncey, and Owen, for the plaintiffs, relied entirely on the case having been fully made out by the evidence.

Martin, Roupell, and Richards, for the defendants, contended that such a case of strict and positive title in the vicar had not been made out as to enable the Court to decide against a rector without an issue; and they commented much on the various evidence, which, they insisted, strong as it certainly was, was still confined to living memory, and did not go to establish any express title to the tithe of hay, which had never been received by the vicars in kind; and it was clear that the vicarage had it not, by the endowment produced in evidence; and non-user or neglect of his rights, ought not to prejudice a rector standing not only on his common-law title, but also (with respect to the vicar) on an express reservation by the terms of his endowment.

Dauncey, about to reply, was stopped by

RICHARDS, Chief Baron. I am of opinion that the vicar has made out such a case as entitles him to an immediate decree for an account of tithe hay. It had occurred to me, that under the endowment produced the tithe of hay might have passed under the words "small tithes" for the endow [196] ment; mentions "all other small tithes,"

* That memorandum was proved to be in Mr. St. Albyn's hand writing, and was as follows:

"N.B. — Ambrose Stacey, of Bridgwater, occupied seven acres, part of Bowles's, No. 19, not in the survey, and had clover in it, of which he made hay; and Richard Taulin of Wembdon carried the hay for him; on his refusing to pay, I sued him in the court of Wells; he stood out about a year; his first plea was that it was in the parish of Bridgwater, and had never paid tithes to the vicar of Wembdon; but finding that I could prove by Mrs. Bowles, the widow of the proprietor of the estate, that her husband had paid Mr. Knight, and that it appeared by Mr. Knight's book of accounts, page 35, that he had paid him several years, and he not being able to prove that he had ever paid the corporation of Bridgwater, he changed his plea, and swore he never occupied the seven acres in dispute. However, he soon after submitted, and paid my demands with costs, June 3d, 1766.

"N.B. — This estate pays great tithes every year to the impropiator of Wembdon."

but the tithe of hay is afterwards in fact absolutely negatived, and therefore under that endowment it is clearly out of the question. If, then, the plaintiff is entitled to hay, it must be under some subsequent endowment : and that the Court will presume in favour of a vicar, if the evidence adduced of his perception be so strong as to warrant it, and that is, therefore, the only question in the present case.

Primâ facie then, the rector in this instance, is entitled to the tithe of hay : and whether Lord Malmesbury thought he had that tithe or not, or whether he intended to convey it or not, if he really was entitled to it, the defendants Cridlands now are, and therefore it is incumbent on the vicar to make out a clear case. It is material here to observe, that one of these parties must be entitled to this tithe : and it is important to see what was the nature of the contract between Lord Malmesbury and Mr. Cridland, for that furnishes evidence of perception from time to time : and if the vicar is found to be constantly in possession of the tithe, and that is not broken in upon by perception by the rector, I must infer that he has been so long in possession as to authorize a presumption of a subsequent endowment. Now the evidence of the vicar's perception has certainly not been broken in upon in this case, for it is admitted on all hands that the rector never had perception of the tithe of hay. In short, there is no sort of evidence offered on his behalf, except what arises from the tenor of the endowment : yet [197] he certainly has shewn himself sufficiently attentive to his interests on other occasions, not to have neglected it in respect of the article now in dispute : and if he had thought that he had any right to the tithe of hay he would have asserted it. I do not admit that a lay rector is usually more negligent of his right to tithes than an ecclesiastical rector. I fear, on the contrary, that the clergyman is most frequently in the habit of neglecting his interest. The vicar's evidence of perception, then, we find to be so strong as not to be attacked even in argument, and that indeed is very candidly admitted ; but then it is contended that the evidence does not go far enough back in point of time to establish such a claim against the common-law right of a rector. The evidence given goes as far back as living memory. [Here his lordship observed on various parts of the evidence furnished by the depositions of some of the witnesses, who were very old.] Beginning, therefore, from so distant a period, and bringing it down to the time of the present vicar, we have a continued and constant stream of evidence to shew that the tithe of hay has always been compounded for with the vicar. Now evidence of a composition is quite as strong in favour of a claim of the particular tithe, as if it had been paid in kind. As to some few exceptions, they only shew that the vicar was negligent. There can be no doubt, therefore, that the composition was paid for tithe-hay, for it could not have been so long mistaken : and that is the fair result of the evidence, for all the witnesses say that that was their view of the composition, and also that it was [198] that of other persons, which is the kind of evidence that we call reputation ; and this is continued for many years.

I had at first misunderstood the term "agistment" in the vicar's books ; but I observe that there is a constant distinction preserved between plough-land and meadow-land. There are other things under the head agistment besides agistment and hay, and if there were any doubt about the heading term, the conduct of the parties makes it quite clear. The parol evidence shews enough to assist that difficulty, and we must adopt the meaning given to it by the parties themselves. After all, the vicar's books are only confirmatory evidence of the parol testimony, but they are strong. As to a vicar's making evidence for his successors, that is what I cannot listen to. This Court knows they do not do so, and the books of the vicar are as good evidence as the books of a steward, charging himself with money due to his employer.

Such, then, is the evidence on the part of the vicar : and as to the objection made, that the length of time is not sufficient, I am of opinion that, if it can be carried as far back as living memory, it is as much as is required. Human memory is certainly but as a day in itself, but it is enough to found a presumption on, that it has existed long anterior, unless that presumption is contradicted by evidence and disproved : 70, 50, or 40 years usage is sufficient to afford presumption of a subsequent endowment, otherwise, an endowment, or any other instrument, [199] could never be presumed in any case by force of usage.

The suit in the ecclesiastical court I do not much rely on as evidence ; nor do I think any thing of the marginal note to the draft of the conveyance. The fact,

however, is, that there was a libel for tithe of hay and other tithes: it may be said that that was confined to a particular piece of land, but the defence set up was inconsistent with a consciousness of any title to the tithe in the defendants. First, it was that the lands were not in the parish; and next, that the defendants had had no titheable matters: and it appears from the evidence, which I admitted (and which I still think good) that the result of the suit was, that the defendant paid the demand, and with costs; now that was by no means like a compromise on the part of the vicar.

With such evidence personally applicable to the vicar, I think he has made out a strong case. Then it is supported by all the documents, except the endowment. The minister's accounts are confined to tithe of corn. That is certainly strong; and I cannot help now thinking that the transactions between Lord Malmesbury and Cridland are applicable here to shew that neither party ever thought that the tithe of hay passed; and it is materially important to shew that there had never been any perception by the rector. All that was sold was the rectory. At the bottom there is mentioned "tithes of corn and grain of the above estate:" if that is not evidence to shew that the rector had no title, it is enough to [200] shew that at least he had no perception; thus, all the evidence proves perception in the vicar, and there is none the other way; and, I am bound, therefore, to give him a decree. Were I to send this case to a jury, and they should find a verdict against the vicar, I would send it down again and again till they came to the right conclusion, and found the other way. I consider myself bound by my oath, as a juryman is: and wherever there is sufficient evidence to enable me to decide one way or the other, if I did not do so, I should be guilty of an abandonment of my duty.

Account decreed, with Costs.

GOUGH v. DAVIES AND GIBBONS. Tuesday, 17th June 1817.—A person depositing money with bankers, and taking their accountable receipts, does not—by continuing to leave his money in the bank after a dissolution of the original firm and the constitution of a new one, which consists of some of the members of the old bank and of other persons—discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, and that for a period of four years, and until they become insolvent.—Nor are those circumstances sufficiently strong to justify such a case being left to a jury.—Garrow, B. dubitante.

This was an action of assumpsit, in which the defendant Gibbons having pleaded his bankruptcy, a *nolle prosequi* was entered as to him, and Davies pleaded the general issue. A verdict was found for the defendant at the Stafford Lent assizes, 1817, under the direction of Mr. J. Parke, who [201] left it to the jury, telling them that there were two questions of fact for their consideration*: 1st, Whether the plaintiff assented to the transfer of the credit from the old firm to the new? 2dly, Whether the defendant consented to take back the credit on himself? In the former case he directed verdict for the defendant; in the latter, for the plaintiff. His lordship had expressed his own opinion to be, that under the circumstances of this case, the verdict ought to be for the defendant; holding that the plaintiff had impliedly assented to a transfer of the credit, and that an express assent was not necessary: and that the accountable receipts were to be considered merely as evidence of the payment of the money, and not as specific securities, having the same effect only as the entries of the same sums in the banker's books would have had. In the following Easter term, a rule having been obtained for setting it aside, the facts were stated, by the desire of the Court, in the following case:

Thomas Gibbons, the elder, deceased, John Davies, and Thomas Gibbons, the younger, (the two defendants in this record,) carried on business as bankers, in partnership, at Wolverhampton, in Staffordshire, from the 1st October 1808 to the 10th October 1811, under the name of "The Wolverhampton Old Bank."

At the latter period, the partnership above mentioned was dissolved, and a new partnership [202] was formed between the said Thomas Gibbons the elder, Thomas Gibbons jun. (the defendant,) and his brothers, John and Benjamin Gibbons. Notice

* See the case *infra*, page 207.

of the dissolution of the old, and the establishment of the new partnership, signed by all the parties, was published in the *London Gazette* of November 12th, 1811*; and the new partnership continued to carry on business, under the same name of "The Wolverhampton Old Bank," till Thomas Gibbons the elder, whose name stood first both on the old and new partnership, died, which was in June 1813; and the survivors continued to carry on the business, under the same name, till the month of March 1816, when the partners became bankrupts. The plaintiff, who has a place within two miles of Wolverhampton, which he comes to occasionally, but resides chiefly at another seat, about ten miles distant from Wolverhampton, from the month of March 1809, was in the habit of depositing money from time to time in the bank at Wolverhampton, for which he received unstamped receipts: and at the period of the dissolution of the old partnership, he had in his possession several of such their receipts for such money so deposited, amounting to the sum of [203] 2213l. 10s. 8d.; and which receipts he still holds, never having had any securities substituted. The form of most of those receipts was as follows:

Wolverhampton Old Bank, 1st March 1809.

N^o 263. Received of John Gough, Esq. two hundred and twenty pounds, to account for with interest.

For THOS. GIBBONS, JOHN DAVIES, and
THOS. GIBBONS, JUN.,
R. BIRCH.

£220.

The interest allowed by the bank upon these deposits was four per cent. being the same rate of interest as that allowed by them on deposits to their customers in general; and some few of the receipts expressed the rate of interest. At the dissolution of the old partnership, the balance of the plaintiff's account was brought forward into the concerns of the new firm. This was done without consulting him; but he knew of the dissolution, and continued to deposit money in the bank after the new partnership commenced, for which he had the accountable receipts of the new firm sent to him for such deposits from time to time; and each time a balance was struck, the interest upon the whole sum, as well that part of it which was deposited before, as that part which was deposited after the new partnership was formed, was calculated as upon one aggregate sum without distinction; and when the new firm became bankrupts, the plaintiff held their accountable receipts for 1941l. 13s. 6d., exclusive of the receipts above mentioned for the old balance of 2213l. 10s. 8d., as appeared by the plaintiff's account, as it [204] stood at the bank at the time of the dissolution; and that balance was due from the firm of Gibbons, Davies, and Gibbons, in which the defendant was a partner at the time of the dissolution. The account is then brought forward by the late firm, leaving a balance of 5018l. 14s. 9d. in favour of the plaintiff.

The plaintiff, at various times after the dissolution, applied for and received several sums at several times, from the new partnership, as interest, which was calculated upon the whole account, without distinction, including the balance due at the dissolution of the old partnership; and he acknowledged the receipts of sums due for interest, by letters addressed to Messrs. Gibbons and Co. bankers, Wolverhampton, without objecting to the manner in which the accounts were kept or the interest calculated; and in 1814, an account was rendered him, by his desire, which was headed,—"Received of John Gough, esq. by Gibbons and Co." Then follow the receipts, amounting to 3128l. 10s. 8d.

There was also received, December 18th, 450l. which was requested not to be put in the general account, with the following remark "because I expected I should want it in a few days." Those words were in the plaintiff's hand-writing upon the paper containing the said account. On the 4th May 1816, the solicitor for the plaintiff attended a meeting under the commission of bankruptcy, and there met John Davies,

* The terms of the advertisement (which the Court required to know during the discussion) were as follows: "Notice is hereby given, That the partnership between [*the parties, naming them individually*] expires upon the 10th day of October inst.; and that the Bank will be continued by [*the same parties, substituting the name of Benjamin Gibbons for John Davies*]*—under the firm of,*" &c.

[Signed by each of the Parties.]

the defendant, and stated [205] to him that the plaintiff had a demand against him and company; and shewed him an account drawn out by himself, (the solicitor) of "Accountable Receipts of the Wolverhampton Old Bank, of Thomas Gibbons, John Davies and Thomas Gibbons, jun. held by Mr. Gough," amounting to 2213l. 10s. 8d. John Davies said, he knew of it before: that he had made various applications to the bankrupts to be exonerated from all claim or risk on account of that demand; that he considered he had been used very ill by them; that he had come into the country previous to the last Christmas, for the purpose of getting exonerated from the claims which might be made by Mr. Gough; that he then suspected the affairs of the bank were in a precarious state, and had threatened them, unless he was exonerated, that he would make a personal application to Mr. Gough to call in his money; in consequence of which, he had obtained a bond of indemnity from Benjamin Gibbons, sen. to secure him against that demand, and some outstanding demands which existed against the partnerships of which he had been a member at the time of the dissolution; that it was his disposition to pay all his debts honourably, and he held himself bound to pay such demand as the plaintiff might have against him, and all other demands outstanding against him, as far as his property would go. The solicitor for the plaintiff said, that John Davies the defendant, had been very ill used, and promised to use his influence with the plaintiff to obtain him every facility to recover his money from the other parties, having understood John Davies to have stated at that [206] time, that Thomas Gibbons, sen. (whose name stood first in the old partnership,) had left a large property more than sufficient to pay all the debts. On the 10th June in the same year, this action being then commenced, the solicitor for the plaintiff again met John Davies, attended by his solicitor, and also by the solicitor and a friend on behalf of Benjamin Gibbons, the surety, when the account above stated, and shewn to John Davies on the 4th May, was again exhibited, and its correctness as to sums and dates, admitted by Mr. Davies and all parties, and the following proposition was put into writing by the solicitor for Mr. Gibbons, and left with the plaintiff's solicitor, to be submitted to the plaintiff, and was ultimately assented to by him; but after a long correspondence and negociation thereon, nothing was done in consequence of such proposal.

"Mr. Benjamin Gibbons, sen. is possessed of three shares in the Staffordshire and Worcestershire Canal, of the value of 2000l. which Mr. Pearson, on behalf of Mr. Gibbons, proposes shall be assigned to or deposited with Mr. Gough, together with his bond, as a collateral security for the sum of 2033l. 10s. 8d. and interest, (for which he stands a guarantee to Captain Davies, under a bond of indemnity dated 13th January last,) to be payable at the end of twelve months from Midsummer next. If this proposition is accepted, Mr. Gough not to be precluded from proceeding against any other parties for payment of his money in the mean while. -11th June 1816."

[207] The learned Judge before whom the cause was tried, left it to the jury to consider whether the plaintiff had not assented to making the new firm his debtors, observing, that with respect to the communication since the bankruptcy with the defendant, that he did not know there had been any subsequent dealings between the parties, and therefore it was for them to say whether if the plaintiff had assented to the transfer of the debt, the defendant had agreed to take it upon himself again.

The jury found a verdict for the defendants.

Duncey and Petit, in support of the verdict, now shewed cause. They submitted, that a debt or credit might be transferred at law, and it having been said that it would require strong evidence to establish such a transfer, admits that it may be matter of evidence. It was established in this case by the verdict of the jury, with the approbation of the Judge. Then having brought together the material facts - they submitted that as at the trial much reliance was placed by the plaintiff on the effect of the facts, and of the several conversations proved, as tending to elucidate them, all which were before the jury, their decision was complete and conclusive.

In the case of *Browning v. Stallard* (5 Taunt. 450), where one had sold and delivered goods to another, who transferred them to a third person, (the defendant,) which was mentioned to the seller when he [208] called for his money in the presence of the defendant; that was held to be a transfer of the goods, and gave the seller a right to recover against such third person.

In the case of *Surtees v. Hubbard* (1 Esp. 203), Lord Ellenborough held expressly, that though choses in action are generally not assignable, yet where a party entitled

to money assigns over his interest to another, although the debtor may refuse his assent, any thing like an assent on the part of the holder of the money would suffice to maintain an action against him for money had and received, because such an action is an equitable one. In *Williams v. Everitt* (14 East, 582), there was an express dissent on the part of the holders of the money, and no privity of contract between the plaintiff and defendants, but the principle is admitted there, that money had and received might be transferred with consent of the holder. The same point is to be found so ruled in the case of *Israel v. Douglas* (1 H. Bl. 239. Sed vid. *Taylor v. Higgins*, 3 East, 169), and in *Moulds v. Birchall* (2 H. Bl. 820), and that even where the amount of the debt transferred was uncertain. The case of *De Burnales v. Fuller* (14 East, 590 (notâ)) also supports the same position.

In the present case, the bank assented to the transfer of the credit which had been originally given to Davies; and the plaintiff, by all his [209] subsequent dealings with them, manifested his entire confidence in the bank, and tacitly agreed to the transfer of the debt due from the old firm to him to the credit of the new firm.

This is an equitable action, and the courts of equity have always kept in view the object of meeting the justice of every such case as this, in their determinations on similar questions. In *Ex parte Peck* (6 Ves. 602), the present Lord Chancellor said, speaking of the case of *Shirreff v. Wilks* (1 East, 48), which had been cited in argument,—“Very slight evidence possibly might have been sufficient to shew, that the partner knew the stock had been sold, and the benefit taken into the stock in which he was partner, and therefore it was conscientious that he should become liable for that.”

They then took several points of distinction between the present case and that of *Daniel v. Cross* (3 Ves. 257): as that in that case the plaintiffs were creditors of the old partnership, by notes for money paid into the bank: whereas, here, nothing had been given but mere receipts—there, the partnership had been only recently dissolved,—here, it was four years and a half, and no application had been made—there, also, there had been no independent dealings between the creditor and the new firm, as a new firm, but all that passed between them was referrible to an agency on the part of the new firm for the former partner. They also distinguished the present case [210] from that of *Deruynes v. Noble* (1 Merivale, Ch. Ca. 530) as not being one on a question of following the assets of a deceased partner: and as that was a case where the interval of the change of firm and of dealing with the two firms was only eight or nine months, they submitted, therefore, that this case was rightly left to the jury, and that the Court would not now disturb the verdict.

Jervis, in support of the rule, contended, that the direction of the learned Judge was incorrect, and that the jury had drawn a wrong conclusion. He submitted, that if Gough had been desirous of proving this debt under the commission against the new firm, he would not have been permitted to do so on the ground of his legal right, as against the present defendant—that nothing had been done by the plaintiff to release Davies, who was clearly originally liable—that the plaintiff had never trusted the new firm exclusively, or shewn himself to have done so by any one act. He relied altogether on the facts of the case, and the authority of *Cross v. Daniel*, and the cases there cited.

Fuller, on the same side, was stopped by

GRAHAM, Baron.—The question left to the jury was, Whether, under the circumstances, they would presume that the plaintiff had adopted the new firm as his debtors, to the release and discharge of the old? According to the view which I have of [211] this case, it does not appear to me, with deference to the learned judge, that the case furnished sufficient evidence to induce the jury to come to this conclusion.

I lay aside the conversation between the defendant and the plaintiff's attorney; not that I say it was not evidence, but I do not consider it of any weight; and out of respect to the learned Judge, I will suppose there is some doubt about it, though I cannot impute to the gentleman who had that conversation an intention to entrap the defendant.

The evidence is, that there was a firm composed of three persons carrying on business as bankers, one of whom still remains a partner in the new firm. This gentleman, the plaintiff, deposited money with that firm, from 1809 till 1811, when it was dissolved. A new partnership was then formed, with whom the plaintiff continued,

trusting to the credit of the firm, to deposit money until their bankruptcy, taking accountable receipts; and on that part of the case the books, if produced, would have furnished decisive evidence.

The amount deposited with the old firm was, 2213l. 10s. 8d. In October 1811 the new firm was constituted; and it is important to consider of whom it consisted. One of the old partners goes out, and two of the old partners, Mr. T. Gibbons, senior, and Mr. T. Gibbons, junior, continue. Two new partners are admitted, and Mr. Davies is excluded. We have no evidence of what was done by the part-[212]-ners inter se. T. Gibbon the elder died in 1813; and the firm goes on without any alteration. No agreement is shewn relating to what took place--no settlement of accounts--nothing is drawn from the plaintiff's mouth, to shew that he released the old firm--nothing has been adduced to make him appear to have trusted the new firm, but the mere fact that he goes on paying money to the new firm and receiving interest.

There is therefore no evidence to shew that Mr. Gough adopted the new firm: what more has he done, than to say I am perfectly willing to take your security for the new debt, but I don't release the old firm. I keep their accountable receipts. Then it is said, that in the new books these gentlemen did, with the knowledge of the defendant, debit themselves with the old debt; but it is not proved that the plaintiff knew it. Their books would have given important evidence; and the reserve of the books shews they would not have furnished decisive evidence in the defendants favour. Nothing is shewn but the account marked C. stating the specific sums paid in. They go on in the same way from the first to the last. It appears to me that this account made an impression upon an extremely intelligent mind, that these sums were carried to the debit of the new firm, but I think otherwise. Supposing the plaintiff to have known the contents of the books, there was nothing to lead him into an impression, that by receiving interest of the new firm, he was discharging the old. He says (it is true), "I call upon you for payment of interest upon the [213] whole debt, but one of the old firm remains a partner in the new, so that one of you, at least, is responsible to me for interest on the whole." Then he does not give up the accountable receipts: therefore it strikes me that the mere circumstance of his receiving interest of the surviving partner cannot release the old firm. Suppose he had brought his action against the new firm, how could he have maintained it? The mere production of the paper, and the draft for payment of interest, would, I think, have been insufficient. If the new partnership had given notice to him to produce the old receipts, he would have been nonsuited, and this general tally of sums received would have been no answer. It seems to me to be going too far to say, that there is any evidence to shew that the old firm was released. The conversation with the solicitor is not immaterial: and the defendant did actually receive an indemnity for this demand. The case, I think, was too weak to be left to a jury: it should have been said, that there was not sufficient evidence to exonerate the defendant from his responsibility for the money actually advanced to the bank before he ceased to be a partner.

WOOD, Baron. I am of the same opinion. It does not appear to me that there was evidence to discharge Davies, as one of the partners of the old firm. The plaintiff deposits money with the bank, or in other words, lends it to them at interest. The old partnership is dissolved, and new partners are taken in: he trusts the new partners as he did the old; but that is not in itself any discharge. What [214] then is there proved beyond that, to discharge Davies?

There is not any evidence that the plaintiff agreed to release the old and receive the new firm as his debtors. The only evidence is that the new firm paid interest upon both debts; one of the new having been a partner in the old firm. What does this prove? The plaintiff might not have known that a new partnership was formed; but even if he knew that the new firm took upon themselves the debts of the old, it would not have affected him, as discharging them; nor would any thing passing merely inter se have done so. There is nothing, that I can see, except the mere payment of interest, which looks any thing like a discharge, and I cannot think that that can discharge the old firm, more especially as one of the partners was the same. At first, I thought there had been a balance struck and carried to the debit of the new partnership account; and that the plaintiff had known of that, and had assented to it: if he had done that, it would have been a very different thing; but that is not the case, no balance had been struck. It does not appear that they have in their own books done so.

If it had appeared that the plaintiff had received from the new firm as much money as would have paid the whole of the old account, it might have discharged the defendant; but no agreement between themselves and the new partners would discharge the old partners from Gough's demand. It appears to me, therefore, that the direction was [215] wrong, and that the case of *Cross and Daniel* is in point.

GARROW, BARON. I cannot agree that there was no evidence to be left to a jury: I think there was important evidence to be left to a jury, and that the judge was so far right. In deference to the rest of the Court, however, I abstain from saying more. I would only observe, that the withholding the books cannot be imputed more to one of the parties than to the other of them; because the plaintiff, by giving a subpoena duces tecum to the banker's clerk, might have compelled their production.

It is not necessary for me to go into the case at any length: the majority of the Court being against me, there must be a new trial. I shall not attempt to shew, and do not mean to intimate, that they are wrong, but merely to say that I certainly entertain much doubt.

Rule absolute.

[216] IN THE EXCHEQUER CHAMBER. [CORAM RICHARDS, LORD CHIEF BARON.]

ARMSTRONG v. HEWITT AND OTHERS. Wednesday, 18th June 1817.—It is not sufficient that a vicar, —who rests his case on presumption of an endowment from evidence of perception, —prove that he has received the tithes claimed from the rest of the parish generally, and even from part of the district in which the defendants lands are situate, unless he carry it to the parts for which the exemption is claimed by the defence. And the vicar not doing so, proof on the part of the defendants, that no tithe has ever been paid for their lands, will entitle them to an issue. —Nor will the Ecclesiastical Survey, (stating the vicar to be entitled to tithe-hay in the parish generally,) supply the absence of proof of perception from the particular lands.—The three legitimate repositories of terriers and vicars books, to make them evidence, are, the church-chest—the registry of the bishop—and the registry of the arch-deacon.

[Applied, *Biddes v. Bridges*, 1885, 54 L. T. 530.]

The principal point in this tithe cause, which was instituted for an account of tithe of hay, was, how far perception to a certain extent, in certain parts of a parish, was evidence of a vicar's general title to the tithe in question, in other parts wherein he could not prove perception.

The plaintiff was lessee of the vicar of Stanwix, (Cumberland,) and the defendants were occupiers of portions of land in certain districts called Cringle Dyke and Burnt Hill, which were of considerable extent: and this bill was filed for the tithe of hay over the whole, claimed under an alleged right founded on prescription as presumptive of an ancient endowment. The defence set up by Hewitt was a title to the tithe as derived to him by mesne conveyances from the persons entitled to the impropriate rectory.

The answer stated, (denying the vicar's right, and deducing the title set up by the defendants [217] from the former owners of the tithes of corn, or prescriptive payments in lieu of the tithes issuing out of the lands within Cringle Dyke,)—that being neither these defendants nor any former owners or occupiers of these lands, had ever made any payment to the present or any former vicar of this parish, in respect of any tithe of grass or hay produced on such lands; and that no such tithe had ever been received in kind by any vicar, for the lands occupied by the defendants, or any other lands within the district; and suggested that if any payments had ever accrued due in respect of such lands, they were due, not to the vicar, but to the persons entitled to the tithe of corn within the district of Cringle Dyke. And they submitted, that if any former vicar had ever, at any time, been entitled to the tithe of hay of the lands in question, it must now be presumed that they had been since commuted for some valuable consideration.

It appeared that the parish was subdivided into nine districts, of which Cringle Dyke was one, and Cargo (wherein some of the lands were situate, according to some of the witnesses,) another; and to those this case more particularly applied.

The plaintiff put in, as the only documentary evidence of his general right to tithe of hay in the parish, the ecclesiastical survey of the 26th Henry VIII. which stated the vicar to be entitled to tithes of hay within the parish,—vicars books, containing entries of money received for tithe of hay,—and various terriers, noticing that tithe-hay [218] was payable in kind to the vicar, except as to certain persons not connected with the present suit.

[Those vicars books were produced from the church-chest. It was objected by Martin that they were, therefore, not admissible in evidence against the occupiers in support of the vicar's claim; for that as they had not been found in either of the only proper repositories*—the bishop's register office, or the archdeacon's registry—but were brought from a custody peculiarly under the control of the vicar, he was not entitled to use them in his favour; and he cited *Atkins v. Hutton* (2 Austr. 386) and *Miller v. Foster*, in the note to that case.

On the other hand it was insisted, that the parish church-chest was an authenticated and legal repository, and one which invested the document with as full authenticity as either of those which had been named; and that such a custody rendered terriers admissible in evidence, on which ever side of a tithe-question they might be offered; because it is a repository connected with their contents, accounting for the custody. *Potts v. Durant* (4 Gw. 1406, H. 1450-4). *Bullen v. Mitchel* (ante, vol. ii. p. 211).

Richards, Chief Baron. If this book had been produced from the same custody by a plaintiff, in a [219] suit to establish a modus, it would clearly be evidence for him: why then is it not admissible against him? The books contain historical facts connected with the parish: and what place is so proper for the custody of such a piece of evidence as the chest of the parish church. The propriety of its custody is founded on the same principles as those which regulate such questions with respect to terriers.

The books were therefore admitted.]

The depositions for the plaintiff tended to shew that the vicar had received the tithes of hay in the parish generally, and in the district of Cargo.

On the other hand it was proved that neither the vicars, nor any of their lessees, had ever received any such tithes for the lands occupied by either of the defendants. The persons who had farmed the tithes of hay of the parish under several former vicars also proved that they had never taken or demanded tithes of hay of the lands in question, because they did not consider themselves entitled to them; for that the last vicar had informed his lessees that the vicar was not entitled to the tithes of hay for the lands of Cringle Dyke and Burnt Hill: and one witness stated that compositions had been paid for these lands to the impropiators for tithes both of corn and hay.

Martin and Barber contended that a sufficient *prima facie* case had been proved by the plaintiff to cast on the defendants the onus of establishing [220] a defence by proving either a title to the tithes of hay, or an exemption, particularly as there was no one mentioned to whom the tithe of hay has been paid.

Dumcey and Phillimore, for the defendants, insisted that a vicar was bound to make out a clear title before he could call on the defendant to answer his case; that in the present instance the vicar had given no proof of perception of the tithes of hay from Cringle Dyke or Burnt Hill farms, for that no part of the evidence went to affect those lands; his case, therefore, resting on perception, failed as to all such parts as were not shewn to have ever paid any tithes. There is also evidence of disclaimer; for it appears that the vicars have, on many occasions, let their tithes with an express declaration that they had no right to tithe-hay. And they submitted, therefore, that the plaintiff had not made out such a satisfactory case as to call on the occupiers for any defence.

RICHARDS, Chief Baron, [having stated the object of the bill]. In this case the vicar is undoubtedly bound to shew his title, for the common law gives him no right, and the plaintiffs, who are his lessees, stand in exactly the same situation as the vicar himself.

The plaintiff is in this predicament: having no existing endowment to produce, we must collect entirely from the evidence of usage, whether there ever was an endowment giving him the tithe of hay. [221] The first evidence is the Ecclesiastical Survey,

It was stated by Mr. Caley, that there were three legitimate repositories: namely, the bishop's registry, the registry of the archdeacon of the diocese, and the church-chest; and to that statement the Lord Chief Baron assented.

26 Hen. 8, from which it appears, that the vicar had decimas feni: and wherever that survey is considered as evidence, it is no doubt in the nature of an endowment. But the ecclesiastical survey, or any other ancient document, is not, in point of evidence, equivalent to an endowment or to usage. Then there are produced five vicars books, from which, at one time, I thought that there was a general title shewn to be in the vicar, to entitle him to the tithe of hay throughout the parish, and that they would be sufficient to authorize me in deciding this case in favour of the plaintiffs; but we must look at the evidence on the other side, and it happens, that in a court of equity every witness whose depositions appear on paper, is unfortunately equally entitled to credit, and so far I have not the means which a jury have of weighing the testimony of one witness against that of another. Now, the nature of the present question is not whether there exists any title in these defendants, but whether the plaintiffs are entitled. It is enough for the defendants to rest their case on the denial of the plaintiff's title. From the evidence I say the vicar has shewn himself to be entitled generally to tithe-hay throughout the parish, yet from the same evidence I must say that the plaintiff has not made out a title to hay in every part of the parish. The vicar's books are strong evidence, and they support the ecclesiastical survey: but they do not shew that the tithes are due to the vicar for these farms, for they only shew him to be entitled generally, and not to every acre of the parish. So far, the present case differs very materially [222] from that of yesterday (*Parsons v. Bellamy*, ante, p. 190): for there the evidence was all one way. Then let us see what is the case that the defendant opposes to that of the vicar. The plaintiff admits that there is no evidence of any vicar having ever, in fact, received tithe of hay of the lands in the occupation of the defendants. In the case of yesterday, the plaintiff had constantly received the tithe. Then to meet the inference which would otherwise necessarily arise from this non-perception, the plaintiff has endeavoured to prove that no hay had been produced on these lands worth collecting, but he has failed in proving that; for within the last forty years it is shewn that the lands produced good crops of hay, the tithe of which would have been well worth collecting, and that is proved by a person whose interest it was to collect the tithes. He adds, indeed, what seems to me, who am bound to give credit to his testimony, to be certainly a little extraordinary, that the vicar had declared that they were not entitled to the tithe of hay on these premises. Other witnesses state that there was but little hay, but none of the witnesses say that there was none. The evidence for the defendant again shews that tithe was never paid for these lands by any one; not meaning that they were exempt, but that they paid no tithes to the vicar; that must be taken to be the effect of it. Then in other parts of the parish it is proved that tithe of hay was paid to the vicar, and that evidence is certainly strong; but such evidence, although it gives great assistance to [223] the ecclesiastical survey generally, does not carry the perception of the tithe through the whole parish, as it has been truly said it was incumbent on the plaintiff by his evidence to do.

[His Lordship then went into the contradictory evidence given as to there not having been a sufficient crop of hay produced on these lands to make the collection of it worth while; and adverted to the positive evidence of the declarations of former vicars, that no tithe-hay was due.]

Then what am I to say to this case, where there is this sort of adverse testimony. I cannot decide this cause (as I did that of yesterday) as a jury may, for I am equally bound to believe the evidence on both sides, where there is conflicting testimony. The vicar's lessee, who was likely to be acquainted with the extent of the vicar's right, does not demand the tithes of hay arising from these lands, because the vicar told him he was not entitled to them: thus the actual non-perception is founded on an intentional deliberate disclaimer; and then what becomes of the suggestion, that the tithe was not worth collecting. Add to all this that some of the witnesses say, the tithe was not paid to the vicar, because it belonged to the Aglionby family. On the whole, therefore, although there is no doubt that the vicar is entitled to tithe-hay in very many parts of the parish, it does not necessarily follow that he is entitled to it from these particular lands, from which he has not proved any perception. The question then is, whether on such evidence I can decide [224] this cause now. There is evidence that no tithe-hay has ever been paid to the vicar for these lands; that the vicars have disclaimed their right to tithe-hay of these lands: and that in fact these lands were accountable for that tithe to another person. Under these circumstances I am bound

to do (what I never will do where I can avoid it,) put the parties to the expense of sending this question to be tried by a jury.

Issue decreed.

THE ATTORNEY-GENERAL v. GREEN. Friday, 20th June 1817.—A maker of vinegar for sale, whether as vinegar, or as blacking, or as any other article not being vinegar properly so called, or pure and applicable to the common uses of vinegar, is liable to the duty of excise, and the other provisions of the several statutes relating to the makers and preparers of vinegar for sale.—It is not necessary to state in the information that the liquid was preparing for sale: that may be proved.

[Referred to, *Attorney-General v. Bailey*, 1846, 16 Mee. & W. 75. Distinguished, *Attorney-General v. Bailey*, 1847, 1 Ex. 294.]

This was an information in rem, for the condemnation of 8519 gallons of vinegar, and liquors preparing for vinegar, seized by the Excise for being fraudulently deposited in an unentered place, with intent to evade the duty under the 43d Geo. III. ch. 69 *1 Sched. A., and which had been claimed by the defendant, who was a blacking-manufacturer.

The cause was tried before the Lord Chief Baron, at the sittings in Middlesex, after Easter term; when the jury found a verdict for the Crown upon the 2d count, charging the article seized to be a liquor preparing for vinegar.

[225] Jervis, on a former day in this term, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, on the ground that it ought to have been stated in the count to have been vinegar preparing for sale, according to the 42d Geo. III. ch. 93, sec. 17.

[Wood, Baron.—It would be sufficient to prove that it was preparing for vinegar for sale.]

Another ground was, that the liquid seized was preparing for blacking, and not for vinegar.

It appeared by the Lord Chief Baron's report to have been in evidence, that the defendant, in his trade of blacking-maker, made and used a certain liquid (frequently sugar-water, as it was called, and coopers-wash), which was in point of fact, vinegar, or at least, a preparation for vinegar, mixed, however, with oil, and lamp or ivory-black, and other ingredients calculated to make blacking; that before it could be used for that purpose it must become vinegar, and was made so by being exposed to the sun and air—that vinegar might be so made of those and many different materials, and that the liquid, which was the subject of the present information, was good vinegar, when it had deposited the other materials which had been mixed with it, by standing for some time.

Dauncey, Clarke, and Walton, now shewed cause. They submitted that the sole question, which was one of law, was whether it were necessary to bring the defendant within the purview of [226] the several acts of parliament on the subject of the duties of excise on vinegar, to shew that the liquid was preparing for vinegar, to be sold as vinegar; and they contended that it was not; for if it were vinegar, and sold, it would be sufficient, whether it were sold as vinegar, or as blacking, or any thing else, provided the liquid was in point of fact, vinegar.

They then adverted to the several statutes on the subject, beginning with the 8th of Anne, ch. 9, sec. 4 & 5 *2, for removing doubts as to the duty being chargeable on makers of pickles, and expressly exempting the makers of white lead, and white

*1 "For every barrel of vinegar, vinegar-beer, or liquors preparing for vinegar, which shall be brewed or made in Great Britain for sale, to be paid by the maker thereof, 10s."

*2 "And whereas it may be doubted whether such persons as make vinegar, and use the same in the preparing or making of pickles for sale, are vinegar-makers within the meaning of this and the other acts relating to the duties upon vinegar: it is hereby declared, That from and after the commencement of this act, the vinegar so made and used is and shall be liable to the duties by this act, and the former acts, whereby the duties on vinegar are imposed; and the said persons shall, to all intents

lead only, as shewing what was intended by the legislature as to who were liable ; and by de-[227]claring that white-lead makers shall be exempt ; it not only shews that vinegar in any shape is liable, but that no other article made with it is favoured but white lead alone.

Jervis, Lawes, and Nolan, in support of the rule, treated the question as one compounded of law and fact ; and contended that the evidence did not bring the defendants within the act : the words expressly imposing a duty on liquor preparing for vinegar for sale ; whereas the acid in question was not preparing for vinegar, but for blacking ; not for the common purposes to which vinegar is applied, but for making a commodity which could not be considered or used as vinegar for culinary and other domestic purposes. Such was the distinction taken by the statute of Anne (an. reg. 8, ch. 4). There the vinegar, used as such in pickles, was declared to be liable, but that the vinegar used not as vinegar, but for the purpose of making white lead, was not. The acid used by the defendant would never have been sent into public as vinegar, or sold as such. The statute of 10 & 11 Will. 3, ch. 21, sec. 11, on the same subject, speaks of "liquor proper for making vinegar found in the possession of a vinegar-maker." The duty, therefore, is only to be taken from the vinegar-maker, and that while it is in a state of preparation for vinegar. All the acts on the subject apply to common vinegar-makers, who prepare that commodity for sale ; and they insisted, that this defendant was not to be considered as a vinegar-maker, or as having a preparation for vinegar in his possession, within the letter or policy of any of those [228] acts of parliament ; and that so to construe these statutes would be injurious to the commerce of the country.

Dauncey having replied ;

RICHARDS, Chief Baron. I am glad that this question, which is certainly an important one, has been brought under discussion. It appeared to me at the trial, that the Crown was entitled to a verdict in case the jury should be of opinion that this liquid was, in point of fact, vinegar, or a preparation for vinegar for sale, of whatever materials it may have been made ; for it is immaterial whether it were made of malt, or sugar and water, coopers-wash, or of any other article ; for in either case it would be equally within this act of parliament.

Vinegar, as the witnesses said, is a necessary ingredient in making blacking ; and being so, this liquor was no doubt, while undergoing fermentation, a preparation for vinegar, and was actually so preparing when found. The single question was, whether any such liquid, whether preparing for vinegar, or having become vinegar, was chargeable for the duties, unless intended to be sold as vinegar ; and I think that if sold as blacking it is within the act.

As to the liquid being vinegar, and having been made for sale, that was clearly proved ; and according to the evidence of the officer, if it had been found on the premises of a vinegar-maker, it must have paid the duty, and so it would if it had been sold to Green.

[229] Then it becomes unnecessary to take into consideration the object of its ultimate application : for if it be liable to duty at all, it is liable during the time that it is in preparation.

The present question is, whether the defendant making this for sale not as vinegar, but as blacking, is chargeable with the duty. No doubt, for making vinegar, if not for sale, but for domestic purposes, he would not be liable. The 4th section of the 8th of Anne was introduced to remove doubts which had been entertained as to whether vinegar used in making pickles was liable ; but the next clause, declaring that the act

and purposes, be deemed and taken to be the makers of vinegar for sale, within the meaning of the same acts.

"Provided always, That nothing in this or any other act, shall extend, or be construed to extend, to charge with this or any other duty, such vinegar as shall be made by the manufacturers of white lead only, and used and consumed by themselves, in the making and preparing the same, and to no other use whatsoever ; nevertheless, such makers of vinegar, so used in the preparing of white lead (in case they shall sell or deliver out any vinegar whatsoever by them made, to any person or persons, or employ the same for any other use,) shall from henceforth be chargeable with all duties payable to her Majesty by vinegar-makers, for all vinegar by them made or to be made."

shall not be construed to extend to makers of white lead only, is very material: for the word "only" is an express exclusion of all other exemptions. [His Lordship read the 4th and 5th sections.] After comparing these two clauses, it seems impossible not to say that a person in the situation of this defendant is liable to the duty. He does not indeed, it is true, call himself a maker of vinegar, but a maker of blacking: but the question is, whether he is not a vinegar-maker in fact. It was urged that he did not sell it as vinegar, but as blacking. But he makes the vinegar, and he sells it, no matter under what denomination. In fact, this very person once entered his premises, and was charged with and paid the duty. In point of law, I am of opinion that the direction was right: for it was a question altogether for the jury; and as to the evidence there was not the least doubt.

[230] GRAHAM, Baron. In order to sustain this verdict, it is necessary to shew that this liquid was a preparation for vinegar for sale at the time when it was seized. I have, certainly, I acknowledge, had considerable doubt whether the object of the duty was not vinegar properly so called, intended to be used as vinegar for the accustomed purposes of that article in life, and it occurred to me primarily that it was. There is no doubt that vinegar may be made in various ways, and with different materials, and it seems to be applied to many other purposes than its principal one, and among others for the making this article of blacking: and if an inferior sort of vinegar, calculated for making blacking only, would be liable to duty in the hands of a vinegar-maker, I see no reason why it should not in the hands of a blacking-manufacturer: and if so, the mixture of other ingredients protecting it, is an idle notion. The act does not look to the sale as in the form of vinegar only: and the arguments of the Crown, drawn from the statute of Anne, as it regards the makers of pickles, are fair: but they leave the other questions open. With regard to white lead makers, that statute is express: but it is strictly confined to that, and therefore it should seem that all other persons are liable. Suppose a distiller buys immense quantities of vinegar for distillation, it must pay the duty. So if finding it cheaper, he makes it, but not to sell as vinegar, but as a refreshment compounded of it, he would still, I take it, be liable. This may perhaps be a very inferior kind of vinegar, but it is vinegar; it is made by the defendant, and [231] he sells it as blacking. I am therefore of opinion that he is within the act.

WOOD, Baron. I do not mean to differ from my Lord Chief Baron, and my brother Graham, but to express some doubts which I have had on this question.

I confess, it struck me that the meaning of the act was, that the liquid should be made vinegar, in the common sense of the word, and sold as such; and as it is a penal law, I doubted whether it ought to be extended beyond the letter. But this was vinegar, no doubt: and if the jury had thought that being sold under a different denomination, as blacking, was a pretext merely, it would have been a fraud, and the verdict could not have been otherwise; but there being no question of fraud in this case, I had considerable doubt on it: but notwithstanding those doubts, I do not mean to dissent in this case from the opinions already expressed.

GARROW, Baron, of the same opinion. I think this verdict may be supported on the broad fact of the liquid being a preparation for vinegar, not to be used as vinegar, but to be sold as blacking. Our attention has been called to the necessity that this liquid should have been intended for sale as vinegar, in the general acceptation of that word: but I do not think that at all necessary to bring the defendant within the statutes. [His lordship then adverted to the statute of Anne.] What is the principle which should exempt a blacking-maker more than [232] a maker of pickles? and an express enactment appears to have been thought necessary to exempt white lead makers.

This person formerly bought vinegar for the same purpose, and if that was not protected from the duty, the ultimate application of it is not to be taken into consideration. As to any argument arising from favouring commerce, even if blacking were an article of considerable exportation, that is not a topic for guiding our judgment, whatever weight it might have in another place. It appears to me that the direction and verdict are quite right, and that therefore the rule must be discharged.

Per Curiam. Rule discharged.

BEDINGTON v. SOUTHALL. Saturday, 21st June 1817.—The Court requires strong facts, and to be distinctly stated, in cases of setting aside an award; and a denial of any such is conclusive.—All the witnesses of the party against whom the award is made must have been examined, and in his presence, or it will be a ground for setting the award aside; but that must be made clearly to appear.—Quere, if it be not necessary to shew that such examination was, in point of fact required; or whether a witness, having been named as to be examined, be not a requisition.

Jervis now shewed cause against a rule obtained by Puller, for setting aside this award for settling the differences between the parties in certain [233] matters of mutual account, on affidavits, the short substance of which was, that the parties having met on the 5th of April, a postponement to the 12th, at the instance of the plaintiff, was agreed on; that on that day a witness of the defendant having been examined by the arbitrator, (a private person,) on the part of the plaintiff, in the absence of the defendant and his attorney, (on Saturday, the 12th April,) it was agreed that he should attend again to be examined, on oath if required, as well as certain other persons mentioned on his part, whom he proposed to examine as to certain items added to the plaintiff's bill since the delivery of his bill of particulars; that, subject to that arrangement, the reference was proceeded in, and closed for that day; that none of the plaintiff's witnesses were examined by the arbitrator in the presence of the defendant or his attorney, so that he had had no opportunity of cross-examining them; and that on the Monday following, (the 14th,) the arbitrator, notwithstanding, made his award at the office of the attorney for the plaintiff, giving a balance in favour of the plaintiff, whereas it was said it should have been in favour of the defendant: and partiality towards the plaintiff was suggested.

Affidavits were now read on the part of the plaintiff. The arbitrator swore that he adjourned the meeting of the 5th April in consequence of the defendant having brought in a larger account than that of the plaintiff, as delivered under the Judge's order, for a delivery of particulars; that one of the plaintiff's witnesses having come a long [234] way, he examined him then to save expense; that on the meeting on the 12th, the plaintiff, his attorney and witnesses, attended at ten in the morning; but as the defendant's attorney did not attend till two hours afterwards, he examined the witness alluded to on the part of the plaintiff; that on the arrival of defendant's attorney, he examined both the plaintiff and defendant, and several witnesses on the part of the defendant, which lasted till five o'clock, when he considered the evidence on both sides closed: that the bonds expiring on the 15th, he made his award on Monday, the 14th. The affidavit of the plaintiff's attorney corroborated the statement of the arbitrator, and denied that any agreement was made on the 12th of April for examining any other witness on a future day.

RICHARDS, Chief Baron, having gone through the circumstances, from which his Lordship said, that in his view, though the affidavits on both sides were very inconclusive and deficient, it appeared to be clear that the defendant's witnesses had not been examined; held, that the arbitrator was bound to examine his witnesses, and in his presence; and that not having done so the award ought not to stand. As to the other fact, of an arrangement to examine them on a future day, that having been denied, was put out of the question.

GRAHAM, Baron, was of opinion that as no corrupt partiality had been established against the arbitrator's character, the Court were bound to pro-[235]tect him in the course of his duty; and observed, that the fact of the defendant having been surprised was not fully made out, as it was not stated that he was preparing his witnesses when he received the award.

WOOD, Baron. It certainly strikes me in the same way; and I think there is not sufficient ground for setting aside this award. The circumstance of further witnesses being agreed to be examined on the part of the defendant, is denied, and that is therefore out of the question. Had the witness been distinctly required to be examined before the award was made, the arbitrator would have done wrong; but that is not made to appear. It is not stated that any such requisition was made, either on Saturday or on Monday, or that the witness had been prepared; and it is not enough to induce a Court to set aside an award, that it is stated loosely, that some of the party's witnesses were not examined, or in the party's presence.

GARROW, Baron. It is quite true that Courts of Justice should give their support

to judges of the party's own choice : and holding this judge of a domestic forum by no very strict rule, it is quite clear that this award cannot stand. It is not denied that one of the witnesses meant to be examined on the part of the defendant, underwent a long examination on the part of the plaintiff, in the defendant's absence ; and it does not appear that he was ever again examined afterwards ; and he [236] might have been examined on the Monday, and then the award would have been good. The arbitrator was bound to have appointed a day for the examination of the witness, otherwise the award could not have been expected, and must have been a surprise : it is not to be supposed that an arbitrator will proceed to make his final arbitrament before the witnesses named to him have been examined, and therefore a formal requisition that he might be examined is out of the question. In the mean time, however, he finds his way to the office of the plaintiff's attorney, and there makes his award. It seems to me, too, to be quite clear that he was making preparation for examining this witness throughout. The decision therefore was *ex parte* : and however justly an arbitrator may decide without hearing all the evidence, it can never be satisfactory. The plain, short objection is, that this arbitrator has disappointed the party.

Rule discharged.

[237] *THE ATTORNEY GENERAL v. HORTON. THE ATTORNEY GENERAL v. CROTHALL.* Friday, 13th June 1817.—It is not a fatal variance (after verdict) where an information, professing to set out the title of an Act of Parliament, describes it as intitled an act (&c.) for repealing duties on salt, and the drawbacks (&c.) “thereon”—the title being (in fact) in the same words, with the exception of having the word “thereout” instead of “thereon” : (and adding) and for granting other duties (&c.) “thereon” ; the concluding word being the same.—Evidence of deficiency in a fish-curer's stock of fish-salt, and of his cart being found in the act of carrying salt from his herring-hang, under a misrepresentation of the contents, and other suspicious circumstances, having been left to the jury to say whether he had delivered salt to a person not being a fish-curer, contrary, &c.—held to have been properly so left, and to be sufficient to sustain a verdict for the Crown on such a charge.

Verdicts having been given for the Crown, on the trial of these informations, against the defendants, for smuggling into consumption a large quantity of their fishery-salt, contrary to the 38 Geo. 3, ch. 89 ;

Jervis now moved for a new trial, on the ground of a variance between the information which professed to set out the title of the act of parliament under which this proceeding was instituted, and the true title of the act—the information stating it to be intitled “An Act for transferring the management of the salt duties to the commissioners of Excise, and for repealing the duties on salt, and the drawbacks, allowances, and bounties thereon,” the act having it “thereout” (and adding) “and for granting other duties, drawbacks, allowances, and bounties thereon.”

Another ground of objection was taken to the evidence against the defendants, not amounting to proof of the particular offence charged by the [238] 11th count. The allegation was, that the defendant being a fish-curer, &c. and having a quantity of salt delivered to him free of duty, according, &c. did, before, &c. deliver to certain persons, to the Attorney General unknown, not being fish curers, &c. a great part, to wit, 3000 pounds weight, &c. contrary, &c. whereby, &c.

The evidence was, that the defendants had given money to the officer to put down in his specimen-paper a greater number of barrels of herrings as branded than he had in fact branded ; that having communicated that to another officer, they took measures for detecting him in defrauding the revenue. On going to weigh the defendants stock of fish salt, they found none, at a time when he ought to have had 121 bushels* and 16 pounds. On the 18th Nov. the officers observing the cart and horses of one of the defendants at his herring-hang, and concluding that it was there for the purpose of smuggling away salt, turned off, and waited till the cart was in motion, when they came forward with some soldiers, whom they had procured in the mean time, and

* A bushel weighs 56 pounds.

inquiring of the men who accompanied it, what they had in the cart, they said "seed wheat." They then proceeded to search the cart, when the men ran away, and they found that it contained five sacks of salt, which they seized, as well as the cart and horses.

It was objected that, whatever other offence such evidence might prove the defendants guilty of, it [239] afforded no proof of the illegal delivery of the deficient salt, as charged in the count.

But the Court were of opinion, that taking the whole of their various transactions together, it was a proper question to be left to the jury, and was proof sufficient to sustain their verdict, finding that the defendants had illegally delivered the salt, charged by the information to have been smuggled into consumption contrary to the statute.

As to the other objection, they held, that the variance was not such a one as was so fatal to the information as to entitle the defendant to have the verdict now set aside, and therefore the rule was

Refused.

[240] BUTTS AND OTHERS v. BILKE AND ANOTHER. Wednesday, 18th June 1817.

—A bankrupt having obtained his certificate under a joint commission issued against him and others, is not estopped, when suing a stranger in trover, from controverting the validity of the commission, or from taking advantage of its illegality, as against such stranger, between whom and the plaintiff there is no reciprocity.—Quære, whether a joint commission, sued out against three persons, pending two previous separate commissions against two of them, is valid in law as against the third, and whether the assignees appointed under the two former commissions, (who were also assignees under the last,) can maintain an action of trover to recover property of such third person jointly with him; or whether it be absolutely void at law, so that the person who is the object of it cannot so join in the action: or whether such subsequent commission be merely voidable, and suspends his right to join till the former commissions are established, or the last superseded?—The Court will not infer, or take notice of, any fact, not expressly stated to have been found by the jury, in an argument on a special verdict.

The plaintiffs, who were the assignees of Alexander Geddes and Thomas Milliken, under two separate commissions of bankrupt, (and also assignees of George Geddes, A. Geddes, and T. Milliken, under a subsequent joint commission against all three of them,) and George Geddes, (who were all three formerly partners in trade, and joint owners of the ship "Satyr,")—brought this action of trover against the defendants, (the sheriff of Surrey, and a judgment-creditor,) to recover the ship "Satyr," which had been seized by the sheriff, under a fieri facias, at the suit of the other defendant.

The cause was tried at the Surrey Lent Assizes, 1814, before Thomson, Chief Baron, when it having been objected, on the part of the defendants, that George Geddes, being a bankrupt, and having therefore no property in the ship, had no right to sue the defendants in this action of trover, the learned Judge held, that as the plaintiffs had [241] bound themselves by the third joint commission, they could not therefore maintain the action, and accordingly nonsuited them.

It was moved, on the part of the defendants, that that nonsuit might be set aside, and a new trial granted, on the ground that the action was maintainable by G. Geddes, notwithstanding the commission of bankruptcy against him. The rule having been granted*.

Trinity, Tuesday, 14th, Wednesday, 15th June 1814.—Nolan, Comyn, Gurney and Bolland, for the defendants, now shewed cause.

They contended that, as these three commissions could not stand together, the two separate commissions were superseded by the third joint commission; and that, as by that commission the property of Geddes in the ship had been divested, he had no longer any right or title remaining in him on which he could support the present action.

They submitted, that whatever might be the practice in regard to concurrent com-

* For the facts of the case, see the special verdict, *infra*, pp. 250 to 254.

missions, several months having intervened between the two separate commissions and the third joint commission, precluded all argument on that ground in favour of the former, in the present case; that pending the prior commission, the last might perhaps be voidable, and by taking the proper course [242] it might have been annulled; but that had not been done; and here the assignees under each commission are the same persons, and must therefore necessarily be estopped from controverting the validity of either of the commissions; and so as to Geddes, who had acquired his certificate under the third commission, and was therefore precluded from denying its legality. So far has the doctrine been carried of a bankrupt being bound by a commission to which he has submitted that, as was observed in *Haviland v. Cook* (5 T. R. 656), by Lord Kenyon, even in the case of a fraudulent bankrupt, capital punishment was inflicted for concealing part of his effects, because the person himself had submitted to it.

They then submitted that, according to the practice, joint commissions were preferred in Courts of Equity, as they were more efficacious, both on account of their more fully reaching, and more satisfactorily distributing, the bankrupt's effects among all the creditors: that in the present case it was quite clear that all parties interested had assented to the subsequent commission for the benefit of all, and beneficial arrangements should be supported, and particularly in cases of bankruptcy; and they observed, that it appeared from all the cases that the Chancellor had the power to supersede a former commission, and suffer the subsequent commission to stand, all of which was in Courts of Equity mere matter of arrangement; [243] and therefore until the other commissions were formally superseded, any one was as much in force as the rest. Thus in *Lees, Ex parte* (16 Ves. 473), the Lord Chancellor, (after adverting to the inconsistency of the decisions, which hold, that a bankrupt uncertificated has no property, yet may acquire it by action, declaring at the same time that they are settled points, and cannot be disturbed), refused to supersede a second commission against an uncertificated bankrupt, holding that it was discretionary in the Court whether they would supersede the second commission or not, where the second was sued out a long time after the first; and in *Ex parte Crew* (16 Ves. 237), the Lord Chancellor said, "We are now in the habit of superseding the one or the other, as may best answer the ends of justice." In *Proudfoot, Ex parte* (1 Atk. 252), also, the Chancellor (Lord Hardwicke) refused to supersede a second commission.

They anticipated that many cases would be cited to shew that, where a subsequent commission was sued out against a bankrupt, pending a former, it was void; but they submitted that the present was quite distinct from any of those, from the circumstance of there having been no previous commission against George Geddes; and that, therefore, as to him, the doctrine for which those cases would be cited did not apply; for as to him, there was clearly some property not divested under the former commission [244]-missions, on which the subsequent joint commission might operate: and, therefore, the principle on which all those cases proceed—that there can be no effects belonging to an uncertificated bankrupt, so that a subsequent commission must be nugatory—could not apply here; and the result of all those cases furnishes the distinction of such commissions being merely voidable.

On the whole, they submitted that the second commission was at most merely voidable, and not void;—that, until it was avoided, it remained in force, at least so far as to take away from the person who was the object of it the right of maintaining, in a Court of Law, such an action as the present; and that if any thing further were wanting to defeat that right, his having conformed, and obtained his certificate under that commission, would, as to himself, completely preclude him.

Dauncey, Marryatt, Lawes, Abbott, and Taddy, for the plaintiffs, insisted that whatever might be the doctrine in equity, in law, the third commission, pending the former, was a mere nullity as against all the parties; and to all intents and purposes absolutely void; that as to the two partners who had been declared bankrupts under the separate commission, and who had not under those obtained their certificates, the third commission was clearly null and void; for there could be no property in them on which a subsequent commission could attach. If, therefore, it be void in part, it must be void entirely; if void against any one, it must be [245] void against all; for whether a commission be to be considered in law as an action, or an execution, it is an entire proceeding, and cannot be good in part, and bad in part. If either of the persons in a joint commission be an infant, or not in trade, &c., the commission cannot be proceeded in against any of the others. *Ex parte Martin* (15 Ves. 115)

[The Court here intimated that holding the joint commission valid would contribute more to effect justice between the parties in such a case, for otherwise, they inquired, how is a joint creditor to prove his debt under the separate commission? And they observed, that under a joint commission separate effects might be seized, but not vice versâ; and that if the last commission were void, the creditors would have no remedy against Geddes: for in such a case the Chancellor could not interfere, because he could not give effect to a void commission. And they suggested that a subsequent commission might possibly (as it had been put in argument) be good against all three, as operating on the property of the third party not affected by the former commission.]

It was then urged that the course in such cases was to give effect to the last, by the Chancellor regularly and formally superseding the first—that until that were done the first would be in force, and the last must therefore necessarily be nugatory: and therefore it is never required to be actually superseded as the first is. And they pressed the dis[246]-tinction already taken of the effect of a subsequent commission, pending, a priori, in a court of law contradistinguished from what might be done in a court of equity, where a power of arrangement in such cases is inherent, and may be exercised at discretion, so as to cope with the legal difficulties of the case. However courts of equity may be disposed to favour joint creditors, in law they are equal; and in courts of law no argument can be drawn from hardship or inconvenience.

The reason and principle of the rule too, they submitted, were strongly in favour of a commission against an uncertificated bankrupt being in all respects a nullity; and it would be dangerous if it were not so, as otherwise such a person might be a second time subjected to all the perils of the bankrupt laws, for no object, and without a shadow of benefit to the creditor.

As to the argument that G. Geddes, by having taken the benefit of the commission issued against him, was estopped from denying the validity of that commission, that is founded on a misconception of the nature of estoppel, as defined by Lord Coke (7 Inst. 352 b.), who says that “every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason that, regularly, a stranger shall neither take advantage, nor be bound by the estoppel.” Here there is no such reciprocity as is so held to be necessary to every estoppel. But if they were estopped [247] from denying the assignment on the certificate, &c. they would not be estopped from saying that the commission was null and void. At all events the Court would not be estopped from deducing the inferences of law from the statement of the facts. That the defendants are not estopped, is quite clear; and if they are not, the other parties cannot be. Lord Coke also says, “where the veritie is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth: for he cannot be estopped to allege the truth when the truth appeareth of record.”

[Graham, Baron. My difficulty is, that if we, a Court of Law, declare this third commission void, the Chancellor may hereafter, to meet the justice of the case, pronounce it valid, and make it the groundwork of all his future proceedings under the bankruptcy.]

Richards, Baron. And if he should supersede the first, it would make the other valid, even in a court of law.]

The Chancellor cannot direct the opinion of a court of law, but he may prevent the effect of it from working a prejudice to any of the parties to the proceeding, by controlling its operation *inter partes*.

In support of the doctrine, that there could be no valid commission, they cited the following cases: [248] In *Martin v. O'Hara* (Cowp. 823), it was held by Lord Mansfield and Mr. Justice Buller, that a second commission against a bankrupt, pending a former commission, was void, because he is incapable of trading or contracting for his own benefit, and all the property he acquires belongs to his creditors; therefore a second commission could have no object, and would be idle and nugatory. So in *Ex parte Martin* (15 Ves. 114. (See Amb. 630)), the Lord Chancellor held, that a second commission against an uncertificated bankrupt could not be maintained; and there, too, it was decided, that a subsequent joint commission against the bankrupt and another person, could not be sustained against such other person, because it would not be good against the bankrupt, which is precisely this case; and leaves no foundation for the distinction taken between a void and voidable commission.—They also cited to the same point, *Cook, Ex parte* (2 P. W. 500),

Rhodes, Ex parte (15 Ves. 539), *Crew, Ex parte* (16 Ves. 237), and *Brown, Ex parte* (1 Ves. & B. 61), *Mason and Others, Ex parte* (1 Rose's B. C. 423).

To establish the point, that if a joint commission of bankrupt were not good against any one of the parties named in it, it would not be a valid commission against any of the rest, they again cited the case *Ex parte Martin*, from 15 Ves. (ante), [249] and *Flower and Others v. Herbert* (2 H. Bl. 279, n.), where a witness was rejected by Ryder, Ld. C. J. as incompetent, on the ground that he, having obtained his certificate under a commission of bankrupt against him and the defendant, was interested to support it, which he would have an opportunity of doing, by proving what was necessary to the bankruptcy of the defendant; for if the commission were not good against the defendant, it would be void against the witness, when his certificate would be void, and he would in consequence be again liable to his debts.

On such arguments, they submitted that the 3d commission was a nullity, and that therefore the right of the plaintiff, George Geddes, to bring and maintain the present action, was not affected by it.

Cur. adv. vult.

Wednesday, 29th June 1814.—The Court having taken time to consider the case;

Thomson, Chief Baron, now stated, that as the Court considered the question one of great difficulty and importance, and that as the objection resting on the point of, whether the third commission was absolutely void, or merely voidable, ought to be well weighed, as it was clear, from many of the cases, that the Chancellor frequently gave effect to such subsequent commissions, by [250] superseding the first; the Court were of opinion, that the cause had not gone on far enough to develop the merits, so as to enable them to pronounce a conclusive judgment; and that, as the question required the utmost consideration, all the facts ought to be put on the record, for the purpose of receiving a solemn determination.

The cause was accordingly sent down again, and was tried before Mr. J. Chambre, Lent Ass. 1815, when the facts were brought before the Court, on the following special verdict, finding,

"That George Geddes, Alexander Geddes, and Thomas Milliken, in the year 1809, were co-partners, and as such jointly carried on the business of merchants, and sought their trade of living by buying and selling, and were also joint owners of the within-mentioned ship, a vessel, called the 'Satyr':"

"That whilst they continued in co-partnership, and were joint owners of the said ship, the said Alexander Geddes and Thomas Milliken, on the 22d day of June, in the year of our Lord 1809, respectively became bankrupts, within the true intent and meaning of the several statutes now in force concerning bankrupts; and that on the 24th day of June, in the same year, separate commissions of bankrupt, under the Great Seal of Great Britain, were issued against them, the said Alexander Geddes, and Thomas Milliken, upon the petition of John Fisher, to whom they, together with the [251] said George Geddes, were then, and at the time of their becoming bankrupts, indebted in the sum of 450l., and under which commissions they were respectively duly found and declared bankrupts by the commissioners named in the said commissions, and to which commissions they respectively surrendered themselves; and the plaintiffs, John Butts, William Hardy, William Tate, and Thomas Wilkinson, on the eleventh day of July, in the year aforesaid, were duly chosen, and at the time of the commencement of this action were assignees of the estates and effects of the said Alexander Geddes, and Thomas Milliken, and thereupon, on the said 11th day of July in the year aforesaid, two several assignments of the said estates and effects of the said Alexander Geddes and Thomas Milliken, of which they were possessed or entitled unto, either alone or jointly with any other person or persons, according to the true intent and meaning of the said statutes, were duly made to the said John Butts, William Hardy, William Tate, and Thomas Wilkinson, by the commissioners in the said commission named:"

"That neither the said Alexander Geddes, nor the said Thomas Milliken, have obtained any certificate of conformity under the said commissions, or either of them:"

"That on the 7th day of November, in the year 1809 aforesaid, a joint commission of bankrupt, under the Great Seal of Great Britain, was issued [252] against the said George Geddes, Alexander Geddes, and Thomas Milliken, upon the petition of the said Thomas Wilkinson, one of the said plaintiffs, to whom they were then, and at the time of their becoming bankrupts, indebted in the sum of 200l., and under which commission they were respectively found and declared bankrupts by the said commis-

sioners named in the said commission, and to which commission they respectively surrendered themselves: and that on the 18th day of the same month of November, the said plaintiffs, William Hardy, William Tate, and Thomas Wilkinson, were duly chosen, and at the time of the commencement of this action were assignees of the joint and separate estates and effects of the said George Geddes, Alexander Geddes, and Thomas Milliken, under the said last-mentioned commission, by virtue of a certain assignment thereof to them made, bearing date the 18th day of November, in the year last aforesaid, by the said commissioners in the said last-mentioned commission named, except so far as the several matters herein found shall be deemed in law to affect or alter their right or title as such assignees as last aforesaid; and that on the 2nd day of May, in the year of our Lord 1810, the said George Geddes, Alexander Geddes, and Thomas Milliken, having respectively conformed themselves under the said last mentioned commission, duly obtained their certificate under that commission:—

“That until, and up to the times when the said Alexander Geddes and Thomas Milliken respectively [253] became bankrupts, they and the plaintiff, George Geddes, were the owners and possessed of the said ship ‘Satyr’: and from thence until the time of the seizure of the said ship ‘Satyr’ by the defendants, the plaintiffs, John Butts, William Hardy, William Tate, and Thomas Wilkinson, as such assignees as aforesaid of the estates and effects of the said Alexander Geddes and Thomas Milliken, and the plaintiff George Geddes, were the owners, and possessed of the said ship, except so far as the several matters herein found shall or may be deemed in law to affect or alter the right or title of them, or either of them, in the said ship:—”

“That on the 24th day of June 1809, the said ship ‘Satyr,’ at the instance and desire of the said William Havelock, was seized and taken in execution by the said Edward Bilke, as sheriff of the county of Surrey, under and by virtue of His Majesty’s writ of fieri facias, to him directed, against the goods and chattels of the said Alexander Geddes and Thomas Milliken, upon a judgment received against them for the sum of 7648l. 10s. in an action against the said Alexander Geddes, Thomas Milliken and George Geddes, at the suit of the said William Havelock, and in which said action the said William Havelock obtained judgment of outlawry against the said George Geddes:—”

“That on the 18th of July in the same year, a writ of capias utlagatum issued against the said George Geddes, upon the said judgment of out-[254]-lawry in the last-mentioned action; and that the said Edward Bilke, as sheriff of the said county of Surrey, to whom the said writ was directed at the instance of the said William Havelock, and by virtue of the same writ, seized the said George Geddes’s share and interest in the said ship or vessel called the ‘Satyr’: and that the said Edward Bilke and William Havelock have, ever since the respective times of seizing the said ship or vessel as aforesaid, kept and detained, and still do keep and detain the same, under the said writ of fieri facias: and that some time after such seizure of the said ship, the said defendants had notice from the said John Butts, William Hardy, William Tate, and Thomas Wilkinson, as assignees as aforesaid of the bankruptcy of the said Alexander Geddes and Thomas Milliken:—”

“That on the 31st day of October 1810, a writ of supersedeas upon a judgment of reversal of the said outlawry against the said George Geddes was sued out, and left at the office of the said Edward Bilke, as sheriff of the said county of Surrey:—”

“That the present action was commenced on the 24th day of May 1813.”

“But whether, &c. &c.”

Wednesday, 18th June 1817.—The case now came on for argument, when

[255] Bolland appeared for the defendants, and

Taddy for the plaintiffs; but on the special verdict being stated,

The Court were of opinion that, as the act of bankruptcy, &c. by George Geddes, were not stated as facts on the record, there appeared nothing to preclude the plaintiff Geddes, from maintaining the present action.

It being then suggested that those facts could be supplied, or might be inferred, and that Geddes was estopped* by his submitting to the commission, from denying those facts, the Court said that in a special verdict no such inference could be intended.

* That was answered, as on the former argument, by the positions from Co. Litt.

GRAHAM, Baron. It is not stated in this special verdict, as a fact found by the jury, that George Geddes ever did commit any act of bankruptcy; and it is quite impossible for the Court to infer that he did; those were facts which it was most material to have found, and for which, in truth, this case was originally sent down.

As to the defendant Geddes being estopped to deny them by his having submitted to the commission, the doctrine of estoppel, as read from Lord Coke, is very strong to shew that there could be [256] no such estoppel in this case, which is not a question between the parties, but as affecting strangers; now these defendants never could have been bound by estoppel, and therefore, the plaintiffs would not; there is, therefore, no reciprocity.

From what appears on this verdict, non constat, that the act of bankruptcy ever was committed when the defendant seized the ship; nor is it stated how, or where, or what it was; and the right of Geo. Geddes was entire, unless he had then committed an act of bankruptcy: he was possessed of an undivided third part, or share. It was in June 1809, when this cause of action arose. A bankruptcy is alluded to, and an assignment; but the mere assignment, without an act of bankruptcy proved, will not convey a right of action. But even if the act of bankruptcy could have been inferred, the time no where appears; and therefore, there is no objection to the action on the facts before the Court.

WOOD, Baron. Two of these persons having committed an act of bankruptcy, it is plain that their assignees were proper parties to bring this action. Then, as to George Geddes, what is there that appears in the special verdict to deprive him of his right to join for his own benefit in the action. It is stated that there was a subsequent joint commission against him and them; so there might be; but there is nothing stated to shew that he had ever become bankrupt: and it is the peculiar nature of a special verdict, that every thing must be stated, and that nothing can be inferred: now where does it [257] appear that he ever committed an act of bankruptcy? There is not a fact stated in the case with legal precision.

Then it is said that having taken the benefit of that commission, he is estopped. On that point, the law, which has been properly stated from Lord Coke, requires that estoppels shall be mutual: here the defendants are strangers, and could not be estopped.

Suppose the assignees had sued without George Geddes, they must then have proved the act of bankruptcy by all, and all other necessary facts: for certainly the commission, assignment, and certificate alone, would not have been sufficient; and it would have been absurd to have offered them in evidence, on the ground of estoppel.

This action, therefore, I think, was properly maintainable by George Geddes.

GARROW, Baron, of the same opinion. The proof of an actual bankruptcy was indispensable to defeat G. Geddes' right of action; and it cannot be inferred on a special verdict.

The want of mutuality, which is of the essence of estoppel, is an answer to the argument, that Geo. Geddes was estopped by this commission.

Postea to the plaintiff.

[258] THE KING v. HUNTER AND OTHERS. ON A WRIT OF EXTENT IN AID OF ANDREW *against* URIE AND OTHERS. Saturday, 21st June 1817. - Where orders have been sent by an insolvent merchant to his agents abroad, to hold balances in their hands at the disposal of certain persons named by him, who are, in point of fact, appointed trustees for his general creditors, by a deed termed a deed of inspection, in which he relinquishes all claim to his business, but agrees to conduct it to the winding up, on their account, as their agent—held not to protect bills of exchange transmitted by such foreign agents, made payable to the insolvent, to satisfy balances due to him in their hands, from a creditor not a party to the deed, on whose behalf the sheriff has seized the bills, under an extent, whilst in his possession and undorsed, against such a proceeding, resorted to after the arrangement, although the foreign agents have acceded to such arrangement: because, for want of a specific appropriation of the bills, and an express consideration quoad those particular bills, being shewn to have been the foundation of their being assigned to the trustees,—and they were held to be the property of the insolvent merchant, notwithstanding the arrangement, and therefore lawfully

seized.—Letters written by the foreign agent, assenting to the arrangement, received in evidence to prove such assent.

The sheriff having under this extent seized certain bills of exchange in the possession of Urie & Co., and made payable to them specially, and undorsed: Hunter & Co. pleaded that the said several bills in the inquisition mentioned, before and at the time, &c., and from thence, &c. were and are the property of said Hunter and Co. and that the same, at the several times of, &c. were in the possession of said Urie & Co. as the agents of said Hunter & Co., protesting possession by Urie & Co. as of their own proper chattels, or chattel interest, as by the said inquisition supposed. Replication taking issue.

The cause was tried before Lord Chief Baron Richards, at the sittings after the last term, when a verdict was entered for the Crown, by the direction of the learned Judge, on the ground that the [259] defendants had failed in proving a transfer of the bills in question from Messrs. Urie & Co. to them.

The point made for the defendants in this case was, that the bills seized under the extent arose from property in cash belonging to the defendants, which had been transferred to their credit abroad by orders from Messrs. Urie & Co., which orders had been accepted and acted upon; and in support of it the cases of *Lewis v. Wallis* (Sir T. Jones, Rep. 222), *Winch v. Keeby* (1 T. R. 619), and *Williams v. Everett* (14 East, 582), were cited by their counsel on the trial.

The evidence of the first witness called on the part of the defendants (Mr. Stratton, one of the late firm of Urie & Co.) was rejected, on the ground of his being an interested witness. The second witness (Mr. Austin, who was clerk to Stratton) proved certain letters from the agents of Urie & Co. which were read by the associate, acknowledging the receipt of their order to transfer, and stating their having acted upon the order,—that from the date of the order (the 6th March), Messrs. Urie & Co. ceased to carry on business on their own account, but were employed by the defendants as their agents, and carried on business for them, and by them they were paid; and witness produced a book kept by him containing an account of all the monies and bills received on account of the defendants, and wherein the whole of the bills in question were entered.

[260] A deed of covenant (usually termed a deed of inspection) between Messrs. Urie & Co. and their creditors, was also produced, dated 1st August 1816, wherein the former covenanted with the defendants, as trustees for the creditors generally, to give up all their property in trust, &c. (they continuing to conduct their affairs until the same should be wound up) for the general benefit of the creditors; but to that deed Andrews, the prosecutor of the extent, was not a party.

The Chief Baron, however, objected that the letters from Messrs. Urie, Stratton, and McNair, directing the transfer, did not state the consideration; and it being proposed to give parol evidence of the transfer of the consideration, his lordship thought that parol evidence was not admissible; and being of opinion that neither the letters produced, nor the deeds, were sufficient evidence of a transfer of the property, his Lordship directed a verdict to be entered for the Crown.

Bosanquet, Serjeant, having obtained a rule for setting aside that verdict in order to a new trial.

Richards, Chief Baron, now read his report, from which it appeared to have been proved that Urie & Co. stopped payment the 4th Mar. 1816; that they then wrote to their correspondents and agents abroad, enclosing orders to transfer their property, and all balances due to them, to the defendants; and that they afterwards carried on no more business on their own account, but acted as [261] agents for the defendants, and Stratton acted as their clerk. Messrs. Fletcher & Co., of Leghorn, having acceded to the arrangement, afterward corresponded with the defendants, whereby they recognized them as their future principals. Those letters were objected to as not being admissible, but his Lordship overruled the objection.

The letters were as follows:—"To Messrs. Hunter & Co.—We are in receipt of your favour 6th instant, enclosing an order from Messrs. Urie, Stratton & Co. to hold any property belonging to them in our hands at your disposal. The whole of the goods consigned to us by said gentlemen are disposed of; we have only, therefore, to hold at your disposition whatever balance may appear due to them on winding up their accounts with us and our Malta house, which we shall do accordingly."

The other letter was to Messrs. Urie & Co. apprizing them of the above.

The deed put in evidence was one now frequently in use, whereby the insolvent undertakes to conduct his business in future under the inspection of some of his principal creditors: the profits to be paid into the Bank, and a dividend made periodically, —the creditors to take no proceeding by attachment or otherwise,—and the inspectors to be entitled to an assignment when they shall require it; with power to the trustees, generally, to transact all matters and concerns relating to the trust-property thus placed entirely under their control.

[262] The bills in question had been mostly remitted by Fletcher & Co. to Stratton, Urie, and M'Nair, and arose from the balance due to them from the produce of their goods in the hands of Fletcher & Co.

His Lordship then stated that he had directed the jury to find a verdict for the Crown, under his opinion, that the bills were the property of Urie & Co., and not of the defendants.

Dauncey, and Wilde, now shewed cause. They contended that notwithstanding the arrangement between the several parties, which it was said the letters proved, the property in the bills was not divested by that arrangement, so as to give the defendants a right against the Crown. The deed of inspection, they insisted also, could not in any way affect the present claim, because Andrews was not a party to it. That deed, besides, is not in fact an assignment, for that would have been an act of bankruptcy, and therefore it could not have passed any property:—that deed too is inconsistent with the previous orders adverted to as having been enclosed in the letters; and they insisted that the defendant had neither a legal or equitable right to the bills.

Bosanquet, Serjeant, and Gaselee, in support of the rule, contended that the bills were the property of the defendants under the particular circumstances of this case. The debt of Fletcher & Co. had been assigned to the defendants in satisfaction of a debt [263] due from Urie & Co. to them, as it might legally have been, *Israel v. Douglas* (1 H. Bl. p. 239), and a debt so assigned has been held not liable to be attached for the debt of the assignor, *Lewis v. Wallis* (Sir T. Jones's Rep. 222). The letters did not require a stamp, as a debt is assignable by parol as well as by deed, *Heath v. Hall* (4 Taunt. 326). In consequence of the arrangement effected by the letters and the deed, Hunter & Co. transact all the business of the late firm of Urie & Co., pay debts, and receive them, and take on themselves all responsibilities. Urie & Co. could, under the circumstances, have only received the bills as the agent of the defendants; and there had been a valid appropriation of the bills to Hunter & Co. by the express consent of all parties, and therefore they were not liable to be seized while in the hands of Urie & Co. by this extent against them.

Dauncey, in reply, distinguished the present case from that of *Israel and Douglas*, because there was in that case a regular integral debt due from the party to the assignee, which was specifically appropriated by the assignor: whereas in this instance there was no such debt, for notwithstanding the defendants might have been in fact creditors of Urie & Co., who might possibly have assigned to them these debts, yet no precise engagement with respect to these particular bills is proved, nor does any express consideration for the transfer, or any specific appropriation, any where appear.

[264] On that ground the Court held, that the issue on the part of the defendants had not been sustained, and therefore they discharged the rule.

Rule discharged.

IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, CHIEF BARON. (IN EQUITY.)

LEONARD v. FRANKLIN. 23d June 1817. A book, from the Registry of Lincoln, containing, inter alia, what were called copies of endowments of certain vicarages, was received as evidence of an endowment of a vicarage in Northamptonshire, by the Lord Chief Baron (giving up considerable doubt) on the production of cases wherein it had been received before.

The plaintiff in this cause (a suit for tithes, by the vicar of Newbottle, Northamptonshire), proposed to give in evidence an entry in a very old book, produced from the registry of the diocese of Lincoln, appearing to be a collection of ecclesiastical

notices, compiled by Hugo Wells, formerly bishop of Lincoln: among which were many abstracts of various endowments of different churches, and one of them was that of the vicarage of Newbottle. It was without date or title.

The production of that book was opposed by Martin and Temple, as not being evidence: because it was a mere private collection of documents, (which might or might not, be genuine, or fabricated,) as matter of curious research, but which were by no means authenticated or verified. It was also objected, that the book was not even in the nature of an official [265] book, nor was it a public writing; that it did not profess to relate to the county of Northampton*, but was, on the contrary, compiled (as it was said) by the bishop of Lincoln, and kept in the registry of that diocese. The custody, therefore, was another insurmountable objection: the possession being no way connected with any interest in the vicarage of Newbottle, nor derived from any person in any way concerned with the vicarage.

Dauncey and Hall, contending for the production of the book, relied on its having been received before on various occasions.

The Lord Chief Baron intimated that his impression was against admitting the book as evidence in the present case, on the objections taken: but if it had been admitted on former occasions, his Lordship said, that he should yield to the authorities: and he ordered the cause to stand over, to give an opportunity of bringing forward any case in which it had been admitted.

On this day the counsel for the plaintiff mentioned the cases of *Halse v. Eyston* (25 Jan. 1809†), and *Hebden v. Freeman* (22d Nov. 1810†); and Dauncey also adverted to [266] its having been admitted at Nisi Prius, on the Oxford circuit, in a case of *Harwood v. Sims* (c), when

The Lord Chief Baron admitted the evidence.

Account decreed, with costs.

IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, CHIEF BARON.

RUMNEY v. MORGAN. Same day.—A cause cannot be heard against some of several defendants, in the absence of the rest, although it is not intended to proceed against them.—The bill must first be formally dismissed, as to them.

The Lord Chief Baron, finding that some of the defendants in this cause did not appear at the hearing, refused to let it proceed: for, said his Lordship, on its being intimated that it was not intended to ask any decree against them, they are parties still, and I cannot hear the cause against some of the defendants while there are others on the record in their absence: and unless the rest are no longer before the Court, the bill being dismissed as to them, I might be called on to hear the cause over again, if I were to go on with it now.

[267] Let it stand over, that the bill may be dismissed as to the defendants, against whom it is not intended to proceed; and let those who now appear have the costs of the day.

IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON. (IN EQUITY.)

GILLIERAND v. SCOTSON. Monday, 23d June 1817.—Where a modus set up by way of defence to a bill for tithes, against the occupier of a certain farm, was pleaded thus—"that the said farm is parcel of the demesne lands of a certain mansion-house called, &c.; and which comprises, &c.; for which, from time, &c. the modus has been payable by the proprietor of the said mansion-house and demesne

* Northamptonshire was formerly within the diocese of Lincoln, and continued to be part of it till the reign of Hen. VIII., when the diocese of Peterborough was carved out of that of Lincoln: and the book in question came from the episcopal registry of the diocese of Lincoln.

† These cases will be reported in an Appendix at the end of this vol.

(c) That case is noticed in Wightw. p. 112, for another point.

lands," it was held to be ill laid, for want of a sufficient description of the lands claiming to be protected by it.—And that although the payment was clearly proved: for pleading a modus for a whole district, and then averring that the particular lands are part of such district, without describing it by metes and bounds, is insufficient and bad, and cannot be aided by the evidence supplying the description by its boundaries.—Therefore an account was decreed, but without costs, in consideration of the merits of the defence.

To this bill, which had been filed by the lessee of a rector, for an account of the tithes (generally) of a certain farm in the occupation of the defendant, called Astley Hall Farm, containing 120 acres, the following defence of modus was put on the record by the answer, "that the said farm is parcel of the demesne lands of a certain mansion-[268]-house, called Astley Hall, situate in the said parish of Chorley, and which said demesne lands, are usually called Astley Hall Demesne, and comprise altogether about 219A. 3R. 36P.; and he believes and insists that from time, &c. a certain modus of 40s. a year hath been payable to the rector of the parish of Croston *, and now is payable yearly and every year at Easter, or as soon after as demanded by the proprietor of the said mansion-house and demesne lands, for and in lieu and full satisfaction and discharge of all the tithes yearly arising upon the whole of the said demesne lands"

Thursday, 12th June.—To that defence so pleaded, Martin and Roupell objected, that the modus was improperly laid, both in respect of the lands alleged to be covered by the payment, and also in respect of the person by whom it was to be paid: for that the description of a farm as being part of an ancient demesne, without setting out metes and bounds, either to the whole, or the part (which was essentially necessary to such a plea as the present,) was insufficient, and destructive of the defence —(*Croft v. Ager* (4 Gw. 1325), *Scott v. Allgood* (ib. 1369)—and that the term, demesne lands, was vague and uncertain, and unknown in legal proceedings, except when applied to the Crown, or the lord of a manor.

[269] They objected, also, that the modus was alleged to be payable by the proprietors, whereas it should have been stated to have been payable by the occupier, for he is the ostensible possessor, and to him it is, and not to the proprietor, (whom it might often be difficult to ascertain or find,) that the clergyman is to apply for his tithes.

Danneey and Blake submitted, that the description was in both respects sufficient in an answer, adverting to the distinction recognized in the case of a bill. The present description, though general, is obvious, and well known, and is much the same as that of "ancient orchard," which has always been held to be sufficient. If, however, the laying of this modus should be somewhat loose, yet where there is evidence, as here, of a long-continued payment, the Courts have always supplied the deficiency in pleading, and have suffered the defence to go to an issue, and they cited *Mallock v. Brouse* (3 Gw. 905), and *Ord v. Clarke* (Gw. 1437, and Anstr. 638). The latter case they put also in opposition to the second objection, of the modus being laid as payable by the proprietor. They then submitted, that the extent of the lands stated to be covered, having been set out by number of acres, was sufficient, as was held in *Fyfe v. Dunze* (Gw. 1124), and *Atkins v. Hatton* (4 Wood, 412, 415).

[270] [In this stage of the cause, the Lord Chief Baron intimated a desire to hear the evidence, which was accordingly read, and it appeared, from the depositions, that the payment alleged to be a modus had been made as far back as memory and reputation extended, and that no tithe had ever been paid or demanded for Astley Hall Farm, within living memory; and one of the witnesses described its boundaries.]

Martin then insisted, that even if the modus should be held to have been well pleaded, as put on the record by the answer, it had not been proved as laid, which was equally necessary: for none of the witnesses have described the lands claiming the protection of the modus as they are described in the terms of the answer. He then adverted to the language used by the witnesses, who spoke of Astley Hall Farm, whereas the pleadings called it so many acres, part of Astley Hall Demesne; and he pressed the indefinite description and vague uncertainty of the expression, demesne,

* The township of Chorley was separated from the parish of Croston by act of parliament, (33d Geo. 3d,) and made to constitute a distinct parish.

which, if it meant any thing, could only signify lands in the occupation of the lord of the manor, and could no longer be considered as demesne, when not in his occupation, any more than a park when disparked. The case of an ancient orchard, he submitted, was an exception to the rule, and that on the ground of "ancient orchard" being a precise description, because it was ostensible, and obvious to the sight; whereas demesne lands afforded no such intelligible or visible designation. [271] And he contended, that to support the present defence every requisite was wanting:—for that the lands stated to be covered by the modus were not (as they ought to be) accurately and clearly described by name, quantity of acres, and their known metes and boundaries;—that the proof did not accord with such description; and that the lands were not clearly shewn to be the same as were sought to be protected by the modus.

Cur. adv. vult.

23d June.—RICHARDS, Chief Baron. The defendant has set up a modus, by way of defence to this bill for tithes, of 40s. a year, said to be payable for certain demesne lands called Astley Hall Demesne, of which the defendant's farm is stated to form a part. In support of the modus there was certainly much evidence offered of the payment of it, and of non-perception of tithes in kind, for a great length of time, though that evidence applied sometimes to the whole estate, and sometimes to this farm only. An objection was taken to the manner in which the modus is pleaded: and certainly, it being stated to be applicable to the general estate, and not to this particular farm, there ought to have been some more intelligible description given of the property to which the modus is applicable. If it had applied to this farm only, the description of it would have been sufficient; but it goes much beyond that, for it is said to apply to the whole of Astley Hall Demesne: and with respect to that, [272] there is no statement of metes and bounds of any kind, or any thing to shew the clergyman the situation and extent of the place claiming the protection of the modus. If, therefore, it be applicable to a larger estate, the description of the part claiming under the exemption of the whole is not sufficient: for notwithstanding so much exactness of description is not necessary in an answer as would be required in a bill, yet it must necessarily state something by way of description of the particular lands claiming to be covered by the modus set up: but here, there is nothing of that sort stated, and it is impossible to apply the evidence so as to supply that deficiency. Therefore, with considerable reluctance, I feel myself bound to say, that I think the description of these premises, as furnished by the answer, is not sufficient to shew that they are part of a definite estate, alleged to be protected by the modus set up, so as to entitle the defendants to succeed in that defence. The Court could not effectually decide on the modus as pleaded, and therefore it is of no value.

At the same time, considering the merits of this case, it is quite idle in these parties to persist in the suit; and they should in the mean time come to some understanding with each other: for if the same application should be made to the Court hereafter, by another bill, the defendant will be enabled to make a better case, and a further inquiry must then be the inevitable result: because the payment of 40s. is perfectly clear upon the evidence, and it [273] does not appear that any thing else has ever been paid: and if this had been laid as a farm-modus, and the lands had been properly described, the defendant would have been clearly entitled to an issue.

But the short objection to it, as at present stated, is that you can not plead a modus as covering a certain district, not described by its metes and bounds, and then say that the defendant's lands, which are also not described by metes and bounds, are part of such district.

The consequence of the modus having been badly pleaded, however, at present is, that there must be a decree for the account prayed by the bill, but as the defendant's case appears to have been a good one, it must be without costs.

Account decreed.*

* Vide *Wolley v. Hadfield*. Ante, vol. 3, p. 210.

[274] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

JACKSON AND OTHERS v. RADFORD AND OTHERS. Thursday, 19th June 1817. —The Court will require a plaintiff (proceeding against a defendant for specific performance of an alleged agreement for a mortgage entered into by the defendant's testator, for securing money advanced to him on such agreement and other debts; and also for an assignment of a bond alleged to have been satisfied by the plaintiff's testator, and constituting part of the plaintiff's demand,) to elect one of such objects of the prayer of his bill, on the ground of inconsistency in the application for both, at one and the same time.—Note.—The plaintiffs having elected to pray an assignment of the bond, a reference to the deputy remembrancer was ordered, to ascertain the fact of the payment of the debt, and if paid, the nature of it. —Such an assignment not being available, the Court would direct (if they relieved the plaintiff,) that the obligees shall permit their names to be used by the plaintiff in putting it in suit. It is the practice in equity to keep an heir at law before the Court, even though he admit the will; semble, for the purposes of giving more complete effect to any decree which the Court may make, and which might require his concurrence.

The plaintiffs in this suit were the executors of George Jackson. The defendants were the devisees, trustees, and heir at law of Samuel Brundrett, deceased, and Jones & Co., who were bankers.

The bill stated that the testator, Brundrett, had become indebted to the testator, Jackson, in 500*l.*; that Brundrett had become bound, as surety, in a bond to the defendants, Jones and Co., for securing the sum of 1600*l.* to be paid to them by the principal, Royle, who had an account with them to the amount of 800*l.*; and that he (Royle) had become indebted to them in 750*l.* 11*s.* 6*d.* on the balance of that account—that Brundrett had proposed to Jones & Co. a mortgage on certain [275] freehold and leasehold estates, his property, which they had refused—that he then applied to Jackson to advance the money for him, offering him a mortgage on part of his said property, for securing that sum and other money which he then owed to Jackson—and that Jackson, on the faith of that arrangement, paid Jones & Co., who had become very urgent, the money due to them by Royle before the execution of the mortgage; and they had accordingly debited Jackson's account, and credited Royle's with the amount.

On an account being afterwards taken between them, Brundrett was found to be indebted to Jackson, on the whole balance, in 1943*l.* 6*s.* 6*d.* Brundrett was soon after taken ill, and died: never having executed the mortgage. Jackson also died in a short time afterwards.

The bill prayed an account of what was due to the plaintiff's testator, and of the assets of the defendant's testator; and that, under and by virtue of the said agreement for a mortgage, the plaintiffs might be considered as specialty creditors of the testator Brundrett; and that the trustees and devisees of his real property might be decreed specifically to perform the said agreement; and that, in case the personal estate and the mortgage should be insufficient to satisfy or secure the amount of the plaintiff's demand, the remainder of the testator's (Brundrett's) real estate, might be sold and disposed of for that purpose; and that Jones & Co. the bankers, might be com [276]pelled to assign the bond, and the plaintiffs to be at liberty to use their names, for the purpose of proceeding thereon.

The defendants, who were immediately interested, (the devisees,) denied the amount of the debt, though they admitted it to a certain extent; and they denied that the account had ever been settled, and that the testator Brundrett had entered into any such agreement as was stated to have been entered into for a mortgage; and that the bond had been paid by Jackson on the behalf of Royle, who was his son-in-law, and not on account of Brundrett.

Danney and Roots, for the plaintiffs, submitted that the question would be, whether they were entitled to any, and what account. They contended that in all events the bond had been proved, and the payment by Jackson, on the account of Brundrett; and that enough had been shewn to prove that a mortgage by Brundrett had been in contemplation, which he had been prevented from carrying into effect by the act of

God. They relied on its having been admitted that some debt was due from Brundrett to Jackson, and that an account had been delivered; so that they were entitled to an assignment of the bond, according to the prayer of the bill.

Richards, Chief Baron. I am afraid I must put you to make your election; for that part of the prayer which seeks a specific performance of the [277] agreement for a mortgage, does not consist with that which asks for an assignment of the bond and sale of the testator's estate in satisfaction of it. If the mortgage is insisted on for the whole of the debt, the bond must be abandoned; for if a mortgage should be decreed, it would give you the whole of the estate.

The plaintiffs then elected [his Lordship having intimated some doubt as to the probability of such a case being made out as would entitle the plaintiffs to a specific performance of the alleged agreement for a mortgage,] to pray an assignment of the bond.

Martin, Agar, Wilson, Duckworth, and Symons, for the defendants, admitting the principle, that a party paying the specialty debt of another became entitled to the same security, contended that the evidence fell short, in the present case, of proving that the testator, Jackson, had taken up the bond as the debt of Brundrett; although, perhaps, the dealings and debts between the parties might afford ground for going before the Deputy Remembrancer.

RICHARDS, Chief Baron. It certainly strikes me that some debt has been proved; and the question as to whether that debt was by specialty or simple contract, is one which will materially affect the interest of the other creditors. It will be the most convenient course, therefore, that all the [278] parties should go before the Deputy Remembrancer, to whom it may be referred, to inquire as to what part of the plaintiffs demand is founded on specialty; all the other creditors will then have an opportunity of coming in.

It is clear that Jackson has paid the debt due to Jones & Co. on the bond; but then Brundrett was only a co-obligor with Royle; and it does not exactly appear what agreement was made with Brundrett before the money was paid by Jackson. As to the account which is said to have been delivered, the settlement of that is at least not acknowledged.

It may be as well to observe here, that the assignment of the bond to the plaintiffs by Jones & Co. would be of no use; but Jones & Co. might be required to permit their names to be used in putting it in suit, in which case the bill would be dismissed as against them, with their costs of suit.

[The counsel for the heir at law having applied for a dismissal of the bill against him,

The Lord Chief Baron observed, that it was not the practice, in Equity, to dismiss such bills against an heir at law, whom it was always considered proper to keep in Court, even though he has admitted the will, for many purposes of arrangement which could not be anticipated; besides its being generally expected that an heir shall be a party in [279] any conveyance which might be directed, although that may be mere matter of form, and not necessary.]

It was accordingly decreed that it should be referred to the Deputy Remembrancer to take the usual account; and to inquire whether Jackson satisfied the bond in aid and on behalf of Brundrett and Royle; the defendants, Jones & Co., consenting that their names might be used in proceedings on the bond, if the Court should so direct, and in such manner, &c.

Costs and further directions reserved.

WILLIAMS AND ANOTHER v. THE RIGHT HONOURABLE W. ODELL. Saturday, 21st June 1817.—The Court cannot order a solicitor's bill of costs, for business done wholly in the House of Lords, in the prosecution of an appeal, to be referred for taxation; because their officer has no means whereby he may be enabled to tax such a bill.

Clarke now shewed cause against a rule obtained by Puller, for referring the plaintiffs bill of costs, for business done by them in parliament, as solicitors for the defendant, (who was a trustee [280] for infants,) to the deputy clerk of the Pleas, or some other competent person, to be taxed; an action having been brought in this Court to recover the balance claimed to be due, and a summons had been taken out

for the same purpose, but without obtaining the object; and on the motion being made, the Court expressed themselves much disposed to assist the defendant, to prevent the necessity of going into the several items at nisi prius, on the quantum meruit count.

The ground on which the application was principally opposed was, that as the bill of costs was wholly made up of business done in the House of Lords, in the prosecution of an appeal from the Court of Chancery, in Ireland, it was not a matter capable of being so referred, as there was no means by which it could be taxed; and that there was no instance of any such reference in practice, where there was not a single charge for business done in the Court to which the application was made.

Puller, on the other hand, referred to the case of *Ex parte Williams* (4 T. R. 496), where the Court of King's Bench (Kenyon, Lord C. J.) after having doubted whether they could do so (ib. 124), ordered a solicitor's bill of costs to be referred for taxation, although all the business had been done at the quarter sessions. That case, he submitted, relieved him from any difficulty which might have been placed in his way by the statute (2 Geo. 2, ch. 23) having [281] directed the application to be made to the Court wherein the greatest part of the business contained in such bill shall have been transacted. As to the objection of the officer of the Court having no means of taxing such a bill of costs as the present, he cited the case of *Lloyd v. Mawd* (1 Tidd's Pr. 321 (6th ed.), where a bill was referred to be taxed, which was for business done in a criminal prosecution, in the Court of great sessions at Carmarthen, where this same difficulty occurred, but the Court said, that if the officer were at a loss he might call in assistance. And he submitted that, as the act of parliament was remedial, and as it was a matter on which it was impossible that a jury should be able to decide, the Court might therefore order the reference as moved.

But the Court held, that—as there was no course in practice for taxation of bills in the House of Lords, (whereas at the quarter sessions, and in the great sessions of Wales, there was an appointed officer, whose business it was so to control and regulate the charges for business done,) there was no criterion by which their officer could be enabled to tax the present bill of costs, or any means to which he could resort for assistance;—they had not the power to grant the order for taxation, and therefore they

Discharged the Rule.

[282] DICKENSON v. HARRISON. (Demurrer.) Monday, 23d June 1817.—Declaration in debt for 800l. on a covenant (in a mortgage-deed for securing payment on a future day certain, of that sum and interest) that the defendant would pay the said sum of 800l. with interest on, &c. with breach that he did not, nor would pay the said sum of 800l. on, &c. held good on special demurrer; although there was no averment that the interest had been satisfied, or that the plaintiff abandoned his claim thereto.—A principal sum secured by deed, and the interest stipulated to be payable thereon, are two distinct sums, and not one entire sum, and either may be sued for, independently of the other. Interest is not a part of the debt secured by mortgage, but rather sounds in damages, although, semble, it may be sued for in debt.

The plaintiff declared in debt against the defendant, on a mortgage for securing the sum of 800l. to be paid on a future day, with interest.

To that declaration the defendant demurred: for that an action of debt is not by law maintainable for part of an entire duty created by one and the same covenant or contract; nor can part of such duty be declared for in such action as debt, and part damages, where the covenant is express to pay the principal sum with interest; and also, for that an action of debt is not by law maintainable for interest accruing from day to day; and that the said declaration does not shew any right in the said plaintiff to recover the said sum of 800l. thereby demanded.

Lawes, E for the demurrer, contended that the declaration was bad, for want of an averment that the interest up to the day of default had been paid; for that a declaration in debt for part of a duty, without shewing that the residue had been satisfied, could not be supported; and he cited *Mounson v. Redshaw* (1 Saund. 201). This demand, he submitted, was for [283] a sum of money due upon mortgage, and therefore the interest up to the day was recoverable in debt, as part of the contract, and therefore

ought to have been included, or stated to have been satisfied. On that ground he distinguished this case from that of *Seaman v. Dee* (1 Ventr. 198); for the debt, in that case, became due on the making of the deed, and there the interest, held not to be recoverable in debt, must have been as to such as should have become due after the day; and in *Harries v. Jamieson* (5 T. R. 553), where the authority of that case was generally doubted by Lord Kenyon, and therefore much shaken, it was held, that debt would lie for the interest of money. In *Lapiere v. Gen. St. Albans* (2 Ld. Raym. 773), it was held, that on a single bill for a sum certain, the interest ought to be taxed; but where the interest is not in damages, but is stated and fixed at a certain rate, debt will. *Williams v. Fowler* (1 Str. 410).

The main ground of this demurrer (he submitted) was, that in the present case the interest up to the day of bringing the action was recoverable as part of the debt, which is entire, and cannot be kept separate: and the declaration, therefore, was radically bad, unless the interest were shewn to have been paid. So Com. Digest, tit. Pleader, 84 (C. 84), and *Holt v. Sanbach* (Cro. Car. 104). To the same point he cited *Welbie v. Phillips* (2 Ventr. 129), where it was held on demurrer that a declaration for less than [284] the plaintiff was entitled to, under one entire and several demand, was bad. So also in *Hunt v. Brines* (4 Mod. 402); *Pemberton v. Shelton* (Cro. Jac. 498); and *Bailey v. Offord* (Cro. Car. 137).

Littledale, in support of the declaration, insisted that the plaintiff was entitled to abandon any claim of interest which he might have, and proceed for the principal alone. Then the question on the record would be, whether the plaintiff were entitled to recover the principal. He submitted, that this was precisely the case put by Lord Hale, in *Seaman v. Dee*, of a party covenanting by deed to pay principal and interest, where it was held that the interest was not to be included with the principal in an action for debt. The reason being, that it shall be turned into damages, which the jury is to measure. Whatever doubt was thrown on that case by the dictum of Lord Kenyon, in *Harries v. Jamieson*, it was not overruled; nor was it necessary on that decision that it should be: for the sole result of that case is, that if a plaintiff choose to proceed for interest separately, he may do so. In the case cited from 2 Cro. Car. and in all the others, the plaintiff declared for less than was manifestly due to him on his own shewing, and in those of course the declaration would be bad, unless it was shewn that the rest had been satisfied. There are cases which hold that a plaintiff must wait till the last day, but here the last day was past. A party may either sue for [285] a principal sum of money, or for the interest due on a given day: but if he sue for the latter, he must declare for the whole, or shew the rest satisfied. In the case of *Welbie v. Phillips*, the plaintiff sued for a whole year's rent, and declared for only half a year. The distinction is, that in this case the contract for re-payment of the principal sum is independent of the contract for the payment of interest. In cases of rent, if one proceed for a subsequent quarter, it shall be intended that the previous quarters have been satisfied: but the demand of interest is quite different, because it is accruing from day to day.

Lawes, in reply. There can be no intendment on a special demurrer. Though interest be a claim accruing from day to day, it may still be sued for integrally up to any given time, for id certum est quod certum reddi potest. The authority of Lord Hale, in *Seaman v. Dee*, it has not been necessary to impugn, because that case is distinguishable. The jury cannot assess interest up to the day in a case of this sort, by way of damages detentione debiti. The argument, that the plaintiff may abandon his claim of interest, is answered by the fact of his not having so declared, and that it is which forms the objection to the declaration raised by this demurrer: for if that claim had been explicitly abandoned, there would have been no ground for this discussion.

GRAHAM, Baron. It would have been more satisfactory to me to have taken time on so nice and important a question as the present; but as my [286] brothers entertain no doubt, I shall give my opinion at once. [His Lordship then stated the objection raised by the demurrer.] Now certainly common sense suggests, that there would be much hardship in allowing that objection to prevail, by holding that a party cannot waive his claim for interest, and sue his debtor for the principal sum due only; and I feel myself grounded in deciding that he may, by the authority of my Lord Hale in the case of *Seaman v. Dee*: and I do not consider that his opinion has been overturned by the subsequent case of *Harries v. Jamieson*. I think the distinction taken

by Lord Hale is sound and just. Indeed the case of *Harries v. Jamieson* differs from it only in holding, that, notwithstanding interest in general is properly for the consideration of a jury, because sounding in damages, yet that a party may bring debt for it wherever the amount has been liquidated.

When the sum sued for is less than what appears to be due, no doubt it should be shewn that the rest has been paid; but in a case where the claim of interest is created by deed, the principal debt is one thing, and the interest accruing, another. The latter is in the nature of damages only, and therefore the plaintiff may, if he pleases, waive that claim.

WOOD, Baron. Notwithstanding a great many cases have been cited in support of this demurrer, I think them all distinguishable from the present, and that the objection which has been raised by it is not on any ground sustainable.

[287] In the deed, as set out in the declaration, there is the usual covenant that the defendant would pay the plaintiff the sum of 800*l.*, and also something more at the same time, which was the interest, and that is equivalent to a covenant to pay two distinct and independent sums of money. The breach is, that nevertheless the said defendant did not, nor would, pay the said sum of 800*l.* on the day and time mentioned and appointed for payment of the same. In all probability the interest has been paid down to the time: afterwards there must have accrued some further interest, but that can be recoverable only in the way of damages.

The question on this demurrer amounts in truth to this—whether, when two distinct sums are due to the same person, on the same day, under the same instrument, he may not sue for either, at his election; or whether he is therefore necessarily compelled to proceed for both in the same action?

I am of opinion that he might sue for either; and in the present case, I think the sums are completely distinct and unconnected, notwithstanding they become due by the same instrument, and that they may therefore be separated by a plaintiff who sues to recover them, so as to be made the subject of separate actions.

The decisions that have been cited were all on cases where the debt was one entire demand; and I agree that where that is so, you must aver in your declaration, if you proceed for a part of the debt, that the rest has been satisfied; as if in this declaration in debt for 800*l.* after having set out the covenant, the plaintiff should have gone on to state whereby an action hath accrued to him, to demand and have of and from the said defendant 700*l.*; that would have been an obvious and palpable inconsistency on the face of the declaration, which would undoubtedly have been, therefore, bad; but that is not so here, or any thing like it; he demands strictly the integral sum of 800*l.*; and that is a good demand; for the other sum is distinct and separable, and need not be demanded by the declaration, or shewn to have been satisfied.

I am therefore of opinion, that this declaration is properly drawn. It certainly might have been made more formal, but that was by no means necessary; therefore there must be judgment for the plaintiff.

GARROW, Baron, concurred. I will say one word only, varying my opinion from that of my brother Wood, who has said that these two sums are separable—I say that they are in their nature separate, and never were one integral sum, and the reason, good sense, and justice of the case, are all against the objection.

Per Cur. Judgment for the plaintiff.

[289] SMITH v. CARRUTHERS AND ANOTHER. Wednesday, 25th June 1817.—

Service of notice of the allowance of a writ of error, (bail in error not having been put in,) on the tipstaff having brought the defendant in custody into Court, (where the notice of the allowance of the writ was tendered to him,) for the purpose of his being charged in execution, is not sufficient to give it the effect of a supersedeas, so as that the defendant may apply for his discharge, after having been charged in execution.—It should also be served on the plaintiff's attorney. Had bail in error been perfected, it might have been ground for a special application to the Court, to discharge the defendant out of custody.

Cause was now shewn, by Reader, against a rule obtained by Richards, that an order for charging the defendant in execution might be discharged, and the defendant freed therefrom; a writ of error having been allowed, and notice thereof previously given to the tipstaff who brought the defendant into Court.

The rule had been moved for on an affidavit, stating, that a writ of error in this cause, tested the 14th June, had been sealed and allowed on the 16th; and that after such allowance, and on the same day, a notice in writing of that allowance was tendered to the tipstaff in Westminster Hall, in whose custody the defendant then was; but that the defendant was, notwithstanding, afterwards on the same day charged in execution.

The affidavits in answer stated, that final judgment had been obtained on the 5th of May last; that a writ of habeas corpus was issued on the 11th of June, and lodged in the Fleet Prison, for the purpose of bringing the defendants up to be charged in execution on the 16th; and that no bail in error had been perfected.

[290] It was contended, that the notice of the allowance of a writ of error, served at such a time and under such circumstances, did not make it an effectual supersedeas.

In support of the rule it was submitted, that the writ of error having been allowed, and the time for putting in bail not having expired, it suspended the execution. In *Sampson v. Brown* (2 East, 439 *1), it was held, that the allowance of a writ of error was in itself a supersedeas, although bail in error had not been put in. So also in *Maughler v. Vandyeck* (2 B. & P. 370), a writ of error was held to be a supersedeas from the time of allowance.

WOOD, Baron. It is not only necessary that the writ should be allowed, but notice of the allowance should be served on the plaintiff's attorney.

[The Master being referred to, certified that that was the practice of this Court.]

GRAHAM, Baron. If bail in error had been perfected, it might have let the defendant in, on a special application to the Court to be discharged from the execution.

Rule discharged.

[291] BUTTS AND OTHERS, Assignees, &c. v. BILKE AND HAVELOCK. Wednesday, 25th June 1817.—The Court will not interfere to stay execution on a judgment recovered in trover against a defendant, till the plaintiff shall do any act, however reasonable, to make the defendant a title to the subject matter of the action. They have no jurisdiction to do so.—A rule for that purpose discharged, with costs.

Dauncey now shewed cause against a rule which had been obtained by Comyn on a former day, that on the defendant Havelock's bringing into Court the damages recovered in this action, the plaintiffs should be restrained from issuing execution in this cause, until they should have executed a bill of sale of the ship "Satyr," and perfected the transfer thereof to the defendant Havelock, and that all further proceedings should, in the mean time, be stayed.

The plaintiffs had recovered a verdict in 3000l. damages against the defendants *2, in an action of trover, for a ship seized by Bilke, the sheriff of Surrey, under a fieri facias, at the suit of Havelock.

The rule was obtained on the suggestion of the hardship which would fall on the defendant if the Court should refuse to interfere, for if he were to be called on to pay the amount of the damages recovered, before a sufficient title should be made to him by the execution of a bill of sale, and a regular [292] transfer perfected, and the register given over to him by the plaintiffs, he would be the whole out of pocket, without being in a situation either to sell the ship, if it were necessary, to enable him to satisfy the judgment, or to exercise any act of ownership over her, to which he was as much entitled by the verdict as the plaintiffs were to their damages.

It was now objected to the motion made on the part of Havelock, that the object of it was merely to delay the plaintiffs; and it was stated that the plaintiffs had it not in their power to do what was required of them, but that they were willing to execute a bill of sale.

Bolland and Comyn, in support of the rule, submitted that it would be great injustice to the defendant, to compel him to pay the value of the ship, without having a title made to him by the parties who were to receive the money;—that this was

*1 In that case Lord Ellenborough, advertent to *Perry v. Campbell*, (3 T. R. 390,) said, that Lord Kenyon had there held, that the allowance and service of the writ of error was a supersedeas.

*2 The particular facts of this case are given at length in the case of *Butts v. Bilke*, ante, p. 241.

an application to have the benefit of the equitable interference of the Court, in exercising a power inherent in them of controlling the proceedings in a cause before them.

RICHARDS, Chief Baron. I fear the Court cannot assist the defendant in the present instance. We cannot tell a plaintiff that he shall not have the fruits of his judgment till he has performed any preceding condition which we might annex to it; though in equity, it is not unusual to order parties to comply with certain terms, as to execute conveyances. [293] All that is wanted is, in the nature of a further assurance, without warranty, and the plaintiffs, it appears, are willing to execute a bill of sale, but will not do any thing not expressly specified. It would be advisable, perhaps, that this should be settled by an arbitrator; but if the plaintiffs will not consent to do what is required of them, we have no power to compel them.

GRAHAM, Baron, of the same opinion. We may regret that we cannot interfere in the way required, but we have no power to order the execution to be stayed, if the plaintiffs refuse to consent.

WOOD, Baron, concurred. Every thing ought to be done in the plaintiff's power to make good the title of the defendant; but we cannot engraft terms on a judgment recovered by plaintiff, operating to stay his execution.

The plaintiff having obtained this verdict for damages, the property in the ship became vested in the defendants; and therefore they may make a title. As to getting the register transferred, there can be no difficulty about that, and the sheriff may do it without the assignees. I never heard of such an application before. We cannot interfere.

GARROW, Baron, of the same opinion. We cannot violate the rules of law to effect any arrangement, however equitable.

Rule discharged, with costs.

[294] WARDE v. JEFFERY. Wednesday, 25th June 1817.—A purchaser cannot declare off a contract, on the ground of the vendor not having perfected the title within a reasonable time, where the former who was in possession had been aware, from an early period of the treaty, that there was some objection to the abstract, but has nevertheless continued to negotiate with the latter down to a recent period, and then on a sudden, (a fortnight after the last act of negotiation,) tells him, that he abandons the contract. An injunction will be granted to stay an action commenced at law by the purchaser, to recover back whatever of the purchase-money has been previously paid under such circumstances, on motion, almost as of course; and if the case were made out, it would be sufficient on the hearing.—Time is not of the essence of such a contract. Had the purchaser declared off, on delivery of the abstract, he might perhaps have got rid of it, and given up the possession.

This bill was filed for a specific performance of a contract, dated the 2d January 1813, for the sale of an estate in certain glebe land and great tithes, and to compel the defendant to pay the remainder of the purchase money, (3500*l.*); and for restraining him from proceeding further in an action commenced by him, to recover back such part of the purchase-money as had been paid by the defendant to the plaintiff on account.

The defendant, in his answer, admitted the agreement, and that he had entered into possession and receipt of the said tithes and premises in the same month, and received the rents at the following Michaelmas, but insisted, that having been advised, on the abstract being delivered in the month of October 1815, that the title was defective, he afterwards (on the 22d January 1815) gave notice of his relinquishing the contract; of which relinquishment he also gave notice to several persons with whom he had made sub-contracts, for the sale of parts of the said glebe and tithes, previous to his [295] commencing the action for the recovery of the purchase money which had been so advanced; and that he could not afterwards be considered as in possession.

The answer also stated, that after the defendant had paid the two first instalments of 2000*l.* and 500*l.* and interest, down to the first of January 1816, he then first discovered that the right to tithes did not extend to all the lands mentioned in the agreement; and therefore he applied to the plaintiff for a terrier or particular of the

said tithes, which was not furnished; and that being pressed for further advances, he wrote a letter to the plaintiff, on the 7th January 1817, stating that when he should have received the terrier, before mentioned, and have been allowed for the quantity of land which appeared to him to be deficient, he would pay the further money required of him, into any banking-house in London, but that such terrier had never been sent to him.

The defendant admitted the action was brought in last Easter Term, and submitted that as the plaintiff had not made out a good title in a reasonable time, whereby he had sustained great damage, loss and trouble, he was therefore not bound by his said contract, or to accept such title as the plaintiff could make to the said lands, tithes and premises, which he had been advised and believed was not good or marketable. On these facts,

Trower and Lovat now moved for an injunction, as to the defendant's action at law, which

[296] Martin and Sprunger opposed, contending that contracts were not to be thus kept open to an indefinite period; and that there must be some time limited within which a vendor ought to be compellable to perfect his title, or a purchaser should be at liberty to abandon it. And they urged the fact of possession having been given before the delivery of the abstract, to shew that, at the time of the defendant's taking possession, he was not aware of the objection to the title.

Trower and Lovat, contra, contended that time was not of the essence of such a contract, and therefore the plaintiff was not bound to complete his title within the precise period. They insisted that it was the defendant himself who had delayed the performance of the contract, for the plaintiff had been always desirous of so doing, while the defendant was throwing objections in his way; and the purchase-money being a large sum, it must be a great object to a vendor who has parted with the possession of his estate, to receive it in this or any case. They submitted, therefore, that the Court would not decide so important a question on an interlocutory motion.

RICHARDS, Chief Baron. The Court are of opinion, that the injunction ought to go. I will state the reasons which govern me, and which may, in the end, be useful to both parties. This case does not involve the question (which must, whenever it arises in any case, be the consequence of very special circumstances) of time being of the [297] essence of a contract. In almost all the cases where the time is fixed, as if it were that the estate should be conveyed within three months, the time is not even then of the essence of the contract, for most generally it cannot be done. Lord Thurlow was strongly of opinion in favour of the rule, that time should not be of the essence of a contract, even where the agreement was for a particular day; and on one occasion (a), where it was put hypothetically in argument, that there might be an express clause inserted for making such a contract void, Lord Thurlow's short answer was,—“Well, Mr. Mansfield, what would you get by that?” But the argument raised on the fact of four years having expired in this case, without a title being made, much surprised me when used by a purchaser, who has himself lain by for a considerable time, without taking any steps, or shewing any anxiety to get his contract completed. He has been equally guilty of delay, although he complains of the plaintiff. [His Lordship dwelt with particularity on the dates of the different periods of the negotiation, and adverted to the fact of the defendant having continued in possession.] Possibly the defendant might have declared off when the abstract was delivered, or in a reasonable time after; but then he must have delivered up possession: but here, from the year 1813 to 1815, letters have been continually passing between the parties, on the subject of the contract; and he accepts further abstracts, and goes on with the negotiation down to the 7th January [298] 1817: on that day, admitting, therefore, that he considered himself to be still a purchaser, and yet so soon after that time,—and after that long course of negotiation, as the 22d of the same month, he turns round on a sudden, and without previous notice, sends a letter, in which he says he declares off, and that on an objection to the title, which he was aware of from the year 1813. Now, can any case be imagined, where, under such circumstances, the Court would refuse to interfere? Surely this is, therefore, a very clear case, and I think that the purchaser is still bound by the contract. For these reasons, independent of the general rule,—that injunctions ought to be granted on motion where a prima

(a) *Gregson v. Riddle*, cited in *Seton v. Slade*, 7 Ves. 268.

facie case, for the interference of the Court, is made out, I should, in such a case as this, say the defendant was bound, were I now giving judgment on the hearing. The better course however would be, that the parties should agree to a reference in the mean time.

GRAHAM, Baron. I am clearly of opinion that the defendant ought not to be permitted to go on with this action. There is no time specified in the contract for its completion. The defendant was put into complete ownership of the property, and has been long in actual possession of the profits; and he enters himself into contracts to sell. The question then is, whether the Court will, in a case of this sort, say that a vendor is bound to complete his title within a certain reasonable time, when the parties themselves have made no such agreement? [299] But here, the defendant, by his letter, admitting himself bound so late as the 7th January 1817, requiring further satisfaction as to the title, cannot be allowed, on the 22d, to declare off, on the ground of the vendor's having neglected to perfect his title in a reasonable time. And the hardship of suffering this action to proceed, would be the greater, because the defendant has received considerable sums of money from the rents and profits. Whenever this shall come to a hearing, there must be a decree for the plaintiff. As to the question of the title, that must go before the Master.

WOOD and GARROW, Barons, of the same opinion.

Injunction granted, and Title to be referred to the Deputy Remembrancer.

[300] JONES AND OTHERS v. DARCH AND OTHERS. Wednesday, 25th June 1817. —In an action on a bill of exchange against the acceptors, where the payee and first indorser was an infant, the jury having found a verdict for the plaintiffs, on evidence that the defendants knew, when they accepted it, that the payee was an infant, and that he had, in fact, indorsed the bill before they accepted it; the Court, under those circumstances, (it appearing also that the defendants had been in the practice of raising money on similar bills,) refused to disturb the verdict by granting a new trial, applied for on the ground of the legal objection,—that an infant could not, by his indorsement, give currency to a bill of exchange; but they refrained from giving any opinion on the effect of it, if brought before them on a case more free from imputation.

This was an action on a bill of exchange drawn by Thomas Aspull on the defendants, (Darch, Dickenson, & Co.) and accepted by them, in favour of Messrs. Wm. Aspull & Co., and by Wm. Aspull indorsed to one Booth, and by him to the plaintiffs, who were his bankers.

It appeared in evidence, on the trial before the Lord Chief Baron, at the sittings in this term, that Thomas Aspull, the drawer of the bill, had been managing clerk of the defendants at the time when the bill was drawn; that the defendants afterwards stopped payment: on which occasion it was arranged between them and their creditors, that on the latter receiving 10s. in the pound by three instalments, no commission of bankruptcy should be sued out against them: and certain persons, who had become security for the due payment of those instalments, entered also into a bond of indemnity to the defendants (on having their property delivered up to them) against the future claims of any of their creditors.

The defence set up was, that Wm. Aspull the [301] payee, who was the son of Thomas Aspull the drawer, was an infant, and could not therefore indorse a bill. And it was put as a suspicious transaction altogether; because, it was stated, that the bill had been in fact applied to the private purposes of the drawer, who was said to have deceived his employers, and that he had kept it back till after the settlement of the defendant's affairs, and that there was no other person in the firm of Wm. Aspull & Co. besides Wm. Aspull, nor ever had been. It was also objected, that in point of law the payee, who was of course the first indorser of the bill, being an infant both then and now, was not entitled to indorse, nor could, by his indorsement, give currency to the bill, or render it legally negotiable. But the cause being suffered to proceed, it appeared that all these circumstances were known to the acceptors (the defendants), and that the bill had been indorsed before they accepted it, and therefore the jury found a verdict for the plaintiffs.

Jones now moved for a new trial, on the ground of the objection, that the indorser, being an infant, could not give the indorsee a right to sue on it against the defendants;

and he cited the case of *Williams v. Harrison* (Carth. 160), where it was ruled, that infancy was a good bar to an action on a bill of exchange, notwithstanding the custom of merchants. In the present case, the infant was the first indorser, and as he could not bind himself, the bill could not be negotiated through him: and [302] he distinguished this case from that of *Taylor v. Croker* (4 Esp. 187) by its having been proved here, that the indorser was not even now of age, so that there could be no subsequent consent implied, or any new promise made.

But the Court refused the rule, saying, that as far as these defendants were concerned, who were proved to have known all the circumstances before they accepted the bill: and as it appeared from the evidence (which the jury believed) to have been their object to get all the money they could by means of such bills: they ought not now to be permitted to avail themselves of the objection, whatever weight it might have had in a case of different circumstances.

Rule refused.

[303] EYTON v. DICKEN. Wednesday, 25th June 1817.—A purchaser, who is not satisfied with the Deputy Remembrancer's report of the title to premises sold under a decree of the Court, must move for leave to file exceptions thereto.—If he does not do so the motion to confirm may be then made, which is an order absolute in the first instance, because it will be considered that he is satisfied with the title. But if, when the order is moved for, the purchaser is prepared to shew exceptions instanter, the Court will allow him to do so.—A purchaser is not compellable to accept a title reported good by the Deputy Remembrancer, in a creditor's suit, against an objection, that the close in dispute having a given name, by which it has been long known, is not described by it in the title-deeds, notwithstanding the vendor has been long in possession of the land as part of the estate conveyed to him by the deeds. Such a title is merely *prima facie*.

William Massey having been declared and confirmed the purchaser of lots Nos. 1 and 6, parcel of certain freehold estates sold before the Deputy Remembrancer, under a decree of this Court in the above cause, (which was a suit by creditors,) and being dissatisfied with the title set out in the abstract, obtained an order to refer it to the Deputy Remembrancer in the usual manner, who reported that a good title could be made to the premises comprised in those lots.

Shadwell now moved to confirm that report absolutely, when

Spranger objected, that in point of practice such an order could not be made absolutely in the first instance, but that it ought to be moved for *nisi*, in order to give the purchaser an opportunity of shewing exceptions for cause, as was the course in the Court of Chancery; but

On reference to the officer, it was reported to be the practice of this Court to move for such an [304] order absolutely in the first instance: and that, wherever it was intended to except to the Deputy Remembrancer's report of title, the course was for the purchaser to apply to the Court for leave to file the exceptions: and that if he should not do so, the rule was, that he should be taken to be satisfied with the report, and then the motion to confirm it was almost of course, and the order was granted absolutely in the first instance, as now moved.

Spranger then proposed to shew exceptions for cause instanter, which the Court allowed him to do.

The exception with respect to lot No. 6 was:—that there were two closes of land comprised in that lot: with respect to one of which, called the Croyle, no mention whatever was made throughout the abstract, nor had any title whatever been deduced to the said close, notwithstanding it had always been known by that name: whereas all the other lands belonging to the estate were particularly specified in the old deeds mentioned in the abstract, and the title formally set forth, and that the only proof of title made to that close before the Deputy Remembrancer, was by the affidavits of several old persons, who had been employed as labourers on the lands generally,—“that they knew the close called the Croyle,—that it had been known by that name, and never by any other, as long as they could remember,—and that it had been also so long in the possession of the defendant and his ancestors, and had been considered part of their estate.” He submitted, [305] therefore, that such a proof of title was not sufficient to compel a purchaser to take it, as at best it was only *prima facie*, (for

mere possession was not inconsistent with any estate not amounting to a fee, to which a purchaser has always been held to have a right to object, and to refuse to accept, and therefore he ought not to be concluded by the report.

Shadwell, on the other hand, contended that proof of such long possession, accompanied with the title-deeds of the estate of which the close in question formed part, was quite enough to justify the report of validity of title, as it would have been to warrant a jury in finding in the affirmative on an issue, whether Dicken was seised of the piece of ground in fee. He submitted that it was not necessary to describe every piece of land by any particular name which may have been given to it, when there are so many better modes of describing them in use: and he insisted that the exception now taken, founded on such an objection, was not sufficient to invalidate the present report.

RICHARDS, Chief Baron. The Court are of opinion that the Master's report is not right. The evidence on which the report proceeds is merely that of long possession. Then this close is not mentioned in the abstract by name, and it is proved to have gone for a great length of time by a particular name, and the other lands are so described. It is therefore too much to call on the Court to presume, at present, that the Croyle was not so [306] called in 1777, when the conveyance of this estate to the defendant's ancestor was made. The Court cannot compel a purchaser to take a *prima facie* title founded on such grounds.

GRAHAM, Baron. The objection may be, perhaps, somewhat captious; but it is one against which we cannot force an unwilling purchaser to accept a title.

WOOD, and GARROW, Barons, concurred.

Exceptions allowed. Title referred back to the Deputy Remembrancer.

——— *v.* ———. Wednesday, 25th June 1817.—The Court will not order a defendant, arrested in trover, to be discharged, on filing common bail, on motion for that purpose, founded on an objection to the form of the affidavit on which the process issued, that it did not negative a tender: although the motion be made on an affidavit, stating, that the value of the subject matter of the action had been, in point of fact, actually tendered to the plaintiff before the writ was sued out.

Parke moved that the defendant, who had been arrested in this action, might be discharged, on filing common bail.

The nature of the action was trover: and he contended, that as the plaintiff had not in his affidavit, on which the process was obtained, negatived a tender, which he submitted he ought to have done, under the 37th Geo. III. ch. 91, s. 8 (Tidd, Pr. 1508, 4th ed.): [307] and more particularly as the value was sworn, by the defendant's affidavit, on which the motion was made, to have been in fact tendered to the plaintiff before the action was brought, the defendant was entitled to be discharged on common bail.

But the Court held that the statute did not apply to the case of a defendant held to bail in trover, which could only be done under special circumstances, and on an application to the Court.

The motion was therefore

Refused.

GOODE *v.* SIR W. LEWES, KNT. Wednesday, 25th June 1817. The Court will not order a party who is in prison, applying for a new trial, on the ground of excessive damages having been given against him, to pay the costs of the former trial before the Plaintiff's Counsel proceed to shew cause against the rule.

The plaintiff (a surveyor) had recovered a verdict, in an action of assumpsit, for work and labour on the defendant's account, at the last Spring assizes at Hereford, damages 500l.

Taunton, in the last term, obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground of the jury having given excessive damages.

Dauncey for the plaintiff, before he proceeded to shew cause, objected that the defendant was not [308] entitled to move to make his rule absolute, until he should deposit with the officer of the Court the costs of the former, which he contended the defendant was bound to do: and he cited the rule from Tidd's Pr. (page 885, 5th edit.),—that where a verdict is set aside, and a new trial granted, on the objection of the damages being excessive, it is always on payment of the costs of the former trial. In this case the defendant being in prison, he submitted that the plaintiff was entitled to the interference of the Court for protection against the probable result of the present rule, which would be the loss to him of the advantage given by the practice of the Court to persons in the plaintiff's situation, who would be at all events entitled to the costs already incurred in the action which had been tried, and had terminated in his favour: and that a defendant ought not to avail himself of the rules of the Court, without complying with the usual terms: But

The Court refused to make the order; observing that if the object of such an application was admitted to be matter of right, the consequence would be, that a party might be compelled, on many occasions, to submit to an unjust verdict against him to any amount, for no other reason than his inability to pay the costs of a former trial. The application was therefore

Refused.

[309] 25th June 1817.—Motions in causes to be heard before the Lord Chief Baron, in the exercise of his sole jurisdiction, can only be made before his Lordship when sitting in the inner Court.

Shadwell rose to make a motion in full Court, in a matter which was pending before the Lord Chief Baron, in the exercise of the sole jurisdiction committed to his Lordship under the recent act of parliament: when the Court intimated (not as matter of regulation, but as the natural course of practice in such cases, to prevent a clashing of jurisdictions), that all motions, in causes to be heard by his Lordship, must be made before him alone, when sitting in the other Court.

WATSON *v.* EDMONDS. 25th June 1817.—If a sheriff's officer, who arrests a defendant, demand and receive from him a larger sum than he is liable to pay as a caption fee, and for the expense of the bail-bond, &c. the Court will, on motion, order it to be referred to the Master to ascertain what the officer is entitled to on that account, and order him to restore the surplus to the defendant, and to pay the costs of the application.—A charge of 2l. 13s. 6d., made on a defendant in fee, wholly disallowed by the Master, on a reference to him under such circumstances.

Owen, Sir Wm. moved, on a former day, that the sheriff of Worcestershire might be ordered to shew cause why it should not be referred to the Master to ascertain whether he (the sheriff) was entitled to any and what part of the sum [310] of 2l. 13s. 6d. paid to his officer by the defendant: and why he should not refund to the defendant such sum (if any) as the Master should report to have been overpaid to the said officer: and why the sheriff should not pay the costs of this application.

The rule was obtained on an affidavit, stating that the defendant had been arrested in last Easter Term, when he immediately entered into a bail-bond: that the officer, after he had executed the bond, demanded the above sum of the defendant, and detained him in custody till he paid it, which he did in order to procure his discharge from the arrest: and that the defendant and the said sheriff's officer, both lived in the same town.

It was submitted, that the sheriff was not entitled to charge any fee for the arrest of a defendant from the defendant himself, because it was a charge to be made by him on the plaintiff: and that, whatever he were entitled to charge the defendant with as the expense of the bail-bond, it could not be any thing like the sum which the officer had demanded and received from the defendant, in the present instance. And he directed the consideration of the Court to the case of a defendant going to prison and afterwards perfecting bail, and inquired whether an officer could then keep him in custody till his fees were paid; or, in the event of the action being defended, whether

the Master would allow the defendant [311] any caption fee in taxing his costs against the plaintiff.

No cause being shewn, the Court now made the Rule absolute*.

End of Trinity Term.

[313] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, SITTINGS AFTER TRINITY TERM, 57 GEO. III. GRAY'S-INN HALL.

THE KING *v.* HODDER. (Extent.) EX PARTE TAUNTON. Wednesday, 9th July 1817.—Where a landlord has distrained for rent arrear, and the tenant has replevied the goods, and has sold a part on his own account, by permission of the landlord, if in the mean time the remainder are seized under an extent tested after the distress for a debt due to the Crown, which is satisfied thereout, according to the exigency of the writ, this Court cannot, in the exercise of its equitable jurisdiction, interfere to enlarge the time for the return of the process, that the sheriff may in the interim proceed under it against the defendant's lands, for the landlord's indemnity, on the ground, that the defendant had not, pending the distress, in point of fact, goods and chattels sufficient to satisfy the Crown's debt, or in any way use the Crown process in favour of the landlord under such circumstances, and principally because on the levy having been made, the writ would be *eo instanti functus officio*.

Owen, Sir Wm. and Taunton, moved for a rule to shew cause why the time should not be enlarged for the sheriff of Somerset to return two writs of [314] extent against the lands of the defendant; and why he should not proceed to take an inquisition upon the seisin of the defendant, of certain lands in the county of Somerset; and why the debts due to the Crown from the defendant, or so much thereof as can be had, should not in the first instance be raised out of such lands, and discharged thereby; and why a certain sum of money, already paid to the said sheriff by the defendant, and which was raised by sale of his chattels, which had been distrained for rent by the applicant, should not in the mean time be staid in the sheriff's hands; and why, after applying such part thereof, if any, to the debt of the Crown, as may be necessary, in aid of the levy made out of the aforesaid lands, the residue should not be paid to the applicant.

[Richards, Chief Baron, on the motion having been made, observed,—It is a very common application in the Court of Chancery to marshal assets under circumstances, but I do not see how this Court can do so in a case of property seized under an extent.]

The affidavit made in support of the motion stated in substance, that the bailiff of the applicant had, on the 3d of March 1817, seized and distrained the cattle, &c. of the defendant, for the sum of 300l. 10s. 9½d. for rent of premises, of which the defendant was tenant to the applicant; that he kept possession thereof till the 8th, on which day, when the same were about to be appraised, &c. the bailiff was served with a summons by virtue of a [315] replevin-warrant from the sheriff of Somerset, to answer the taking, &c.

“That on the same day the residue of the goods, &c. of the defendant so distrained, as well as the cattle, goods, &c. so replevied, were seized by the said sheriff, under a writ of extent issued against the defendant, tested the 7th day of the same month of March, for 302l. 11s. 11d. and were also soon after taken and seized by the said sheriff under another writ of extent, tested the 10th day of March, for 127l. 12s. 10½d., both such sums being due to his Majesty for assessed property and land-taxes from the defendant, who was a collector of taxes.

“That on the 16th, the defendant, his attorney, and one of his sureties, applied to the landlord for his consent to an intended sale of the goods replevied by the defendant on his own account, when they entered into an agreement that the produce of the sale should be paid to the under sheriff, for the Crown, in discharge of the extent, and the balance to be paid to the landlord: or, that the whole should be paid to a Mr. White,

* The Master disallowed the whole of the charge.

to be appropriated to either debt, as he should think proper : and that, upon taking an account on that occasion, the defendant admitted 1315l. 11s. to be at that time due to the landlord for rent ; that the landlord agreed to accept a smaller sum of money, in consideration of being paid it immediately out of the produce of the sale of the replevied goods : and that the defendant's attorney represented, that the defendant's sureties had deposited with him 300l. ; and that he would [316] himself advance the remainder of the amount agreed on to be paid to the landlord : That at a subsequent meeting (23d March) the following agreement (which was not to prejudice the former agreement), was entered into, and put into writing, viz. that on payment of 1050l. to the applicant (in manner therein mentioned), the defendant should receive a receipt in full of all demands ; that a valuation of a third of the hay, and all the green crops on the farm, was to be made, and deducted from that sum : and concluding with a provision, that in case the agreement should not be performed on the defendant's part within a month, the distress and sale should proceed for the benefit of the landlord. The affidavit then went on to state, that on the faith of such agreement the defendant was allowed to take away, for his own use, his cattle, &c. so distrained ; that 300l. or 400l. of the said sum was afterwards paid, but that the residue was not ; and that the defendant's attorney had refused to pay the remainder out of the sums so deposited in his hands by the sureties, or to make up the deficiency himself as agreed on as aforesaid.

"That the defendant was seised of lands in the said county of Somerset, subject to certain encumbrances, but which would, if sold, produce more than sufficient to pay off the extents, and discharge such encumbrances, without resorting to any of the goods, &c. of the defendant.

"That no inquisition had been taken on the writs of extent ; and that they had not yet been re-[317]-turned : and that the stock, &c. replevied, was sold under the direction of the defendant's attorney, and not by the sheriff, or adversely to the defendant ; and that the defendant's attorney received the produce.

"That the solicitors for the affairs of taxes, on application being made to them on behalf of the landlord, under the circumstances, to resort to the defendant's lands, had consented to give the applicant all the assistance in their power, and applied to the sheriff for that purpose, who refused to act further in the matter.

"That the stock, &c. so sold, had produced 509l. 19s. over and above certain part thereof, which had been bought in by, and restored to, the defendant ; and that the whole of the goods distrained would not have been of sufficient value to satisfy the rent due."

These facts so detailed in the affidavit, it was submitted, afforded good ground for resorting to this application for the equitable interference of the Court, so to marshal the assets of the Crown's debtor, as that a landlord who was a bona fide creditor of such debtor for rent due, and who had actually distrained for the amount before the teste of the extent, might not have his pledge taken out of his hands, to the exoneration of the lands of the debtor, against which the Crown might proceed availably, although the landlord could not ; and that if the Court had no power to interfere in a case of this [318] sort, every tenant distrained on, might by collusion release his goods and chattels from the effect of such a proceeding, through the medium of an extent, and thereby defraud his landlord. In this instance, the Crown's debt will have been levied on the property of a third person, (the defendant's landlord,) and put into his possession, by a mode of proceeding favoured by law, and always protected by the Courts.

It was contended also, that in this case the defendant had by his conduct waived the benefit of the general rule, that the sale of the Crown debtor's lands shall be postponed to that of his goods and chattels, where he has sufficient to satisfy the Crown's debt ; whereas the landlord had not relinquished, by any act of his, the pledge which the law gives him in property distrained : and the defendant had, in fact, no interest in these goods at the time of their seizure under the extent, which could bring the Crown within the rule observed by Court, as to the sale of goods, &c. in the first instance, or preclude the Crown's right to proceed against the lands as given by the 25th Geo. III. ch. 35, s. 1*. Nor in this case would it be adverse [319] to the

* By that statute the Court of Exchequer is authorized, on the application of the Attorney-General, in a summary way, by motion, to order that the right, title, and

provision of Magna Charta, that the lands should be taken, for the same reason, because by operation of the distress the defendant had not goods and chattels sufficient to pay the Crown's debt, nor was he himself at the time of the seizure prepared to do so thereout. The words of the charter are, "Non seisiemus terram aliquam, vel redditum pro debito aliquo quam diu catalla debitoris presentia sufficient ad debitum reddendum et ipse debitor paratus sit inde satisfacere" (Co. 2d Inst. 19)

They distinguished this case from that of *The King v. De Caux* (ante, vol. ii. p. 17), li. as in that case there had been no distress made before the seizure under the extent; nor did it appear then that there was sufficient property, of any sort, to satisfy the Crown's debt and the landlord's arrears of rent; and the application was altogether of a different nature, et alio intuitu^{*1}. In this case there was no objection made on the part of the Crown.

[320] They submitted, therefore, that the Court had power to grant the present application; and moved as above.

RICHARDS, Chief Baron. This is a case which must have occurred often, in effect, though it may not till now have been brought before the Court, perhaps, in this precise shape. The extent, it appears, came in after the distress, but was satisfied first, in point of fact, and out of the very goods which the landlord had distrained. Then the landlord says the Crown has deprived him of the benefit of his distress; and that the sheriff ought to have taken the defendant's land, which the landlord cannot proceed against. But a judgment-creditor might say so too, who has also a special property in the debtor's goods, and I do not perceive what equity a landlord has which a judgment-creditor has not; and there is, I believe, no instance of such an application having ever been made before.

The short case is this: The Crown's debt has been satisfied out of the personal effects of the debtor; then the subject-creditor of the Crown's debtor, on the ground already noticed, applies to this Court to interfere, as it is now moved. I really know not on what principle this Court can interfere to such an extent; nor do I know of any power which this Court has to marshal assets in the case of an extent, under such circumstances as these.

[321] But another short and insuperable objection arises, from the fact of the Crown's debt having been satisfied, and that being so, how can the Court proceed to effect the desired object? The Crown can have no other process; and nothing can come before the Court again under this extent.

GRAHAM, Baron, of the same opinion, and for the same reasons. Nothing can bring this extent again before the Court. The sheriff having seized these goods, even if irregularly, must be answerable to the Crown if called on; and must make good the Crown debt which he has, in point of fact, levied.

The statute of Henry VIII. as to extents goes, certainly, farther than Magna Charta, in giving efficacy to the Crown process; but the Court, respecting the fundamental principle of the Great Charter, tempers the exigency of the writ by a negative mode, in ordering the sheriff not to proceed against the land if the debtor's goods and chattels, are sufficient to satisfy the Crown's debt^{*2}; and there is a clause in every extent, restraining the sale till after further order; but when the Crown's debt is once satisfied, the Court can not look to the interests of other creditors.

WOOD, Baron. It is quite impossible for us to grant the relief prayed by this motion. Suppose the sheriff had been called on to make his return: [322] it must have been, that he had levied the Crown's debt out of the defendant's goods and

estate of any debtor to his Majesty, in any lands which have been, or hereafter shall be, extended under or by virtue of any such writ of extent, or dum clausit extremum as aforesaid, or so much thereof as shall be sufficient to satisfy any such debt, shall be sold in such manner as the Court shall direct, (with costs,) and the surplus to be returned to the person who would have been entitled to the lands if no sale had been made.

^{*1} Nor does the more recent decision in the case of *The King, in Aid of Simpson v. Hopper*, ante, vol. iii. p. 46, appear to stand in the way of this application, for the reasons given above in shewing that it is not contrary to the terms of the great charter.

^{*2} See also his Lordship's judgment in *Rex in Aid, &c. v. Hopper*, ante, vol. iii. p. 47.

chattels. Could we in that case order a new writ to levy the landlord's rent out of the defendant's land? The Crown can not levy its debt a second time. It is quite impossible that we can interfere in the way that has been suggested, if it were only in point of form.

GARROW, Baron, concurred.
Motion refused.

MEADE v. NORBURY. Thursday, 10th July 1817.—The Court will not restrain the Deputy Remembrancer from proceeding in the taxation of costs, on the ground that a petition of appeal has been presented to the House of Lords, against part of a decree, and is still depending.—But they will order the payment of the taxed costs to be suspended till after the decision of the appeal.

Martin moved that the Deputy Remembrancer might be restrained from proceeding further in the taxation of the costs in this cause.

He stated that the defendant had presented a petition of appeal to the House of Lords, against the decree made by this Court on the 20th May 1816*, so far as it directed an account to be taken of the tithes of certain lands in the defendant's occupation, called the Lower Friars Lands; and that, notwithstanding [323]—standing such appeal was still depending and unheard, the Deputy Remembrancer was proceeding in the taxation of the plaintiff's costs, which, he submitted, ought to be suspended till the decision of the appeal.

The Court refused to make the order prayed; because, they said, they could not interfere to stay proceedings which were going on in regular course, though they would stop the payment of the money, which was the only thing they could do; and they accordingly ordered that the Deputy Remembrancer should proceed in such taxation, but that the payment of the costs should be suspended till after the appeal should have been decided, and the further order of the Court.

THE KING v. BICKLEY. 11th July 1817.—A defendant in an extent having moved to quash it, on facts stated by affidavits, which are satisfactorily answered, whereon a venditioni exponas issues, will not afterwards be permitted to enter a claim and traverse the inquisition.

A rule had been heretofore obtained by Copley, Serjeant, calling on the Attorney-General to shew cause why this extent should not be quashed, and the proceedings in the mean time stayed, founded on certain facts stated in affidavits made by the defendant and others. Those affidavits were answered or denied by others, made on the part of the prosecutors of the extent, and the Court discharged the rule with costs.

[324] Gaselee now applied for leave to enter a claim, and traverse the extent.

To that it was objected that it was contrary to the practice; that there had been rules to claim and plead, and that a venditioni exponas had issued; and that it would operate to delay the prosecutors, which was stated to be in effect the sole object of the application.

The Court held that such an application could not be granted after the defendant had elected to take the course of moving to set aside the proceedings, on affidavits which had, in effect, brought his merits before the Court, and were satisfactorily answered.

Therefore they
Refused the application.

[325] MILWARD AND ANOTHER v. OLDFIELD. 9th July 1817.—The Court will not allow a plaintiff to amend his bill where he has been dilatory without reason, in his former proceedings.—And, refusing such an application, they will do so with costs.

Wingfield moved that the plaintiffs might be at liberty to withdraw their replication in this cause, and amend their original bill.

The amendment proposed was, that another person might be made a co-plaintiff in

* Vide ante, vol. ii. page 338.

the suit, and that certain other premises, (not included in the original bill,) being in the defendant's possession, might be introduced into the amended bill.

Rose opposed it, on the ground of the motion being in the delay of the defendant, there having been already great remissness in proceeding on the part of the plaintiff.

The bill had been filed in Easter Term, 1815; the defendant filed his answer 16th November following; replication, Easter Term, 1816. In Michaelmas Term, the defendant moved to dismiss the bill, when the plaintiff entered into a peremptory undertaking. A subpoena to hear judgment having been served, the plaintiff obtained orders to enlarge publication till Easter Term 1817.

In such a case it was submitted that the application should not be encouraged.

[326] On the other hand, it was pressed that the amendment now sought to be allowed, not being on the common grounds, but for the purpose in fact of avoiding multiplicity of suits, by consolidating claims to the same property founded on the same title, and to be litigated between the same parties; the Court would, for that reason, grant the motion.

RICHARDS, Chief Baron. It would be injurious to the course of practice to grant this motion. [His Lordship recapitulated the proceedings.] It is now more than a year since the replication was filed, and why was not this application made before? There is no good reason given for not having applied; nor is it stated when the new matter was first discovered. Then, what has been said in support of the motion does not appear to me to forward it; for it is not a mere amendment that it is required to make, it would be a new bill: and if such a proceeding were now indulged, there is no length of time at which it may not be done.

Motion refused, with costs.

[327] HOYTE v. HAWKINS, BARONET. Friday, 11th July 1817.—An injunction obtained to restrain proceedings at law on a promissory note, on the ground of its having been given to the plaintiff at law under a promise not to sue on it, and an engagement that it should never be asked for or demanded, dissolved on the defendant's putting in an answer, in which he swore that he never had entered into any such engagement, or made any such promise, to the best of his recollection or belief; for the Court holds itself bound by the positive allegations on oath in a defendant's answer.

The defendant had brought an action against the plaintiff, to recover the amount of two promissory notes with interest. The plaintiff filed his bill for a discovery of the circumstances under which the notes were given, and for an injunction to stay the proceedings in the action; which injunction was obtained.

The bill stated that the plaintiff being, in 1808, concerned for the defendant in confidential affairs, and having occasion for 150*l.*, applied to the defendant for and obtained the amount; for which, it was agreed, that a promissory note should be given, payable on demand, with interest, and which note the plaintiff accordingly gave; that the defendant, nevertheless, at the same time, expressly stated, that he would never call for, or demand, payment; but that he wished the note to be given as a mere matter of form, or to that effect; that plaintiff accordingly relied upon the defendant's honour; but was requested, in 1811, by Mr. Chilcott, the defendant's steward, to pay three years interest upon the note: that plaintiff, aware of his liability in law, and apprehending proceedings, tendered the three years interest to Mr. Chilcott, who refused to receive for more than one year, but desired a promissory note for the remainder, which the plaintiff gave; that the defendant afterwards having further occasion for the confidential services of the [328] plaintiff, the latter reminded the defendant of his engagement not to demand the 150*l.* or interest; whereupon the defendant pledged his word and honour that the notes should be destroyed, and promised to write to his steward to that effect. The defendant was then interrogated by the bill, as to the truth of its statements.

The answer of the defendant contained an unqualified denial of his having ever stated to, assured, or gave the plaintiff to understand, that the 150*l.* and interest would not be called for or demanded. The defendant also stated, by his answer, "That the plaintiff did not, to the best of his (the defendant's) remembrance and belief, ever mention to the defendant that he (the defendant) had made an engagement not to demand the 150*l.* and interest; he, according to the best of his recollection

and belief, in fact, never having made any such engagement:" and, "that he doth not recollect or believe that he did pledge his word and honour that the notes should be destroyed, or promise that he would write to Mr. Chilcott."

Barber now moved, on the part of the defendant, to make absolute the usual order nisi for dissolving the injunction.

Hone, for the plaintiff, shewed cause against the order, on the merits in the answer, contending, that the transaction was of a such a nature as to leave no doubt but that the defendant could speak most un-[329]-equivocally to every material fact charged in the bill. If he were competent to deny, in unqualified terms, (as he has done,) that he ever engaged not to demand the amount in question, he could, in an equally unqualified manner, have denied the truth of the plaintiff's charge as to what subsequently passed between them: but, when answering that part of the bill, he alters his language, and instead of positively denying that any thing afterwards occurred, states that, to the best of his remembrance and belief, the plaintiff never reminded him of the engagement he is charged to have entered into; and he then cuts down, or at least weakens, the express and positive denial contained in the former part of his answer, by stating that according to the best of his recollection and belief he never made the engagement: adding, that he does not recollect or believe that he pledged his word and honour to destroy the notes, and write to his steward. And it was submitted that it could not be credited, that a person charged with having given a solemn pledge at a certain time, in reference to one plain and intelligible fact, and under circumstances distinctly and directly stated, should be unable either to admit or deny the truth of the charge, without having recourse to an ambiguous and circuitous mode of answering, and sheltering himself by a denial, on recollection and belief, of what he must necessarily have remembered if it had been so. The defendant ought to put in an answer consistent with itself in all its parts, and state a complete and positive negative of the circumstance on which the plaintiff's right to equitable relief is founded: [330] and in such direct terms as that he might be indicted for perjury if untrue, before he can ask for a dissolution of the injunction.

Sed per Cur. The defendant has sufficiently denied the principal allegation in the bill, and that destroys the plaintiff's equity: for the Court are bound by the defendant's positive allegation on oath. They therefore made the

Order absolute.

ASKAM v. THOMPSON AND OTHERS. (Exceptions.) 11th July 1817.—It is not sufficient ground for an application for an injunction to restrain bankers from proceeding at law, to recover the amount of cheques paid by them, on account of the plaintiff in equity, that the bill (which also prayed a discovery) states that a partnership subsisted between the plaintiff and the deceased principal of the banking firm, in another concern, of which the plaintiff had the conduct and management, and that the cheques were drawn under special circumstances, founded on a mutual understanding between the plaintiff and the deceased, to which the defendants in equity, (the surviving partners in the banking concern), say they were not privy, denying positively, by their answer, that they were in any manner engaged in the concern as partners or otherwise.—Nor is it matter of material exception to the defendants answer, that under such circumstances they do not set forth, as required, the language of the body of the cheques drawn by the plaintiff as such managing partner, for having denied that they were in any way concerned or interested in the business, it would be of no service to the plaintiff, if it were so set forth, as that (if it were true) would avail him on the trial at law.

The plaintiff applied for an injunction on opening a material exception.

The bill—which was filed for an account between the parties, and for an injunction to restrain the defendants from proceeding in an action commenced [331] by them at law, to recover the balance from the plaintiff,—stated (in substance) that Smith, a creditor of the defendants who were bankers at Leeds, had agreed to furnish them weekly with a stipulated quantity of coals for a given period, in discharge of his debt to them; that they having acceded to his proposal, applied to the plaintiff to undertake the management of the business of selling such coals, which he agreed to do, in consideration of receiving half the profits, and the defendants furnishing him with

money for carrying on the concern in which they had so become partners; that it was part of the previous agreement between Smith and the defendants, that the former should be paid weekly for whatever coal he furnished them beyond the stipulated quantity, and that he should draw cheques for the amount; that in the course of the carrying on of the said concern, large quantities of coal had been delivered by Smith to the partnership, and a great excess beyond the stipulated weekly quantity, and that the plaintiff had made, as acting partner and manager of the concern, various payments of money into the banking house of the defendants, and had drawn cheques on them in favour of Smith, at various times, on account of the excess, to the amount, at the death of W. Thompson, (who had been of the principal banking firm) of 500l.; that divers complicated accounts had arisen between the plaintiff and Wm. Thompson in consequence of the premises; that after his (Thompson's) decease, at a meeting at Smith's residence, between Wm. Thompson's executors, Smith the plaintiff, and the defendants, certain accounts were stated and agreed [332] upon, in which the plaintiff did not interfere, and he (the plaintiff) was then (to his surprise) requested to sign a cheque produced by the defendants in favour of Smith, for the sum of 5404l. 2s. 6d. which he (plaintiff) on the representation of one of the defendants, in whom he had much confidence, that he was required to sign it merely for their accommodation, and in order to enable them to settle Smith's accounts with themselves and Wm. Thompson's executors, after considerable hesitation accordingly did; that having afterwards investigated the accounts of the said coal concern, he found that the said cheque comprized all the coals furnished by Smith, and not merely what had been delivered by him in liquidation of his debt according to his agreement, but also the weekly excess for which he was to be paid in money, and for which cheques had been previously given by plaintiff to Smith, which the plaintiff represented to the defendants, and requested them to correct the error, which they had promised to do but had not done; that in September 1815, it was agreed that Smith should continue to deliver coals to the plaintiff on account of the defendants, in liquidation of balances due from Smith to them, the sale of which coals the plaintiff was to have the management and conduct of, as before the death of Wm. Thompson. And that in consequence of the premises, divers complicated accounts had arisen between the plaintiff and the defendants, which were still unsettled; and that a very large sum of money was due to the plaintiff on the balance, on account of his share of the profits.

[333] On that statement of facts, the plaintiff charged that the defendants, knowing the plaintiff could not defend himself in the action at law, against the said cheques, they had refused to come to any settlement with him, and threatened, &c. unless, &c.

And he interrogated them, amongst other things,

Whether complainant did not draw some and what cheques in favour of Smith, for the amount or price of such coals as had been delivered by him, over and above the stipulated quantity in the said bill of complainant particularly mentioned and set forth?

Whether such cheques did not amount, at the time of the death of Wm. Thompson, to about the sum of 500l. or to some and what other sum?

Whether a certain cheque in the said bill, mentioned as having been signed by the plaintiff for the sum of 5494l. 2s. 6d. did not purport to be the amount of all the coals delivered to the plaintiff, in discharge of the debts due to the said Wm. Thompson and the defendants respectively, or how otherwise?

Whether at the time in the bill in that behalf mentioned, or at some other and what time it was not agreed, that Smith should continue to deliver coals to the said plaintiff in further liquidation of the money owing by him to the said defendants?

The defendants in their answer admitted, that [334] such a partnership as had been charged had existed between the plaintiff and Wm. Thompson, but denied expressly that they were themselves partners in the concern, or had any thing to do with it, further than as bankers, with whom Smith and the plaintiff had opened an account; and they admitted that the plaintiff had made payments of money into the bank, for an account of which, they referred to a schedule annexed to their answer; and they also stated, that the plaintiff had drawn several cheques on them in favour of Smith or bearer, and that it was expressed in the body of some or all of such cheques, "that the same were drawn on account of coals delivered by said Charles Smith to said coal concern of R. D. Askam & Co. but whether said cheques expressed that same were drawn by said plaintiff in favour of said Charles Smith, for the amount or price of such coals as had been delivered by him, over and above the stipulated quantity in

said bill mentioned, defendants cannot state either as to their knowledge, remembrance, information or belief, inasmuch as defendants say that said cheques are not in the possession of defendants, or of any or either of them, but that the same are now in the possession of Mr. Moore of Leeds, the late managing clerk to defendants in their said banking business: that they had no opportunity of applying to said Mr. Moore for said cheques, prior to defendants coming to London, for that they were not served with the subpoena to appear to the bill, until the return-day at a late hour, and that after such service, it was necessary for defendants immediately to come [335] up to town, to prepare and put in their answer to said bill, in order that they might not be restrained by the injunction of this Court, from proceeding in the action at law, which they have commenced against said plaintiff: and that they cannot, except as therein before stated, set forth as to their knowledge, remembrance, information or belief, whether said plaintiff did draw any and what cheques in favour of said Charles Smith, for the amount or price of such coals as had been delivered by him over and above the stipulated quantity in said bill mentioned. And defendants cannot state, either as to their knowledge, remembrance, information or belief, whether such charges as in the said bill of plaintiffs in that behalf mentioned, amounted at the time of the death of the said Wm. Thompson, deceased, to about the sum of 500l. or any other sum in particular: that they believed that all the cheques which the said plaintiff drew on the said banking house of the said Wm. Thompson, deceased, and these defendants, on account of the said coal concern, (which he carried on in partnership with the said Wm. Thompson, deceased, alone) were made payable to bearer, except one: and that the said banking-house of the said Wm. Thompson, deceased, and these defendants paid the amount of the said cheques to any person who presented the same at such banking house, and that the said cheques were paid at the banking house of these defendants and said Wm. Thompson, deceased, as the banker of the said plaintiff, and the said Wm. Thompson deceased who carried on the coal trade [336] under the firm of R. D. Askam & Co. wholly unconnected with these defendants, or any or either of them."

To that answer the plaintiff excepted in the terms of the interrogatories.

Dauncey, and Temple, in support of the motion, contended, that the defendants could not protect themselves from answering, by stating that the cheques inquired of were in the possession of their clerk, who was not in town: and they submitted, that as the question was an important one to the plaintiff, the defendants were bound to answer it, and to give the discovery sought, as on that discovery their equity would arise.

Shadwell, and Harrison, for the defendants, contended, that as the question was general, it was not necessary that the defendants should answer it more particularly than it had been put. In the present case the alleged partnership had been positively denied, which put the ground of there being any partnership accounts unsettled between the parties wholly out of the question, and the defendants were merely proceeding to recover the balance due to them as bankers on the plaintiff's banking account. The general purport of the cheques they have given, the terms in which they were drawn would be surplusage, and not material as affecting these defendants, if they could be set forth, whatever they might be as between the plaintiff and Wm. Thompson.

Dauncey, in reply, attempted to draw the attention [337] of the Court to the general objects of the bill, and the tenor of the several interrogatories; but

The Court held, that they could not look beyond the exceptions, and that as the partnership of the defendants with the plaintiff and Wm. Thompson had been denied by the answer, the exceptions were rendered immaterial, for the answers sought to be obtained from the defendants could be of no service to the plaintiff in giving him any advantage which they would not as well furnish on the trial; and therefore the exceptions were

Overruled.

Dauncey, and Temple, then proceeded on the merits, submitting that the present was not merely a case between a banking house and their customers, but attended with complicated circumstances, which raised an equity on behalf of the plaintiff, of which it was incumbent on the defendants to rid the case before they could be suffered to proceed at law: that it did not appear that there had been any conclusive settlement of accounts, or that the deceased partner, (who was also at the head of the

banking firm, and therefore at least in some measure connected the plaintiff with the defendants,) had not agreed to allow the plaintiff a commission on the amount of the coals sold. And it was not denied that he (Wm. Thompson) had himself drawn the cheque for the purpose of settling the banking books; against all which circumstances, the mere denial that the defendants were partners, as relied on by them, was not a sufficient answer.

[338] Shadwell, and Harrison, observing that where an injunction is prayed for on merits, the object is to obtain some discovery ancillary to the relief prayed by the bill: contended, that the defendants having denied the partnership, there was nothing laid before the Court on the part of the plaintiff, to shew them that their interference would afford him any relief, so that he had not made out such a case as called for the equitable interference of the Court, to restrain the defendants from proceeding in their action.

The Court held, that there was nothing in the case to prevent the defendant pursuing his legal remedy against the plaintiff, and therefore
Dissolved the Injunction.

[339] *HIRST v. PEIRSE*. 11th July 1817.—A plaintiff applying for an injunction to restrain a defendant from proceeding at law to recover the amount of a promissory note, on the ground that there are accounts subsisting between them, held to be precluded by having settled and signed an account leaving a balance in favor of the defendant.—And if there have been other subsequent accounts between them, the Court will not consider that a ground for interfering, where the defendant states that the plaintiff has withheld his accounts, and refused, though often requested, to come to a settlement.—Charges for business done, as attorney or agent, will not raise an account, so as to give such attorney or agent an equity against the holder of his promissory note, as money mutually due on either side will, for such demands are rather matter of set-off. Nor does it destroy the effect in equity of a settlement of accounts that charges for business done before the liquidation of the accounts were not included in the account so settled.—To constitute what is called a material exception, or one on the opening of which an injunction will be granted, it is not only necessary that the charge is not fully answered, but the charge itself must be of such import that the answer will be of use to the plaintiff in his defence at law; and if that is not manifest, the want of answer will not entitle the plaintiff to an injunction.

The plaintiff filed this bill (in June last) for an account and an injunction to restrain the defendant from proceeding further in an action at law commenced against him, on his promissory note for 4000l. The bill stated that the plaintiff had been for a long time engaged as confidential solicitor and agent for the defendant, receiving his rents, and managing and conducting the business of his estates and other property; in consequence whereof a considerable balance became due to the plaintiff, which, on a cursory survey of the accounts between them, in the year 1809, was supposed to amount to 4000l. or thereabouts, which the plaintiff applied to the defendant to pay; that the defendant borrowed that sum on his bond, and a mortgage of part of his estate, and paid it to plaintiff in liquidation of such balance, and that the plaintiff at the same time gave the defendant his promissory note for the same sum; [340] agreeing, at the same time, that if the balance should turn out to be more, or less, it was to be settled afterwards between themselves.

That the plaintiff afterwards continued to be employed by the defendant as aforesaid till the present year, and that no other settlement of accounts ever took place between them till about March last, when their mutual accounts were stated up to December 1816, and signed by both parties, whereby a balance of 97l. appeared to be due from the plaintiff to the defendant; but that such accounts were imperfect and erroneous, inasmuch as, although the plaintiff had continued to transact all the defendant's business from said month of December to March, and particularly in the conduct of a certain suit in Chancery, for which a considerable sum was due to plaintiff, which had neither been paid or included in the said account, and which, if charged, would amount to 4000l., or thereabouts.

The bill then charged, that several sums stated by the defendant in the said account to have been paid to plaintiff for his private use were, in fact, trust-mones

and payable to certain other persons; and particularly sundry sums, of considerable amount, stated to have been paid to plaintiff in respect of the sale of certain estates; and that the defendant was considerably indebted to the plaintiff for transacting his private business: he therefore prayed, that an account might be taken of all the transactions between them, allowing plaintiff all reasonable charges for his professional and other services: and that the [341] said promissory note might be delivered to the proper officer of the Court, or otherwise secured, for the benefit of the person eventually entitled thereto: and for an injunction, in the mean time, as to the action at law.

The defendant, by his answer, denied that the balance of account in the year 1809 amounted to 4000*l.*: but admitted, that from the accounts rendered by the plaintiff in December in that year, he made it appear that a balance of 459*l.* 17*s.* 8*d.* was due to him. That, in 1815, plaintiff stated to the defendant that 4000*l.* was due to him on the balance of accounts, although none had at that time been rendered to the defendant: and that he (the plaintiff) applied to the defendant for payment of such supposed balance, and that he the defendant assented to the plaintiff's borrowing the money on his (defendant's) credit, and retaining it for his (plaintiff's) own use, in discharge of such supposed balance, as alleged in the bill; that by the accounts rendered in March last, there appeared a balance in the defendant's favour of 97*l.* 18*s.* 1*d.* exclusive of the sum of 4000*l.*: and that such accounts were made out through means, and from documents, wholly in the plaintiff's possession.

He admitted also, the plaintiff having been continued afterwards in his employ, as stated in the bill, and that no charge was made in the said accounts for business done during the said period, or for conducting the said Chancery suit, which the defendant admitted that the plaintiff did conduct and manage; but he alleged that he had repeatedly, and in vain, applied [342] for his bill of charges on account of such suit, whereas for other business done by the plaintiff for the defendant he had given credit in the aforesaid furnished and settled accounts; and that, save as aforesaid, no other settlement of accounts ever took place between them, but that the accounts so settled were signed by both parties, and that he believed them to be correct and just; that the plaintiff had never agreed with him for any stipulated allowance in respect of conducting the affairs of his property, and that he, the defendant, considered that the receiving his rents, which amounted to about 4000*l.* a year, and which the plaintiff (who was a banker) always kept in his hands for a considerable time, or at least a very large balance, furnished an adequate compensation for his trouble in that respect; but he admitted that, after the settling and signing the said accounts, the plaintiff stated that no charge had been made for receiving the said rents, and required that the same should be made, whereupon the defendant had requested that the plaintiff would make what charge he thought proper, which he had never since done.

The answer also stated, that the plaintiff had then a balance in his hands of the defendant's monies sufficient to cover any charges which the Court might be of opinion ought to have been included in the account so furnished to defendant by plaintiff as aforesaid, or which he may since have become entitled to be paid; that, as he did not believe that the said accounts so furnished by the plaintiff were in any respect erroneous and imperfect, he was consequently unable to set forth as to his knowledge, belief, or otherwise, whether any and what sums in [343] particular, or to any amount, or for what due, were or were not omitted, or for what reason, in such accounts; and that he was unable to set forth the particular description, or amount, of any of the particulars in the plaintiff's bill alleged to have been omitted in such accounts, or when, or for what, the same or any of them became due.

He therefore insisted that for the reasons stated, the said accounts, so settled, ought not to be disturbed or gone into; and that he ought not to be restrained from proceeding at law for the recovery of the amount of the said promissory note, so as aforesaid given for the ascertained balance in his favour.

Dauncey, and Willis, now moved for the injunction as prayed, on the opening of the following material exception to the defendant's answer: "for that the defendant had not discovered and set forth, according to the best and utmost of his knowledge, remembrance, information and belief, a full true and particular account of the trust-monies in the said bill mentioned, which were paid by him to the said complainant, or which were received by the said complainant, with his privity and approbation, and consent; together with the times when, from whom, and for what, the same and

every of them were so received." And, "for that he had not answered and set forth, in manner aforesaid, what charge or allowance is made in the said accounts for business done by the said complainant for the said defendant as his attorney or solicitor."

[344] They submitted that it was no answer to those interrogatories, to say, that the complainant had full knowledge of all that was inquired of, because the documents from which the accounts were made out, were in the plaintiff's possession; for however that might be, the object was to get the discovery of the facts inquired of, by the defendant's admission, so that the plaintiff might use it at law in defending himself against the demand on the note.

In *Rowe v. Teed* (B. & Ves. 378), and *Leonard v. Leonard* (Ball & Beat. p. 325), it was held, that a defendant is compellable to answer every thing which does not tend to self crimination, with the exception of the case of a purchaser for valuable consideration; and if such interrogatories as these are not to be answered, there would be an end of most of the exceptions which are so commonly brought before the Court.

Martin contended that the answer was sufficient.

Richards, Chief Baron. We are of opinion that this is not what is called a material exception, or one which the defendant is bound to answer. There is great mistake, in general, in this Court, as to what is a material exception. The true way of arguing and considering such an exception, is by ascertaining whether, if the defendant should answer in the affirmative, his admission would be of use to the plaintiff. If it would it must be answered; if not, it is not material.

The counsel on both sides then proceeded on the merits.

[345] RICHARDS, Chief Baron. This is an action on a promissory note; and there must be a strong case of equity made out by the defendant at law, to affect the note, to entitle him to the interference of the Court. His ground is, that there is an account subsisting between him and the plaintiff; and he endeavours to support it, by stating, that a large sum is due to him for services, in the character of confidential agent. But that is clearly nothing like an account. Work and labour is not matter of account. There must be monies paid or accounted for, both on one side and the other, to raise an account between parties. I never yet heard that agency merely was matter of account. It may much more properly be a subject of set-off; and if any thing should be due to Hirst for his services he must take that course.

The rest of the Court concurring, pronounced the Injunction dissolved.

Friday, 11th July 1817.—The Court will not allow more than two motions to be made successively by the same counsel, till they have gone through the rest of the bar.

Agar, coming into Court to oppose a motion which was to have been made by Dauncey, and requesting that it might be brought on, the Lord Chief Baron stated, that two motions had been already made by Mr. Dauncey, and that the practice was, not to permit more than that number to be made by the same counsel, till they had gone through the Bar; and the rest of the Court expressing their approbation of that rule, said that as it was one founded on convenience for the general accommodation of the Profession, it therefore would be strictly adhered to.

[346] SCOTT v. BECHER AND WIFE, SHARP, (their Agent) AND THE GOVERNOR & CO. OF THE BANK OF ENGLAND. Friday, 11th July 1817. — An affidavit made in support of an injunction bill will be ordered to be filed, (although it is not in the course of practice to file such affidavits,) if the defendant require it, for the purpose of being afforded an opportunity of answering the matters contained in it. — The Court will appoint a receiver of an intestate's personal estate, when the administrator is sworn to be insolvent before his answer be come in, although the fact of his being abroad stated in the plaintiff's affidavit be denied. — If a material fact be charged in a bill filed for an injunction, and also deposed to in the affidavit used in support of it, not positively, but as the plaintiff has reason to

know and that he believes it to be true, and if that fact be one which, if true, lies within the knowledge of the defendant only, and who may, if not true, deny it, the Court will grant the injunction if it is not denied by him, for they will take his not denying it as an acknowledgment of its truth. —A plaintiff who has obtained an order for an injunction is not entitled, in point of practice, to serve it with the writ of execution before it be passed and entered, although it is usual to do so; and if he should so serve it, and there should be an error in drawing up the order, to the prejudice of the defendant, it will be considered a contempt, and so treated by the Court on an application to them to punish the plaintiff for so doing; nor will the plaintiff be suffered to avail himself of the excuse of its being a mistake; and all the costs incurred by the defendant, arising from such an irregularity, will be ordered to be paid by the plaintiff. —Though the Court will, on behalf of the next of kin, order a defendant, administrator, in whose hands there is shewn to be a clear balance of the intestate's personal estate unapplied, and that it is in danger of being misapplied, to bring it into Court; yet they will expect a plain and strong case to be clearly and satisfactorily made out by the plaintiff. —A defendant, being in Court when the order for an injunction is made, is bound by it from that time, although it be not formally served till some time afterwards. —Semble, that an injunction, restraining an administrator from transferring the intestate's stock into his own name, will, by equitable construction, operate to prevent his parting with any of the intestate's outstanding estate which has previously come to his hands.

This bill had been filed by one of the next of kin, (who was also a creditor of the intestate) against the defendants, who were the administratrix and her husband, and their agent, and the Bank, for an account of an intestate's personal estate, and that a receiver might be appointed, and for an injunction [347] to restrain the defendants from transferring funds standing in the name of the intestate.

The suit was founded on the ground of the administratrix and her husband, (who had become insolvent) having gone abroad, and a previous misapplication of the assets.

16th December 1816. —The defendants had appeared, but had not answered, and the plaintiff now (before answer), moved as above, on the authority of the cases of *Taylor v. Allen* (2 Atk. 213), and *Muddleton v. Dodswell* (13 Ves. 266), and on an affidavit, stating that the husband of the administratrix was insolvent, and had with his wife gone abroad, and that the other defendant Sharp, their agent, was an uncertificated bankrupt.

It was required by the counsel for the defendant, that the affidavit, which, according to the practice, had not been filed, so that it could not be answered by the parties against whom it was to be used, might be filed; and that the application might be ordered to stand over till that should be done.

The Court ordered that it should be filed, for the purpose of giving an opportunity of answering it, and that another notice of motion should in the mean time be given, and they refused to grant the injunction in the mean time. The Bank being parties, [348] and having had notice of the motion, would not permit a further transfer.

20th December 1816. —Pepys now moved on the bill, supported by the affidavit, (which had in the mean time been filed) as before, for a receiver of the outstanding personal estate, and an injunction to restrain the defendants, Becher and Sharp, from selling out the stock belonging to the estate of the intestate, and particularly as to two sums of 900l. and 500l. standing in the funds in his own name: the affidavit stating that the sum of 900l. had been transferred from the name of the deceased, into the name of the defendant Becher; and that the other sum of 500l. which had been purchased by Becher afterwards, was purchased, as the plaintiff believed, from his acquaintance with the defendant's circumstances, with the produce of other stock, also part of the intestate's estate, which had been sold by the defendant Becher; and from collecting an outstanding estate.

The defendants affidavit denied that the defendant Becher was abroad, but did not effectually answer the fact of his insolvency.

The Court granted the receiver, and the injunction as to the outstanding estate, and also as to the sum of 900l. but they refused it, with respect to the 500l. on the ground that the plaintiff could not know with what monies it had been purchased.

The plaintiff afterwards drew up an order for the injunction, as to both the 900l. and the 500l. according to the terms of his notice of motion, [349] extending it to the 500l. and without having it passed and entered, he served it with a writ of execution upon the parties.

31st January 1817.—The bill having been since amended, Pepys now moved again for a further injunction as to the 500l. on an affidavit, stating that 1100l., 3 per cent. consols, part of the intestate's estate, had been sold out by the defendant Becher, and that 500l., 5 per cents., had been purchased by him on the same day; and that the plaintiff, from his acquaintance with the insolvent circumstances of the defendant, believed that they could not have purchased that 500l. except with the produce of the intestate's estate; and that having applied to the defendant's stock-broker, to inform him of the truth as to that fact, he had refused to give him any information.

On that affidavit, the Court ordered that the injunction should issue; and they said, that it ought to have been granted in the first instance; for that—where a party swears to his belief of a circumstance, which must, if true, be in the knowledge of the person whom the statement is meant to affect, and who has an opportunity of contradicting or denying it, if he choose to do so—if he do not deny it—such belief will be sufficient to induce the Court to take the circumstances as acknowledged, and to authorize them to interfere; and therefore in the present case they granted the injunction as prayed.

The fact of the order having been drawn up, as before stated, improperly including the 500l. being mentioned to the Court by the counsel for the [350] defendant, it was stated to have been done by mistake; and it was also said to be the usual practice in cases in the nature of waste, for the clerk in Court to draw up the order immediately, and for the plaintiff to get it served, with the writ of execution, on the parties before the order is passed and entered, as has been done in the present case; but

The Court said, that though such a practice might be usual, it was improper. And they rejected the excuse of mistake in the drawing up the order; and added, that the plaintiff, by so doing, had committed a contempt, which they would have punished, if an application had been made to them for that purpose. And they ordered, that the defendants should be allowed all the costs occasioned by the irregularity.

11th July.—Pepys now moved that the defendants Becher and wife might be ordered, within ten days, to pay into Court the sum of 884l. 16s. 8d. or such other sum as should appear by their answer and the schedule thereto, to have come to their hands since the order for the injunction was pronounced, on account of the personal estate of the intestate, and not to have been properly applied.

The defendants, Becher and wife, had delivered in certain accounts by a schedule to their answer, charging the estate with money expended on account of it, as the payment of debts, &c. and also with claims of remuneration for work, and labour, and agency. Most of the former were objected to on account of the want of proper vouchers, and their dates, and the latter altogether; for it was [351] contended, that if it were permitted to administrators to make charges for the alleged employment of agents, with respect to such estates, it would afford them the means of retaining any balance in their hands under such a pretext; but

The Court observing that, although in general, in order to support such an application as the present, it was incumbent on the plaintiff to make out a very clear and satisfactory case of unapplied funds, in the hands of the defendant, by admission from his answer, (which might be made complete, by compelling him to give dates to his vouchers, &c.) before the Court would *brevi manu* take the money from him; yet they ultimately ordered the defendant Becher to pay into Court the whole sum as prayed.

Pepys also moved that the defendant Sharp, should be ordered to pay into Court 832l. 7s. 2d. as having come to his hands on the same account, and not applied by him thereto, since the 20th December 1810.

Sharp, by his answer, claimed a balance of upwards of 200l. to be due to him, after charging his agency, and the monies paid to Becher, or for the purpose of the estate, by his order.

Teed, for the defendant Sharp, contended that if the injunction were held to take effect from the time when the order was pronounced, yet that as it did not extend to

restrain the defendant from employing the money, which he had then actually received, in satisfying demands on the estate for the prevention of suits, he was at all events to be allowed for the sums so expended.

[352] It was then stated that some of the money accounted for had been paid, after the injunction had been obtained: to which it was answered that none had been paid after the injunction had been served: when it was submitted, that the defendants having been in Court when the injunction was moved for, and ordered, it was a contempt to pay over any money even before service, and he had therefore done so in his own wrong, and the cases of *Skip v. Harwood* (3 Atk. 565), *Osborne v. Tennant* (14 Ves. 136), and *Kimpton v. Eke* (2 Ves. & B. 349), were cited as authorities establishing that point.

The Court held that the defendant's knowledge of the order was sufficient to preclude him from being permitted to take any advantage of acts done by him in the mean time, which would affect such funds of the intestate as had come to his hands, so as to protect himself from a motion like the present, by having paid debts or other sums, which but for the injunction he might have been allowed, as covering any or all of the money sought to be paid by him into Court, and they determined that such an order operated to prevent a defendant from using monies, arising from transfers of the intestate's stock, or which had been received by the defendant before the order for the injunction had been obtained; and after disallowing all the items of discharge after the 20th December, the date of the injunction, Sharp was ordered to pay 89l. 13s. 9d. into Court.

[353] *ROBINSON AND OTHERS v. MULLETT AND OTHERS*. Saturday, 12th July 1817.—A solicitor who has acted to a certain extent only for parties, defendants in an amicable suit in Chancery, will not be restrained from acting in a cause by bill filed by some of those defendants, on behalf of themselves, against others of them, the solicitor making affidavit that he is not confidentially possessed of any secrets which might be used to the prejudice of such other defendants, or has knowledge of any facts unknown to his clients.—It appears to be necessary that a solicitor, in such a case, should be shewn to be possessed of knowledge of matters which might give him undue advantage, to found such a motion.

[Referred to, *Hutchins v. Hutchins*, 1825, 1 Hog. 318; *Biggs v. Head*, 1837, *Sau. & Sc.* 358.]

A bill had been filed in the Court of Chancery, by one of the defendants in this cause (a residuary legatee) against the plaintiffs and the other defendants, (other residuary legatees and executors,) for the purpose of procuring the opinion of the Court upon the construction of the will. All the defendants in the suit in Chancery, which was an amicable one, employed the same solicitors to put in their answers. In consequence of disputes afterwards arising between the parties, the plaintiffs in this suit filed their bill against the executors, and other parties, to have the trusts of the will executed, and for an injunction and receiver: and employed the solicitor who had been employed by themselves, the executors, and the other parties, in the suit in Chancery, to prosecute that suit.

Fonblanque, on the part of the executors, on the authority of *Cholmondeley and Clinton* (Coop Rep. 80), and an affidavit that the plaintiffs now solicitors had been retained by and were still acting as solicitors, as well for the plaintiffs as for the executors and others, and the now defendants in the suit in Chancery, obtained an order of Court, that they should be restrained by injunction from acting as solicitors for the plaintiffs in this suit, or as attorneys or solicitors in any other suit at law or in equity between the parties.

[354] That order had been obtained in the absence of the solicitors who were the object of it; and now

Agar, and Teed, moved that it might be set aside on that ground, and on the deposition of the solicitors, that they were not in possession of any secrets of the defendants, or any information whereby their interest could, in the slightest degree, be prejudiced; and that all communications made by the defendants to them, had been made in the presence of the plaintiffs, or subsequently related to them by the deponents.

The Court held, that the employment of these solicitors for the present plaintiffs by such of the defendants as they had acted for in that suit, and to such an extent only, was too slight a ground for the application to restrain them from acting in this cause, as there did not appear to have been any important confidential matter disclosed to them, the knowledge of which might be used in prejudice of the party so applying. Therefore, as to that part of the order, it was

Discharged.

[355] LEATHES (Clerk, Rector of the Rectory of the Vicarage of Mepal and Vicar of Sutton,) v. NEWITT AND OTHERS, Occupiers of Lands and Farms in both the Parishes, AND THE DEAN AND CHAPTER OF ELY, Rectors of the Parish of Sutton, and their Lessees. Friday, 11th July 1817.—Modus of 1s. for a milch cow, in lieu of the tithe of milk of such cow, sent to an issue.—Modus “of 1½d. for every calf fallen or dropt in the parish, in lieu of the tithe of such calf,” is not proved, if the evidence add a qualification to the custom; as, if the proof be, that where such calf shall be sold within the first year after being calved, a further sum, after the rate of 1s. in every 10s. of the price at which the calf was sold, is to be paid to the vicar.—As to the effect of certain ancient documents, and the conduct of parties, given in evidence in this case, as tending to negative a rector’s common-law right in favour of a vicar without proof of perception, claiming against him the great tithes in the vicarage, see the documents (in the Appendix,)—which appear to be of so singular a character, that there have been none among the many ancient records and instruments brought before the Court in tithe causes which, by analogy in their contents, or by reasoning on their effect, can lead to any conclusion as to their operation as matter of evidence in questions, where, in the absence of positive proof, perception and usage are so much resorted to as in cases of this description,—and see the evidence, and the conclusion of the Lord Chief Baron’s judgment—where the Court were of opinion, that the effect of such documentary evidence had so obscured the *prima facie* right of the rector, as that they were obliged to direct an issue to put the case in a course of further inquiry.—Evidence of reputation of certain lands having been inclosed in pursuance of an agreement, not admissible.—Copy of a lost terrier rejected as evidence.—For other points, see the marginal notes in the case *passim*.

The plaintiff filed this bill as rector of Mepal and vicar of Sutton, (Isle of Ely, county of Cambridge,) for the great tithes of the rectory of Mepal, and the small tithes of the vicarage of Sutton, and also the great tithes arising in certain parts of the parish of Sutton, (the vicarage,) and particularly in North Fen, and Holts or Holbrooks, parts of a certain district of fen or marsh-land, being several, or late inclosed fen grounds, within the said parish [356] of Sutton, containing 3700 acres, or thereabouts, situate in a fen called Sutton Fen, and for agistment.

The defendants, the dean and chapter of Ely, rector of Sutton, admitted the plaintiff’s title, as vicar, to all small tithes in Sutton, except saffron, osiers, and mills, which they claimed as appropriators, denying his title to great tithes in the North Fen, and Holts or Holbrooks, which they also claimed, as well as the great tithes of all other parts of the parish, as appropriators; and their answer stated, that they had always let the rectory of Sutton, which was now let to others of the defendants; and that if the occupiers of any of the lands or farms in Sutton had paid any of the excepted tithes to the vicar, they had done so wrongfully; and, admitting that no great tithes, or agistment, had been received by them from North Fen, they insisted that their rights were nevertheless not affected by the laches of their lessees.

The defendants, Newitt and Cole, (occupiers in Mepal,) denied the plaintiff’s title to all tithes, great and small, in part of the parish of Mepal; for as to that, they insisted that there was a certain fen, called North Fen, or Sutton Fen, situate within the parishes of Mepal and Sutton, and that such part as was situate in Mepal, and the titheable places thereof, consisted of 500 acres; and that the plaintiff (if he were rector) was entitled to tithes in kind of wool and lambs, and to certain moduses in lieu of the tithes of milk, calves, and foals, and also to [357] the tithe in kind of pigs, provided he kept a boar for the use of the parish, and to no other tithe, either in kind, or sub modo, in that part of the fen lying within the said rectory.

They then set up a defence of exemption for that same part of the fen, as being part of the possessions of the dissolved priory of Ely*.

Next, they pleaded, that the occupiers within the rectory, including the said 500 acres, had paid the following moduses; "1s. for every milch cow, in lieu of the tithe of milk of such cow; 1½d. for every calf fallen or dropt in the parish, in lieu of the tithe of the said calf, and 2½d. for every foal, in lieu of the tithe of the said foal."

Newitt further stated, that he occupied only thirteen acres in the North Fen, and had had no titheable matters thereon: and Cole, that he occupied thirty acres there, and had had thereon most of the titheable matters charged by the bill. And they alleged, that the plaintiff having let all his tithes to one Jellings, except the moduses for the milch cows and calf, had no demand: and Cole further stated, that he had paid all the tithes due from his farm to the lessee, except 15s. 9d. due up to Michaelmas 1811, for the moduses for milch cow and calf.

[358] On the part of the defendants, in answer to the plaintiff's claim in Mepal, it was proved, that among other payments set up as moduses, 2½d. had been paid in lieu of the tithe of each foal within the parish, as far back as living memory; and that the same had been a fixed payment in all cases where the breeders of the same foals kept the same for more than twelve months; but when they sold the same within twelve months after foaling, then, in addition to the said sum of 2½d. a further sum, at and after the rate of 1s. in every 10s. of the price at which the said foals were sold.

So also one halfpenny for calves weaned, except they were sold within the first year after being calved, in which case the vicar was paid one tenth of the price.

The same defendants, and others, occupiers of lands in Sutton parish, denying the plaintiff's title, admitted the vicar's right in Sutton to tithe of hay from certain lands called the Cottage Homesteads, a few pieces of meadow in the high lands, and meadlands, and within a certain fen called Middlemoor: and that the plaintiff had received the tithe of hay from a certain farm called Sutton Holwood, and Little Holwood farm, but denied the vicar's title to hay in any other part of the parish: and alleged that it had never been received by any vicar, for that the vicar was not endowed of hay, even in the places from whence he received it; [359] and that he received it therefrom, or some compensation in lieu thereof, under some agreement between the dean and chapter of Ely, to whom the farms of Middlemoor and Little Holwood belonged, and some or one of the preceding vicars.

They also denied his right to, or that the vicarage was endowed of, tithe of corn within the vicarage, except that by virtue of the aforesaid agreement he had received the tithe of corn, or some compensation therefor for the said farm of Little Holwood. They admitted the vicar to be entitled to tithes in kind of lambs, wool, and pigs, and by modus to calves, milk, and foals, and to seeds, and orchard-fruit in kind, from lands called the High Lands, but denied his right to all other tithes, except that the vicars had received, by virtue of the aforesaid agreement, the tenths of all the profits of the said farm, called Sutton or Little Holwood: and admitted, that he and some of his predecessors had received by virtue of some other agreement, the tithes of grass and fodder growing upon the said fen, called Middlemoor.

They also set up the following moduses:—"5d. for every milch cow in lieu of the tithes of milk of such cow: one halfpenny for every calf, for the tithe of such calf, and a tenth of the price if sold; and 2½d. for every foal, in lieu of the tithe of such foal."

The other defendants, lessees of the dean and chapter of Ely, claimed the great tithes under their lessors, as appropriate rectors of Sutton.

[360] The evidence produced on the part of the plaintiff, as vicar of Sutton, was (having proved his title) a general perception of the great and small tithes of that part of the inclosed fen called Little Holwood, by a compensation, and so for another part of the same fen called Cocksnest, and from other parts of Sutton parish, not being part of Sutton fen: and that he and his predecessors had received small tithes generally throughout the parish of Sutton. It was also sworn by Jellings, a lessee of the plaintiff (by indenture,) of all the tithes of Mepal, great and small, for a term of seven years, that he had received such tithes from the defendant Cole, for the thirty acres, part of the 130 occupied by him in North Fen, and that he had received the small tithes only for the remainder.

* That defence was abandoned at the hearing.

It was proved that Sutton Fen had been inclosed by a decree of the Court of Chancery, in the reign of James the first, founded on an agreement entered into between all parties at that time interested: that North Fen, and Holts or Holbrooks, were called together by the name of Sutton Fen, and were in the parish of Sutton: that for those parts the dean and chapter of Ely had never received great tithes, but that they had received them from divers parts of the high, arable and pasture lauds: that the proportion of Sutton Fen, situate in Mepal parish, was between five and six hundred acres, and that the remainder (about 1200 acres,) was situate in Sutton parish: that the district called Cocksnest was in Sutton fen and parish.

[361] In support of the claim of the great tithes in Sutton, the plaintiff also proved, that the districts called North Fen, and Holts or Holbrooks, situated partly in Mepal, and partly in Sutton, and that the district called Sutton, Little Holwood, and Cocksnest, were situate in the parish of Sutton, and were called by the name of Sutton Fen, and that the whole had been for a long time inclosed and occupied in severalty: that the vicar and his predecessors had received, by their agents, from the occupiers of Little Holwood farm, and Cocksnest, money-payments in lieu of the great and small tithes, but not for the great tithes from any other parts of the parish of Sutton.

It was also proved from the vicar's books, that they had on many occasions been paid sums of money in lieu of the tithes of the articles said to be covered by the moduses, differing in amount, and other respects, from the alleged immemorial payments.

[That part of the depositions which were proposed to be read, to prove that the lands were reputed to have been inclosed in consequence of an agreement entered into in 1622, was objected to, and rejected.]

There were also produced in evidence the following documents. On the effect of leases marked with italics, and on the agreement and decree, as it regarded Mepal, and the right of the rectors to the great tithes in Sutton, much of the case mainly rested.

They consisted of various leases granted from time [362] to time by the dean and chapter:—The first was a lease of Sutton rectory (of the 1st Eliz.), demising the rectory, with *all* the tithes, without excepting the advowson of the vicarage, or making any reservation in favour of the vicar; the next produced was of the 29th Eliz. also of Sutton rectory, and demising *all* tithes, but excepting the advowson, and augmenting the vicarage with two quarterns of corn. A lease of the 16th Jac. of Middlemoor, to certain of the inhabitants of Sutton, wherein the vicar was to enjoy a piece therein mentioned, called the Harp, and the gatestead therewith; the crop of the part belonging to the vicarage house, and the tithe of the grass and fodder of Middlemoor: and if Middlemoor be fed with cattle before Lammas, the lessees covenanted to pay the vicar 16l. a year in lieu of tithe:—A lease of Little Holwood (of 2d Car.) to a person of the name of Church, for seven years, containing no reservation of the tithe to the vicar: a similar lease (4 Car.) of Sutton rectory to Story. *A second lease* (6 Car.) *of Little Holwood to Church in which the tenant covenanted to pay all the tenths yearly of all the profits that shall grow, arise, &c. from the demised premises to the vicar of Sutton for the time being.* Several other leases of *the rectory* were also put in evidence, and were in nearly the same terms as that granted to Story, coming down to very modern times*.

A decree of the Court of Chancery (21 Jac.)† entitled, Sutton and Mepal decree, and which ad [363] verted to the bill filed by Dr. Cesar, then dean, and the chapter of Ely, whom it described as lords of the manors of Sutton and Mepal, against the tenants (by name) amongst whom (and described also by name, as one of the tenants) was the then vicar of Sutton, after reciting, that by reason of the promiscuous feeding of the fens and marshy grounds, they had been more injurious than profitable to the commoners: and that therefore the dean and chapter, as lords, had entered into an agreement with the tenants, that the said dean and chapter (lords, &c.) should retain to them and their successors, in severalty, all that fenny ground in Sutton called Little Holwood: it was agreed that all the residue of all the fen-ground, except Mepal Gall, should be divided as follows: first, there shall be laid out and allotted to every

* For the terms of one of the latest of the leases. See the Appendix.

† See Appendix.

manor-house, freehold and copyhold, and farm-house, and every other dwelling-house, and to every owner of arable or upland-grounds, &c. (certain different definite allotments). The fines on the admission of copyholders to be certain. It then set out the answer of the defendants, admitting the allegations, particularly the inaptitude of the fen to the feeding and depasturing of cattle: and prayed that the agreement might be ratified and decreed.

It then gave the several answer of the then vicar, admitting complainants to be lords of the manor and lordship of Sutton, whereof the defendant was incumbent; and that within the said manors were spacious commons, being fenny ground, wherein the tenants which did inhabit in any of the an-[364]cient commonable houses or tenements therein, and the vicar of the town of Sutton, had, in right of the vicarage, used and accustomed to have common of pasture for all the cattle, levant and couchant, belonging to the said commonable houses, the vicarage being likewise a commonable house; and that such promiscuous feeding, &c. was injurious, and therefore, that he agreed to the before-mentioned allotment: so that the defendant (the vicar) might have for his part allotted unto him, and the succeeding vicars, 20 acres (by the particular admeasurement), lying, &c. called, &c.: in consideration that neither he nor the succeeding vicars after him, should thereafter demand, in right of his and their vicarage, any tithes out of any the said commons after such allotment, except the tithes of milch kine, calves, foals, sheep, pigs, geese, and such like: and except the tithe of one fen called Little Holwood. The agreement was accordingly decreed: and a commission having been awarded, the allotment agreed on was set out to the vicar in the terms and on the conditions of the agreement.

For the defendant, (the rector of Sutton,) there was also put in a case of *Foster v. Tymbs*, in Hil. 1672, where the then rector sued the defendant by bill for the great tithes of a part of the fen which Tymbs had ploughed: and when the cause was ready for hearing the defendant gave it up.

[A paper purporting to be a copy of a lost terrier was offered in evidence, but objected to, and rejected.]

[365] Dauncey, and Hall, for the plaintiffs, contended (the defence of the lauds having belonged to a religious house having been given up), with respect to the moduses set up for Mepal, that the payment of 1s. for a milch cow was rank, and they cited *Franklin v. The Master, &c. of St. Cross* (Bunb. 7); and that the other two moduses were not proved as laid, and therefore could not be established by the evidence, (citing the cases of *Bishop v. Clchester* (Gw. 1321), *Leigh v. Maudsley* (ib. 703), *Scott v. Fenwick* (ib. 1250);) and they brought forward, to destroy their validity as moduses, the entries from former vicars books, which proved that other payments had been made, varying from those now set up, as to that part of the cause which lay between the rector and vicar, on the claim of the latter of the great and all the small tithes of the parish of Mepal.

They then submitted, that as they had shewn, by conclusive evidence, perception of the great tithes in some parts of the parish of Sutton, the Court would presume an endowment of those tithes in favour of the vicar, in the parish generally—that his non-perception hitherto had arisen from the delusion that he was bound by his predecessors agreement, and the decree of 1622, and could not therefore claim them; whereas, in point of law, the successor could not then be bound by the engagement [366] of his predecessors*, that it was in proof that the vicar had accepted an allotment on the inclosure of the common, in lieu of tithes—that that having been the result of an agreement entered into by one of his predecessors, at a time when they had no power to bind their successors, although void, was of use to the vicar now, to shew that he was then entitled to the tithes throughout the parish, or at least over the fen; and that must be in as ample manner as he had them from the parts of the parish now, for his general right must have been as full as his particular enjoyment. They therefore contended that, receiving at this day all the tithes, both great and

The doctrine of non-perception of tithes being unavailable as against a vicar, where it may be attributable to a mistake of the law, appears to have been recognized in the case of *Dorman v. Corra*, lately decided by the present Lord Chief Baron (ante, p. 110), since this case was argued: where one point ruled was, that perception by a rector of the tithe claimed by the vicar, but which it had been long doubtful in point of law, as to which of them it was payable to, did not destroy the vicar's right.

small, from certain parts of the parish, it was proof that they were entitled originally to such tithes from all the rest; and as the long non-user might be accounted for from the effect of the allotment, under the agreement of the preceding vicars, who no doubt considered themselves bound by it, there was nothing in this case opposed to the plaintiff's claim. The great tithes must be due to one of these parties: [367] and the rector, so far from claiming them, has constantly paid them to the vicar.

Wetherell, Clarke, Newland, Boteler and Richards, for the defendants, in answer to the objection of the rankness of the *ls. modus*, cited *Hawes v. Goodman* (2 Wood, 288), and *Roe v. Bishop of Exeter* (Banbury, 57); and as to the objection of variance between the laying of the other moduses, and the proof, they insisted, that the allegation had been borne out by the evidence: more had been proved, it was true, but that was not destructive of the plea, though it might have been so, had the evidence fallen short of it. The qualification superadded was not, they submitted, an integral part of the modus, and the proof carrying it farther had put it more favourably to the rector. As much had been alleged, as covered the defendant's case, and more would have been idle, or at least was not necessary. In the cases which have been cited, the variation was material, but it is not so here.

They then submitted, that if those payments had not been sufficiently proved, the plaintiffs themselves had proved other payments for the defendants; and that they were entitled to an issue on that ground.

On the greater question, of the plaintiff's claim against the rector in Sutton, they contended that [368] the vicar had not made out his case to support his claim to the great tithes of the vicarage of Sutton.

The vicar produces no evidence; yet says, if I shew perception in part, I am entitled to claim for the whole. A vicar is imperatively bound to give some proof, either positive, or by implication, of his having been endowed of the great tithes of a vicarage. The decree put in will not supply the absence of either of those accustomed modes of proof of an endowment.

As to the effect of the evidence of the leases, they urged, that those leases were in fact augmentations, merely emanating from the usual bounty of that day, in favour of the church; if, therefore, the decree was out of the way, there would be not a shadow of foundation for this claim by the vicar. There is however no recital there of any right in the vicar; and it is not probable that the 20 acres had been given him in commutation of his right to all the great and small tithes of those 3700 acres of land which the parish consisted of. It is incumbent on a vicar to prove his case against a rector; and here is nothing like evidence to support his claim against the rector's common-law right. They insisted also, that the decree itself furnished evidence against the plaintiff's claim, not merely from the incommensurate and inadequate allotment given him in commutation for so large a claim, but from the species of tithes reserved, which are subsequently enumerated.

[369] RICHARDS, Chief Baron, now delivered judgment. [Having stated the case.] The plaintiff filed this bill in two distinct characters, as rector of Mepal, and vicar of Sutton. One of the principal defendants (Newitt,) denies his having had titheable matters; that however is disproved; another (Cole), admits that 30 acres of his land are liable to pay the vicar tithe. The other 100 acres he attempts to cover because, he says, they are in the North Fen.

These defendants had at first set up a claim of exemption from payment of all tithes, but that was abandoned at the hearing; and it was impossible to make that case out by the evidence. They thus admitted therefore their liability to pay tithes either in kind, or otherwise. But, then, they say that certain of the tithes claimed by the vicar are covered by the following moduses:—*ls.* for every milch cow, in lieu of the tithe of milk of such cow; $1\frac{1}{2}d.$ for every calf, fallen or dropt in the parish, in lieu of the tithe of the said calf; and $2\frac{1}{2}d.$ for every foal, in lieu of the tithe of the said foal. Now it has certainly been decided, in the case of *Franklin v. The Master, &c., of St. Cross*, that *ls.* for a milch cow is rank (Banb. 78). On the other hand, however, there have been cases where issues have been granted to try such a modus. Here also, therefore, I must direct an issue to try that modus.

As to the other moduses for calves and foals, they are differently situated. They are not proved [370] by the evidence as laid in the answer, inasmuch as they are pleaded as positive payments simply, and without any qualification: whereas the evidence adds this important and material qualification, that if they were sold within

the first year after being calved or foaled, a further sum, after the rate of 1s. in every 10s. was payable to the vicar. That evidence, therefore, destroys rather than supports the character of payments, attempted to be established as moduses. If the tithe of those articles is to be so augmented in such cases it is a most important variation in favour of the rector, who by common law would not be entitled to the advantage which such a custom gives him, and therefore it is important to him to know it precisely, and it must be so set out. Whether such a payment, if it had been laid as proved, would have been good, is another question. It is sufficient here to say, that it is destructive of the defence of modus, that the allegation and the proof differ in the material respects which I have pointed out; and if the plea is not supported by the evidence the Court cannot receive it. The Court cannot direct an issue to try part of a custom; all customs are in their nature entire, and all the parts must be taken together; we cannot separate it, and say what part shall be tried, and what shall not. In *Bishop v. Chichester* (Gwil. 1321) the Court so determined; and in *Scott v. Fenwick* (ib. 1250) the Court would not direct an issue to try a payment which was laid generally, but proved to have been made with an exception.

[371] The rector must therefore have a decree for an account of those titheable matters for which the moduses pleaded are not proved, the calf and foal.

Then let us see whether the defendants are right in the other points of their case. It is contended, that the vicar has himself proved moduses for the defendants, by the payments which he has given in evidence from the books, and that therefore he cannot have a decree, because those payments should be sent to be tried. If he had done so undoubtedly he must have failed; but I am of opinion that he has not. He has certainly proved that other payments have been made, and that those are inconsistent with the payments set up by the defendants as moduses; but he has not proved that they are immemorial or uniform payments, or that they have any of the requisites to constitute moduses.

The defendant, Cole, next says, that for some valuable consideration the plaintiff let to William Jellings all the tithes of all the titheable matters in the parish, except the modus for the milch cow and calf; and that he had paid Jellings all that was due, and insists therefore on his discharge. The defendant, Newitt, also relies on the same lease, if it avails Cole. In support of that defence the lease is produced, from which it appears, that the term expired in Michaelmas 1809, and whether the plaintiff meant to grant all the tithes or not is not now to be inquired. Then they say, that he farmed the tithes under a parol agreement; to which it was objected, that tithes are not the subject of a [372] parol lease; and if that were so, Jellings would have had no right to receive them; and if he had none, the plaintiff would; at all events, it is clear, that the plaintiff was not entitled to tithes down to Michaelmas 1809, therefore we are to direct our attention only to the subsequent time.

Now Jellings says, that from 1809 he held under a parol agreement, and that he received all that he considered due for the tithes from Cole, except the tithes of calf and foal. If indeed that appeared, notwithstanding the agreement was by parol, probably the rector would not be entitled to recover the value again from Cole. If they had not been received it would be another question. It is however stated, and it is a very loose expression, that Jellings received all he considered due from Cole; and it is hardly to be supposed, that when the exemption was understood by Cole, on which he has insisted, that he would have paid those tithes; but the agreement being by parol, the precise terms do not appear. It has been said, that no tithes were considered due from the lands in question, because they were in North Fen; whereas it is quite clear that Cole had some land liable to tithes, and therefore I think the plaintiff entitled to a decree for all the tithes he demands for those lands, from Michaelmas 1809, except for milk. That is all that relates to the rectory of Mepal.

Then the plaintiff, as vicar of Sutton, claims all the tithes, great and small, of the North Fen and Holts or Hollbrooks, and some other parts of Sutton [373] parish, containing 3700 acres, situate in a fen called Sutton Fen. Some of the defendants occupy lands in the fen. The other defendants, the dean and chapter of Ely, are rectors, and they and their lessees claim the great tithes as rector: but with respect to the small tithes the rector admits the vicar's title to all, except saffron, osiers, and mills, which are at present not in question. The occupiers and rector deny his right to great tithes, and the occupiers also deny his title to all the small tithes: therefore

the question is much narrowed by the rector (who is entitled at common law) admitting the vicar's right: and thus it lies merely between him and the occupiers as to the small tithes. They admit the plaintiff, if he be vicar, to be entitled to the tithes of hay within certain known lands, called Cottage Homesteads, a few pieces of meadow in the high lands, and a few pieces of meadow in the mead-lands: and that he had received the tithe of hay from a certain farm called Sutton Holwood, or Little Holwood farm, under and by virtue of some agreement between the dean and chapter of Ely, to whom the same belonged, and some or one of his predecessors: and that he had also received the tithe of grass and fodder from the fen called Middlemoor: but they deny that he is entitled to hay from any other parts of the parish. They also admit him to be entitled to certain small tithes, and that the other are payable to the rector. The rector however disclaims. Then they say that certain small tithes are covered by moduses: "5d. for every milch cow, in lieu of the tithes of the milk of such cow: one halfpenny for every calf fallen or dropt in the parish, in lieu of the tithe of the [374] said calf, and a tenth part of the price, if sold: and a modus of twopence-halfpenny for every foal fallen in the said parish, in lieu of the tithe of such foal."

The modus for the cow has been proved, and so has the halfpenny for every calf: but the modus of twopence-halfpenny for every foal having been, as in the former instance, laid without the qualification which is annexed to it by the proof, that will fall under the same objection as was applied to the other part of the case, and as to that, there must also be a decree for an account in favour of the plaintiff.

Then, the rector admitting the right of the vicar to all small tithes, excepting the excepted articles, and the occupiers admitting it also by the inference afforded by the disclaimer of the rector, as the small tithes must be due either to the rector, or the vicar claiming under him, we must take it to be proved that the vicar is entitled to all other small tithes generally. His title to agistment might have been doubted: but that where the title is general, with certain express exceptions, and the rector is not proved to be entitled beyond those exceptions, we must consider the evidence of perception as applying to all, and must presume the vicar to have been endowed of all the other small tithes arising within the parish. I am of opinion therefore, that he is entitled to an account of all the other small tithes, except such as are covered by the moduses which have been established.

[375] On the modus for milk, therefore, there must be an issue. On the calf-modus, which was laid and proved as one entire custom, there must be an issue also. The modus for foal lying under the objection already mentioned, there must be an account for that tithe.

We then come to a very important part of the case, as it affects the interest of all the parties before the Court; for although the question is chiefly between the rector and vicar in substance, yet it is of importance to the occupiers to sustain the denial by the rector, of the vicar's right, on account of the question of costs.

The vicar claims the great tithes of the North Fen, and Holts or Holbrooks, which are places situate within the vicarage.

In support of that claim, there is no endowment, or even any terrier, produced; and the case rests solely on the agreement of 1621, and the subsequent decree. It becomes important to see how the matter stood before that agreement was made. There is no evidence of any endowment of the great tithes of the parish; but it appears that the vicar had perception of the great tithes in Middlemoor, Mead land, Cocksnest, and Little Holwood; but the defendants say, that those are not parts of the fen, and that therefore, that perception cannot apply to the land inclosed in the time of Charles the first; and that, therefore, perception of tithes there, is not evidence of an endowment of the great tithes of the fen, or of those of any other part of the [376] parish, than where perception has been proved to have been had. There is no mention of any tithes paid to the vicar in the leases of the reign of Elizabeth. Then, in James the first, there is a lease of the rectory, with a covenant that the lessees should pay tithe to the vicar, shewing, therefore, that something new had arisen between the time of Elizabeth and James. It is difficult to say what construction should be put on these transactions. It appears clearly from the latter lease, that there had been perception of tithe of hay by the vicar, before the decree, but with respect to the effect of the proof of that fact on this question, it is difficult to say what is to be inferred from the lease. It is certainly unusual for lessors so to make

voluntary provision for the church, in their leases to tenants, by forcing them to pay tithes to the vicar: but as to its being an augmentation, there is no foundation or pretence for such a supposition, for the vicar is not a party to these leases. The law on that subject was not passed till the time of Charles the second, subsequently to the Restoration, and this lease was made in the time of James the first.

I now pass on to Sutton, or Little Holwood, and there there is the same covenant in the leases as was contained in the other. I feel insuperable difficulty in saying what ought to be the effect of these transactions; but it is not of so much importance in my view of this case.

The defendant's argument is, that the leases operated as an augmentation to the vicar: and that as to other parts, where he has received tithe, we [377] ought to presume a similar origin, and not an endowment: and that it is not to be presumed, where the perception is confined to particular places, that the endowment, if there was any at all, was applicable to the whole fen.

On the other hand, the vicar is not a party to those leases; and augmentations were not referred to by statute till long after the Restoration.

Then the agreement of 1621, on which all turns, comes to be considered. At that time vicars were not competent to bind those who came after them: so the law stood then. In the decree, the dean and chapter are described, not as rector, but as lords of the manor. It also appears from the agreement, that the subject of it was marsh-land, and common, not producing any great tithe: and it is to be gathered from it, that the expectation was, that the property was likely to be used as pasture in future times. The rector and vicar had both an interest in the common, independently of their ecclesiastical right: and the vicar is described as a tenant as well as vicar. There is nothing throughout the whole decree which speaks of the dean and chapter, as rector, or as claiming tithes: on the contrary, it rather looks like an abandonment of their claim, although there is nothing expressed to shew that any right was given up by them, in their character of rector. I will only observe further on this paper, that it appears from it, that the allotment was made to the vicar of Sutton, as vicar, and also as tenant, [378] probably in respect of his glebe. The order is, that Richard Wigmore, clerk, the then incumbent in Sutton, and his successors incumbents there, should, in right of their vicarage, have and enjoy for his and their allotted part, 20 acres, for and in lieu of his and their right of common, in consideration, that neither he nor any of his successors, shall thereafter claim or demand, in right of the said vicarage, tithes out of any the aforesaid commons, after they shall be allotted, except tithes of milch kine, &c. and such like, and except tithe of one fen, called Little Holwood. Now of Little Holwood the rector was owner, and thenceforth, from that district, the vicar has confessedly received all the tithes both great and small.

But before this decree there was, certainly, no evidence of any thing like an endowment of great tithes: and the question is, whether it is not to be gathered from that document, that the tithe of all titheable matters is not admitted by the rector to belong to the vicar. It is altogether a singular transaction. The dean and chapter have never once described themselves as rector, which, if they were conscious of having any right to tithe in that character, is certainly very extraordinary. The vicar, on the contrary, had a claim to some tithes, and he takes an allotment. There is nothing in the agreement to affect the rector's right, if he had any, as is the case with the vicar. *Prima facie*, the rector had a right, but the silence of the decree makes against it. Then it must be noticed that [379] they have paid tithes for Little Holwood, and they have not received nor claimed tithe themselves; yet the great tithes must be due to one of them, for there is no third claimant.

The vicars, on the other hand, have also never received any tithe, or made any claim till the present time: but the plaintiff accounts for that by saying, that they thought themselves bound by the decree not to demand them. It may have happened too that no great tithe might have arisen till lately, so that the attention of either party might not have been called to the subject. It is on the whole a very equivocal and doubtful case, from which different minds might well draw different conclusions. It is certainly a strong fact,—to shew that the rector did not consider himself entitled to the great tithes at the time of the agreement,—that he did not make any mention of that right. The matter is nevertheless involved in great obscurity and intricacy: and though I have examined it with great care, I am not able to come to any decisive

conclusion. The long acquiescence of the rector may also be considered as evidence of his not having any right, or at least, as proof of a consciousness that he had none; but, as it is a nice and difficult question, and as there is nothing to prove the right in the vicar, but that decree alone, I fear I should be doing wrong if I were not to send this to a further inquiry.

As to the small tithes, there must be a decree for an account. On the question of the great [380] tithes there must be an issue, in which the vicar must be made plaintiff.

The consideration of costs to be generally reserved.

THE KING v. GREGORY. 12th July 1817.—Where a confirmed purchaser of premises under a decree of the Court, died before any conveyance had been made to him, having in the mean time devised his interest therein to trustees, the Court ordered that a conveyance should be made to them, without the consent of the testator's heir at law, he being an infant.

John Wood was the purchaser of premises, sold in the usual manner, under a decree in this cause.

He was confirmed the purchaser, and ordered to pay in his purchase money, and to be let into possession; and under the orders in that behalf he paid in his money, and was let into possession.

He shortly afterwards died before any conveyance had been made to him, and devised these premises, and all his real estate, to certain persons upon trust.

The devisees had moved, that a conveyance might be made to them.

The Court then said that could not be done without the consent of the purchaser's heir at law.

[381] But being now informed that the heir was an infant, and therefore could not consent; and that the utmost inconvenience would arise from not allowing a conveyance to be made to the devisees in trust of the purchaser, the conveyance was

Ordered.

THE ATTORNEY GENERAL v. HARDING AND OTHERS. 12th July 1817.—The Court will not make an order that the witnesses of a defendant claiming goods seized by the customs, may be allowed to inspect them before the trial of the usual information in rem, on an affidavit of the party, that he believes he shall be able to prove by such witnesses, that the goods are not contraband, but were made in this country, and, for the most part, by the witnesses, who were required to be allowed to see them.

Adam moved, pursuant to notice, that the witnesses of the defendants might be allowed, at proper times, and on reasonable notice, to inspect the goods, (a quantity of black silk and thread lace,) which had been seized by the Customs as smuggled, and appraised, for the condemnation of which the present information in rem had been filed.

The affidavit of one of the defendant's partners stated, that he believed he should be able to prove that none of the goods seized were contraband; and that a great part thereof was actually manufactured by persons in this country, whom it was the intention of the defendant and his partners to bring [382] forward on the trial of the cause, to prove the manufacture thereof;—that the said witnesses were numerous; and that it was necessary that they should be allowed to inspect the said goods, to be prepared to give such evidence.

It was thereupon moved that, as the witnesses alluded to in that affidavit not having seen the laces in question for a long time, whereby it became necessary that they should be allowed the opportunity sought to be given them by the present application, the Court would make an order for the purpose; but,

The Court having stated that this motion was quite novel, and that such applications had a tendency to embarrass the proceedings of those whose duty it was to protect the public revenue, and to throw difficulties in their way which they had not

the means that private parties possessed of obviating, and that it would be, therefore, a dangerous precedent, refused the application.

Order refused*.

[383] LAYNG v. YARBOROUGH. Saturday, 12th July 1817.—A modus of 5s. for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe-milk of the cow belonging to such calves, called renew cows, or cows having had each a calf within the year,—preceded by a modus of three halfpence for every cow called a renew cow, or a cow that has had a calf within the year and is full of milk,—in lieu of the tithe of the milk of such cow, cannot be supported on the ground of inconsistency.—Wood, B. dissentiente.—The latter standing alone, would also be objectionable, because it is not stated what is to be paid for the number of calves under five, or between ten and five.—One shilling for every tenth fleece, in lieu of the tithe of the ten fleeces, rank.—It is also bad on the second objection taken to the preceding modus. By Wood, B. aliter.—Three-pence for a lamb, or 2s. 6d. for every tenth lamb, in lieu of the tithe of such ten lambs, not so rank as to be decided on by the Court of Equity without an issue.—Graham, B. dubitante.—One shilling for every tenth pig, in lieu of the tithe of such ten pigs, rank, and not sufficiently particular as to intermediate numbers, and therefore bad.—Wood, B. contra.—So as to geese.—A modus for tithes of articles of modern introduction, cannot be supported, because of the anachronism.—Eighteen-pence in lieu of tithe of rape-seed, when sold in the seed, is bad for uncertainty, and being capable of fraud.—Wood, B. dissentiente.—The following moduses held good and issues decreed:—4d. for messuage and garth—2d. for every cottage and garth—1d. for every strip cow—4d. for every foal—2s. 6d. for every tenth lamb, in lieu of the tithe of such ten lambs.—As to all the other moduses, the usual account. Costs to be taxed, and the consideration as to payment reserved.

This was a bill filed by the vicar of St. Lawrence without Walingate Bar (York), for an account from the defendants (occupiers) of all the titheable matters, except corn, hay, hens and eggs, taken by them on their respective farms.

[384] The grounds of the defence were as follow: 1st, That the plaintiff never resided in the parish. 2dly, The following moduses:

Fourpence for every messuage and garth.

Twopence for every cottage and garth.

A penny for every cow called a strip cow, or cow that has not had a calf within the year, and is old in milk, in lieu of the tithe of milk of such cow.

Three halfpence for every cow called a renew cow, or a cow that has had a calf within the year, and is full in milk, in lieu of the tithe of the milk of such cow.

Five shillings for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe-milk of the cow belonging to such calves, and called renew cows, or cows having had each a calf within the year.

Two shillings and sixpence for every five calves, where there happens to be only five calves, in lieu of the tithe thereof, and also of the tithe-milk of the cows belonging to such calves, and called renew cows, or cows having each had a calf within the year: but for every calf under five the answer stated that no tithe was ever paid, or any thing in lieu of the tithe of every such calf, save as to the additional payment of fourpence-halfpenny, as thereafter mentioned.

[385] Fourpence for every foal, in lieu of the tithe thereof.

One shilling for every tenth fleece of wool, in lieu of the tithe of every such 10 fleeces of wool.

Two shillings and sixpence for every tenth lamb, in lieu of the tithe of every such ten lambs.

One shilling for every tenth pig, in lieu of the tithe of such ten pigs.

One shilling for every tenth goose, in lieu of the tithe of every such ten geese.

Five shillings for every acre of potatoes, in lieu of the tithe thereof.

Two shillings for every acre of turnips, when the same are eaten by the cattle of the person who grows the same, in lieu of the tithe thereof.

* Vide *Attorney-General v. Green*, ante, vol. i. p. 130.

One shilling and sixpence in the pound in lieu of the tithe of turnips, when sold by the person who grows the same.

One shilling and sixpence in the pound in lieu of the tithe of rape-seed, when the same is sold in the seed.

Five shillings for every acre of line or linseed, in lieu of the tithe thereof; all of which become due and ought to be accepted, &c. on the 21st day of December, or on the last day of each year.

[386] The answer then stated, that such payments were all ancient and immemorial payments, and never had been raised, except about thirteen years ago, when an additional payment of fourpence-halfpenny for each calf under five calves was, on the request of the then tithe-gatherer, consented to by some persons, and had since been paid, but which, they insisted, ought not to destroy the said customary ancient payments. The payments were all proved, and non-perception of tithes in kind.

Martin, and Roupell, for the plaintiff, insisted on the following objections to the several moduses, or as pleaded, or as proved—that the modus for message should have stated the house to be ancient, and that that for the garth should have described its quantity or boundaries, otherwise it would be uncertain and indeterminate. To the modus of one penny for strip cow, and one penny-halfpenny for renew cow, they objected that they were badly laid, in not having stated expressly, when those moduses were respectively payable; for the moduses are all stated to be payable collectively, and in the aggregate, on the 21st of December, or at the end of the year; whereas many of the separate species of tithe is of right payable at the time of its production, as wool at shearing time, &c. and that it did not appear for what time the modus so laid was payable; and they cited *Goddard v. Keble* (Gw. 631), and *Penrice v. Dugard* (ib. 632).

[387] To the moduses of five shillings for every ten calves, and two shillings and sixpence for every five, &c., they submitted, as insurmountable objections both in point of pleading and of substance, that they were badly laid, as having been stated to be payable for the milk of the cows belonging to them, and called renew cows; because by the modus immediately preceding, the milk of that species of cow is stated to be covered by that modus; that they were rank in amount, and that they were also bad on account of there being no consideration given to the clergyman as a commutation for the tithes of the calves under the number of five, or for those between five and ten; that the same objection also arose as to the manner of laying these moduses as had been taken to the former—there being no time stated as the period to which the moduses were applicable, so as to shew the quantity of produce meant to be covered by the payment.

The several moduses of 1s. for every 10th fleece of wool, 2s. 6d. for every 10th lamb, 1s. for every 10th pig, and 1s. for every 10th goose, they contended, were palpably rank, and could not therefore be supported; and that they were also objectionable in not having accounted for any less number, to the tithe of which the vicar was as clearly entitled as to the tithe of the number stated.

To the modus of 5s. an acre for potatoes, and 2s. an acre for turnips, they objected the anachronism of prescribing an immemorial payment for articles of modern introduction in terms—a payment which must have originated before the time of Richard [388] the first—and that as a commutation for tithe of an article not known in this country till the reign of Elizabeth. They contended, besides, that if such a modus could be put on the record, the payment would be grossly rank; for 5s. an acre had been held rank, even for wheat. *Torriano v. Legge* (Gw. 909).

They insisted on similar objections to the moduses of 1s. 6d. in the pound for turnips sold by the grower, both that such a payment could not have had an immemorial origin, the pound not having been known in England as a measure of money till the reign of Charles the first; that it was also rank, and was calculated to enable the occupier to defraud the clergyman; and they applied the same objections to the modus for rape, when sold in the seed; and to the modus of 5s. per acre for line or linseed.

Fonblanque, and Trower, for the defendants, contended that it was not necessary that the house should be laid as ancient, or that the garth should be more particularly described. In *Dr. Grant's case* (11 Co. 16, and Gw. 259. Hob. 10. Bunb. 108), it was resolved, that a modus might be pleaded for houses for which tithes were due, and no objection was made as to their not having been laid to be ancient. So also in

Whitaker v. Legfield (Gw. 261), and *Legfield v. Tisdale* (ib. 263), where the tithe for houses and buildings was accounted for on the principle of the former liability of the land on which they [389] were erected. The object of the defence is to put these admitted payments into such a form as that they may be submitted to a Jury to decide on them, and therefore, whenever fair doubts arise, the obvious course is the direction of an issue.

To the objection of rankness, they answered, that the particular mode in which all the payments were made, and the very consideration which had been adverted to as a further objection to them—that where the numbers did not extend to a certain amount, nothing was to be paid for tithe,—furnished an argument against any objection on that ground. In *Gill v. Horrocks* (Gw. 861), a modus objected to on the hearing of the suit in equity, on the same ground, (because in laying the modus it was not said, and so in proportion for a greater or less quantity,) was sent to an issue, and established by a verdict; and the question, whether such an agreement was ever, in point of fact, made is one which ought peculiarly to belong to the province of a Jury, when it arises in any case of singularity, or deviation from the usual customs by which money-payments become entitled to be considered as moduses. They cited, as to the amount of the lamb-modus, *Webb v. Gifford* (ib. 708), *Green v. Askew* (ante, vol. ii. 314), and *Bertie v. Beaumont* (ib. 303).

As to the rankness objected to, 5s. an acre for tithe of line or linseed, it was admitted that there were no cases on that point: but it was urged that, [390] therefore, and in consequence of the prevailing want of knowledge of the value of such articles in the time of Rich. I. when it was probable that such things were of considerably greater proportional value than at present, the doubt should decide that the assistance of a jury was necessary, and therefore an issue ought to be directed.

They then defended the modus for potatoes and turnips, on the ground that, although historically they were reputed to be articles of modern introduction, yet in the case of *Boscawen v. Roberts* (3 Gw. 947), the Court decided that they were a subject of modus.

To all the objections founded on the suggestion of the agreement being open to fraud, they submitted in answer, that that, even if it were well founded, would not be sufficient to deprive the occupier of the benefit of such an agreement; and that, although in the case of mills and agistment the same objection arose to money-payments in lieu of those tithes, that objection had never been allowed to prevail.

Martin, in reply, insisted on the rankness of all the money-payments set up; and, adverting to the case cited to establish the proposition, that a modus might be pleaded for potatoes, he denied that that case was law, and asserted that it was calculated merely to mislead, as the principle would not bear investigation or discussion.

[391] He repeated, that the tendency to encourage fraud, inherent in the payment of so much in the pound for rape-seed, was an objection to that mode of paying the tithes which was sufficient to destroy it: and in the case of mills and agistment, he submitted that such a mode of rendering the tithe was adopted of necessity, and therefore the course had obtained in those instances where it could not be collected in any other manner, whereas rape is tithed in the field.

[Richards, Chief Baron. It has been held in the case of clover-seed, that it ought to be set out in the field (m).]

With respect to linseed, it was observed, that that was a statutory payment, under the 11th and 12th Will. 3, ch. 16.

Cur. adv. vult.

The Court, not concurring on all the points, now delivered their several opinions seriatim.

WOOD, Baron. In the case of *Layng v. Yarborough and Others*, there being a difference of opinion in the Court, it falls to my lot to give my reasons first, my learned brother Garrow not being here when the cause was heard. This bill was filed by Mr. Layng as vicar of St. Lawrence, without Walingate Bar, within the liberties of the city of York; and it is to recover the tithes of a certain district of that parish, called the constabulary of St. Lawrence, in the township of Heslington. The defendants [392] say they are not liable to pay any tithes in kind, because they have at all times paid moduses in lieu of tithes; and it is clear from the evidence which has been given in

the cause, that no tithes in kind have ever been taken, but that certain pecuniary payments have at all times been made in lieu of tithes; and the questions will be, whether all, or any, and which, of the payments which have been so set up, are legal and valid moduses.

It was said that some of these moduses are rank, and that others are inconsistent with themselves. With respect to the general doctrine of rankness, I will not, on this day, when we are much hurried, enter into the reasonableness or validity of it. I have already given my opinion upon it very fully, in *Heaton v. Cook*, in Wightwick's Reports; and therefore, with respect to that, I shall say nothing at present. Probably that matter will receive a further discussion in parliament, in the course of next session; and I hope something will be done to set us perfectly right on that subject. I have always thought, and always shall think, that the determination of moduses upon the idea of rankness is an usurpation upon the province of Juries, such as we are not warranted in, except in cases of very unreasonable payments. Modus is a question of fact, and the people of this country are entitled to have their cases tried according to law. That has always been my opinion; and, from the best investigation I have been able to give to the subject, I still retain it. However, I shall now confine myself to the consideration of the different [393] moduses which have been set up, and to see whether we are not warranted in declaring all of them to be good upon the authorities we have upon the subject.

The first modus set up is fourpence for every messuage and garth; the objection made to that was, that the term "garth" is not sufficiently definite; and that it is not alleged of what particular quantity a garth consists. I understand from my brother Graham, that that is not disputed; but is conceded to be a good modus. It is a term very well known in the north of England, and it is mentioned in Cunningham, and all the Law Dictionaries, I believe, as a thing as well known as an orchard; and we have held, that a prescription for an orchard and garden is good in general; with respect therefore to a messuage and garth, or a cottage and garth, there is no objection to it.

The next modus is a penny for every strip cow, or a cow that has not had a calf within the year, and is old in milk, in lieu of the tithe of milk of such cow. There is no objection, I think, made by the counsel to that, if it be well laid; but it is said that it is not, because it is not stated for what time the modus is payable (a). If it is meant by that, that no time is stated when the modus is to be paid, that is not the fact, because all the moduses are in general alleged to be payable on the 21st of December. With respect to the time they are to cover, it must be one year; therefore it is sufficiently certain that it is [394] meant to cover the tithe of the strip cow for one year; and all the other moduses are stated to be payable on a precise day at the end of the year; therefore I conceive that generally to be a good modus.

Then the next is a penny-halfpenny for every cow called a renew cow, or a cow having had a calf within the year, and is full of milk, in lieu of the tithe of the milk of such cow. There is no objection to that, as I understand from the Counsel, if it had been well laid. They make the same objection to that as to the other; but, however, it appears to me that that is clearly a good modus.

The next modus is five shillings for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe milk of the cows belonging to such calves, and called renew cows, or cows having had each a calf within the year. There is another, which I will state at the same time, because they seem to be connected: two shillings and sixpence for every five calves, where there happen to be only five calves, in lieu of the tithe thereof, and also of the tithe milk of the cows belonging to such calves, and called renew cows, or cows having had each a calf within the year; but for every calf under five no tithe was ever paid or demanded, or any thing in lieu thereof, except fourpence halfpenny as thereafter mentioned. This alludes to what is said afterwards in the answer, that about thirteen years ago fourpence-half-penny for every calf was paid by some persons, as it is stated.

[395] Now the objections to these two moduses are, that there is no satisfaction for the tithe of any calves under ten, and above five; and no satisfaction for any calves under five; and they are also said to be inconsistent, because there has been already a modus of a penny halfpenny laid as for the milk of every renew cow, and here the milk is repeated again as to the calves. Certainly these are not laid very correctly, nor

(a) Held not a fatal objection in the case of *Gibb v. Goodman*, Bumb. 328. Gwilt. 735.

technically : and it is very much to be lamented that in most of the answers we see, we can scarcely find one that states a modus with precision and legal certainty : however, if we can collect the true sense and meaning of it, it is then sufficient to send it to a Jury, provided the question of rankness does not interfere to prevent it.

Now let us see how far they are inconsistent. The inconsistency is said to be, if I understand it rightly, there being first a penny half-penny for the milk of every cow, and then a repetition of the milk of the cows belonging to the calves. Now I take the meaning of it to be this, that for every renew cow there is at any rate payable a penny-halfpenny to cover the milk, that is, to cover the milk in whatever shape it may be used. It is very clear that the milk of the cow may be used for suckling the calf, or for household purposes : and therefore at any rate the vicar is entitled to a penny-halfpenny for that ; then the next is, the farmer is to pay for the calves, and the milk, as I understand it, which their calves have ; it may be tautology, so far as respects that ; but it is no inconsistency : for the first is, whatever milk you have, [396] whether you use it for the calves or not : in lieu of milk you shall pay a penny-halfpenny for the cow : or if you use it to suckle the calves it shall be covered under the calf-modus : and I see no inconsistency in it, though perhaps it is not well expressed.

Then the next objection to it is, that there is no satisfaction for any calves above ten, nor for any calves above five, until you come to ten ; I agree that that is so : but still I consider that it is a good modus. The modus is five shillings for every ten calves ; it does not stop at the first ten calves, but for every ten calves ; supposing there are a hundred calves, there are to be ten times five shillings paid : if it was to be only for the first ten calves, and to pay nothing more, it would be unreasonable, because they would then only pay one five shillings : but here the modus is, that they shall pay five shillings for every ten that they have.

Then for every five calves they are to pay half-a-crown, that is, for five, half-a-crown, and for ten, five shillings : this cannot be considered rank by any means : there have been many instances where moduses for calves of sixpence a calf have been held good. In *Pacock v. Coles*, in the year 1684, reported in 1st Wood's Tithe Decrees, 336, it was sent to an issue, whether there was a modus of sixpence for a calf, in lieu of tithe, and there are many instances in the books. In the 1st Wood, 365, in the case of *Harding v. Golding* in 1696, there was eight-pence for the tithe of every calf, and it was held good : that would be six shillings and eight-pence [397] for ten. In *Gibb v. Goodman* (2 Gwill. 735 Bumb. 328), there were six shillings and eight-pence paid for every tenth calf : there was an objection taken to the rankness of it : but the Court would not have sent it to an issue if they had considered it rank ; yet they did send it to an issue ; and they said, that the jury might find whether it was payable for a greater or less number, in the proportion of six shillings and eight-pence, and if it were, it would be a good modus : but there being in that case a prescription for every tenth calf in lieu of all calves whatsoever, the Court thought it rank, because there was nothing payable for the intermediate calves. Still they said it might be made good, if the jury found a proportion payable, if there were less than ten : so that the objection of rankness to six shillings and eight-pence was not admitted in that case. They went on this, that it was a prescription for a certain sum in lieu of all tithes. In this case there is for every ten calves a modus of five shillings, and for every five calves a modus of half-a-crown.

Then the question is, whether it is not reasonable to suppose, that in consideration of a larger sum paid for a certain number, the farmer or owner of the calves might be excused from paying when it was under that number. In the case of *Mantell v. Paine*, in 1798, before Lord Chief Baron Eyre, reported in 4 Gwillim, 1504, it was held, that a custom to pay one pig where there were seven and under ten was good, although no satisfaction was to be made where the number was under seven : [398] is not that pretty much the same as this ? They prescribe here to pay five shillings for every ten calves, and half-a-crown for every five there happen to be, that is, they pay nothing under five, but two shillings and sixpence for the five ; then they pay nothing from five to ten, but for ten they pay five shillings, and nothing for a less number than five ; therefore, there appears to me to be no objection to any of these moduses.

If we go farther back into more remote periods, we find in the case of *Reddington v. Nee* (2 Wood, 62) (1716,) a modus of, for every sow and ten pigs, one pig ; if but seven, the same ; but if fewer than seven, they were to pay nothing for tithe : and

that was held good, and no objection was taken to it. There was also in a case since, for every ten fleeces one, and for every seven fleeces one, and for fewer no tithe: so that there are many instances where paying more for a large number, nothing is paid for a less number; and therefore, it is not a non decimando, under that number, because the parson has more for the larger quantity. For every five, as I understand it, this clergyman will have two shillings and sixpence, but nothing for a less number: I can see no objection to that; and it seems to be warranted by the authorities. I have already shewn that it is warranted by the reasonableness of the case. Moduses are contracts which have run for a length of time; and why cannot we suppose that parties might make such a contract as that. If you consider this as a composition, it appears to have existed long; that there is nothing so unreasonable in it as [399] to lead to the conclusion that it could not have existed as a contract before legal memory, because it has in fact existed as a contract during living memory. Why cannot we suppose that a clergyman would stipulate, if you pay him half-a-crown when you have five, you shall pay for none less; there is nothing improper in that, and therefore I am of opinion that all these moduses as to the strip cow, the renew cow, and the tithe of calves, where ten or five, are perfectly consistent, and although they might have been laid plainer or clearer, that is the fair construction to be put upon them.

The next modus is fourpence for every foal; with respect to that, I do not find any objection, and I take it there can be no dispute that that is a good modus.

The next is one shilling for every tenth fleece, in lieu of the tithe of ten fleeces. Now, I cannot conceive any objection to that; the objection made is rankness; but I do not conceive how that can possibly be considered rank; for observe what the description is. It is not a shilling for every fleece. If it was a shilling for every fleece it would be rank, I agree: but attend to the terms: it is a commutation of the tithes for money; for every tenth fleece you shall take one shilling in lieu of it. In lieu of what? not of all the tithe, but in lieu of that tenth fleece, or the ten fleeces. If the fleeces do not amount to ten, I admit the vicar may be entitled to some pecuniary compensation for the tithe, according to value, and that he may have by subdividing the modus; there may [400] be a modus as to a part of a tithe, leaving the rest untouched. If this modus be divided into parts it would be one penny, and not quite a farthing a fleece more. I can never hold that to be rank. In *Boswell v. Roberts*, (3 Gwillim, 946,) one penny for every fleece was held good, and decreed: and in another case three halfpence for every fleece has been held a good modus. Then this is a shilling, not for the tithe of every fleece, but it is a shilling for the tenth fleece, that is to say, when I am liable to pay you the tenth fleece, in lieu of that you shall take a shilling; there is nothing rank in that; and therefore from the manner in which the objection is made, I think it could not have been understood, because if it was a penny halfpenny for every fleece it would be good; then why cannot a shilling be good for every tenth? The parson will be entitled to his tithe in kind. (that is, the value of the tithe in kind,) for any number under ten, and when it amounts to ten he is to take a shilling instead of the tithe in kind.

Then the next modus is two shillings and sixpence for every tenth lamb, in lieu of the tithes of ten lambs; that is, on the same plan; it is, if a tenth lamb becomes due to you, you shall take two shillings and sixpence instead of it: that would be, if you divide it, and make it cover the whole, threepence a lamb. It is true that in *Bishop v. Chichester* Lord Thurlow said, that threepence for a lamb was notoriously rank: but was he warranted in that? most undoubtedly he was not: and it is merely a dictum. But how does this modus stand [401] with respect to lambs? There have been larger moduses. In the first volume of Wood, 200 (*Habber v. Claver*), there is fourpence a lamb, in the year 1680: for this idea of rankness had never crept into the law at that time: I believe the objection originated in *Gifford v. Webb*, which went to the House of Lords. Again, in 1 Wood, 373, *Leach v. Davon & Watts*, (1696,) there was for every lamb yeamed in the parish threepence, and held good. Then came the case of *Gifford v. Webb*, which was this: it was decided first, by two Barons, that threepence for a lamb was good. There was a petition for a re-hearing: there was afterwards a re-hearing, and then all the Barons concurred in opinion that it was a good modus. The parson was dissatisfied, and he appealed to the House of Lords, who held it not rank; therefore what authority Lord Thurlow had for his dictum in *Bishop v. Chichester*, I cannot say; it was not founded in legal authority. Since that time this Court has considered rankness: and we, in the recent case of *Birtles v.*

Beaumont, directed an issue to try whether threepence for a lamb was rank or not : so that I take for granted, upon that authority, that it cannot be disputed that threepence for a lamb, or (what is the same thing) a commutation of two shillings and sixpence for every tenth lamb, is good : therefore I conceive that modus to be valid.

The next modus is a shilling and a halfpenny for every tenth pig, in lieu of the tithe of such tenth pig : There is nothing said there also about [402] the intermediate quantity : but this is only a commutation of money for the tithe in kind. And what objection can there be to that ? There are many moduses as high as that : it would be a penny three farthings a pig, and if that meant the tithe of all pigs, that would be rank ! and if that is not rank, then a shilling and a halfpenny for the tenth is not rank. It does not go in lieu of all tithes of pigs : but it is a commutation, that for every tenth pig due to you, you shall take one shilling and a halfpenny.

The next is a shilling for every tenth goose. That comes under the same observations as I have made as to the others : Instead of taking the goose in kind, when there are ten you shall have one shilling in lieu of it. In the case just mentioned, of *Boscawen v. Roberts*, one penny-halfpenny for every goose was held a good modus : and that would amount to more than a shilling for the tenth goose.

The next is five shillings for every acre of potatoes. Certainly that cannot be sustained, because it is a prescription for potatoes by themselves : and potatoes are of modern introduction : there can be no doubt, therefore, that that certainly is bad.

The next is two shillings and sixpence for every acre of turnips : that is bad upon the same ground, because they are also of modern introduction, and there cannot be a modus for that which has been introduced within time of memory, if it be so expressly laid.

Then the next is eighteen pence in the pound [403] in lieu of the tithe of rape-seed when the same is sold in the seed. I suppose the objection to that is, that a modus to pay so much in the pound is bad because it is liable to fraud. Now I find many instances where so much in the pound has been held to be good. In 1 Wood, 60, (*Holbech v. Taylor*), two shillings for every pound rent of the lands agisted for tithes of herbage, was held to be good. In *Simpson v. Tucker*, in the same book, p. 197, twenty pence in the pound for agistment, according to the yearly rent, was held to be good. In *Ernst and Others v. Watts*, 1 Wood, 304, (1692,) for such apples and pears as the parishoner gathered and sold, the tenth part of the money for which he sold the same : that was established as a good modus. In 1 Wood, 373, an. 1696 (*Leash v. Deacon and Watts*), the tenth of what the calf sells for, or, if killed by the owner, the right shoulder : also the tenth penny for which honey sold within the parish, was held to be good. In the same book, 485, *Hockmore v. Richards*, a penny for every calf fallen and reared : and also the tenth part of the price for which every calf fallen therein has been sold by such owner or occupier, was established ; and in the case of *Leathes v. Newitt*, yesterday, we sent a modus to trial, of the tenth of what the calf sold for. Now here, I conceive, is abundant authority to shew that a tenth part of the rent, or a tenth part of what the thing is sold for, is good. I am aware of the case of *Startup v. Dodderidge*, in 1705, where two shillings in the pound, according to the true improved yearly rent or value of all the land in the parish, in lieu of all tithes, was held bad, principally on the ground [404] of liability to fraud, and yet I do not find that rule has been applied to a modus for any other subject of tithe : and it is remarkable that it was in the year 1705 when *Startup v. Dodderidge* was decided : and yet in the next year, 1706, the Court of Exchequer, in *Hockmore v. Richards*, determined the tenth part of the price for which a calf sold to be good : therefore I think I am warranted in saying that this modus is also good.

The last is five shillings for every acre of line or linseed, in lieu of the tithe thereof : this, though called a modus improperly, is a statutable payment given by the 11 and 12 William III. cap. 16, and the vicar cannot take more.

Upon the whole, I think all the moduses good, and that they ought to be sent to be tried, with the exception of those which I have mentioned ; viz. for potatoes, turnips, and line or linseed.

GRAHAM, Baron. I have the misfortune to differ from my learned brother Wood, with respect to several of these moduses, as indeed I am often obliged to do : but I have some satisfaction in finding that I generally concur with the majority of the Court, and I cannot but express the little surprize I feel in differing on this occasion, because the view which he has taken of the consideration of these moduses does not

fall in with the general impression I have picked up by looking at the authorities, not of one Judge, but established by the decisions of the majority of the Judges, in the various cases which I have felt it my duty to study.

[405] Now there are several of these moduses that I do not mean to dispute at all, and which, as they stand at present, may fairly undergo further inquiry. With respect to fourpence for every cottage and garth, I think that that term is sufficiently understood in many parts of the kingdom, to admit of a ready application of any pecuniary payment to it, as a subject of modus. So twopence for every cottage and garth, in lieu of the tithes thereof, there is no objection to that: and as it appears to me, there is no objection, upon the evidence, to the third modus, of a penny for every cow called a strip cow, or a cow which has not had a calf within the year, and is old in milk, in lieu of the tithes of milk of such cow; but with respect to the three succeeding moduses, they seem to be so confounded, so inexplicable, and so perfectly unintelligible, that after the utmost labour and ingenuity which I can bestow upon them, I am prepared to say that not one of them can stand, and it will be necessary for me to state my reasons very particularly.

The first modus to which I object, as involving (when taken with that which follows) one confused notion of a modus founded on several payments, is that of the penny halfpenny for every cow called a renew cow, or a cow having had a calf within the year, and is old in milk, in lieu of the tithes of milk of such cow. Now this modus, taken by itself, stands simple and absolute; and any person looking at it would necessarily understand that it was a penny halfpenny payable for every individual cow, (be their numbers what they may,) which should answer the [406] description of a renew cow, in lieu of the tithe of its milk, and so it might stand without any qualification whatever. But mark the qualification that is necessarily introduced by the succeeding modus, not taking them by themselves. That cannot be true according to the very next modus; for a renew cow does not pay a penny halfpenny for every calf, if the next modus exists; but for every ten calves, when there happen to be ten, five shillings instead of a penny halfpenny are to be paid in lieu of the tithe of such calves, and also of the tithe of the milk of the cows belonging to such calves, and called renew cows. How can that consist? The first proposition was, that the renew cow paid only a penny halfpenny for milk: then they say the renew cow does not pay a penny halfpenny for the milk, but the modus dances, shifts, and leaps from the simple subject of the milk, and is confounded with the two other subjects: and by a most unaccountable effect, that cow, which in respect of its milk pays only a penny halfpenny when she has ten calves, pays five shillings in lieu of the penny halfpenny: and so when there are five calves, two shillings and sixpence is to be paid in lieu of that one penny halfpenny. Now my first objection to this is, if you state the first modus of a penny halfpenny for the milk of the renew cow, you should state it to be payable for the milk, except where there were ten cows and ten calves, or five cows and five calves, and then that they do not pay a penny halfpenny, but five shillings and two shillings and sixpence, in respect of the milk and calves. That would be the proposition, if any thing; but that is not so stated; and therefore [407] it seems to me, that at any rate the modus of a penny halfpenny for a cow cannot stand, because it is not stated to be modified by those qualifications.

With respect to the moduses themselves of five shillings for ten calves, and two shillings and sixpence when there happen to be only five calves, it appears to me that they are perfectly objectionable from the circumstance, that nothing is said as to what is to be paid for the calves up to five, or from five to ten, or for the calves from ten upwards to any quantity: because, unfortunately, from the manner in which the moduses are laid, that construction which a jury might put on it, as my learned brother suggests, is excluded by the very terms of it: for those moduses are expressly stated to be paid only when there are ten or five calves: and it would be monstrous if we were to be called on, in every instance, to help a defendant out in making good these payments, and tell him, instead of saying that the five shillings and the two shillings and sixpence are to be paid for the calf and milk, when ten or five, you mean in that proportion till they come to five, and in that proportion till they come to ten, and as they amount to fifteen, twenty, and twenty-five, and so on; but that is not only not stated, but the conjecture of it is precluded by the manner in which they have in fact stated their proposition, that it is paid in those two instances only: therefore it really seems to me that these three moduses are perfectly inconsistent and bad.

Whatever loose ideas may possibly be gathered from the fact of some pecuniary payments having been made, it seems impossible to pick out from them [408] what those distinct customs are upon which the defendants mean to stand. Besides, is it possible not to see, that the expression of five shillings for every ten calves savours so strongly of modern times that one can hardly doubt about it ; five shillings has evidently the strongest appearance, in my apprehension, of one of those modern payments which ecclesiastical people make with their parishioners, by way of temporary composition. But, I repeat, that from the observations I have made, I have satisfied my mind, and I hope those who hear me, that it is impossible to pick out any distinct custom to bar the plaintiff ; for with respect to these moduses, some of them are perfectly unintelligible taken together, and the others of them are equally unintelligible taken individually.

The next modus of fourpence for a foal I see no reason to find fault with.

With respect to the modus of one shilling for every tenth fleece, I will venture to say, though I have not much skill in agriculture, that, in many parts of England, a person would be glad to take a shilling for every tenth fleece, at this day, including lambs and all : and it is utterly inconsistent with all historical knowledge that one shilling should be paid for the fleece of any animal : long subsequent to legal memory, that was more than the price of a sheep. One shilling for a fleece, therefore, is rank on the face of it.

A notion has gone abroad, as if the term rankness was of novel introduction ; I have taken the same [409] pains as my learned brother, in the case of *Heaton v. Cook*, to which he has alluded, to shew that that is a mistake. That the grossness of the price has always been a subject of consideration for the Court in moduses, even those most zealously attached to the jurisdiction of a jury, (and none are more so than I am, where the Court cannot form an opinion of its own,) must admit ; and though the constant practice has been to send it to a jury in cases of doubt, the grossness of value is, in the first instance, to be taken into consideration here.

Now, in order to fortify myself in the opinion of its rankness, I would refer to the case of *Torriano v. Legge*, (Rayner, 521,) where a penny for every fleece was held bad. But there is another objection which goes to the very root of the thing, that it is ridiculous in the manner in which they state it, that there is a shilling for every tenth fleece ; for nothing is to be paid up to ten, or from ten to twenty. It is defectively and inconsistently laid, because it gives the parson nothing for the intermediate fleeces ; and if the farmer has, for years together, nine sheep, he pays nothing, which cannot be ; therefore, I think, that on both these grounds, it is bad.

Then we come to the modus of two shillings and sixpence for every tenth lamb, in lieu of the tithe of such lambs ; with respect to which, whether it is to be decided by the Court now, or by a jury, I throw myself upon the opinion of my Lord Chief Baron, and my brother Wood. I do not insist upon that, though [410] I am of opinion that it is palpably gross in itself. We know that up to the period of *Gifford v. Webb*, in two or three instances, the Court had no hesitation in saying that three pence for each lamb was gross. In *Gifford v. Webb*, the Barons, as has been truly stated by my learned brother, were of a different opinion, and the House of Lords confirmed their opinion, and sent it to an issue there. My learned brother will, however, forgive me for not agreeing with him, in attempting to impeach that decision of Lord Thurlow, or in treating his solemn opinion, in his situation of Lord Chancellor, with the same respect as an authority, as we treat the opinion of one of the four Judges of the Court of Exchequer. It is a little derogating from his authority not to give him the same degree of credit as one judge has with us ; but Lord Thurlow's authority on that subject was not to be despised, for it was one on which he had thought very much, and he was clearly of opinion that two shillings and sixpence for a lamb was ridiculous : he would not hear of it, and he actually refused to send it to an issue : and not one of the numerous counsel who there attended ever disputed it, but gave it up. Out of respect, however, to that decision in the House of Lords, we, in the case of *Askeu v. Greenhow*, sent an issue to try the question : and a very learned brother of ours on that occasion, when he came to lay the question before the jury, told them very roundly, that they could not doubt of it : that it was impossible, consistently with historical knowledge : and the jury found accordingly, that it was rank, and the modus was set aside. An application was made for a new [411] trial, and it was said that the judge had run away with the jury ; because he had told them

his opinion, and they had found accordingly; but we thought that no reason for granting a new trial; and certainly if the question of fact is left to the jury, whether a lamb would sell for that price at the time to which we refer, it is an absurdity that common sense will not admit of. Thus the matter was disposed of; yet we are now required to grant another issue on the subject. If this view of the case does not make a proper impression, let it go to an issue, and the result must be the same; I have a great idea of the integrity of juries, though I know they may on some occasions be biassed.

The next is a shilling for every tenth pig, without saying what is to be paid for a less or greater number; but I, proceeding on the idea which I have thrown out on the former part of the subject, should have no difficulty in supposing that a sucking pig was not worth a shilling, because the tithe pig is to be paid when the pig is at the dug; the farmer is not to keep it till it is a grown pig, the parson must take it in five or six weeks; now what can be said of one pig in a farrow being worth a shilling, at a time when the pig itself, and all the pigs in the sty, perhaps, would not have been worth so much. Then the question of rankness being discussed, another objection is, that nothing is stated to be payable for the numbers above or below ten.

The same as to geese; it is only one shilling for every tenth goose, that is more than a penny for [412] the tithe of a goose; I think that also is too gross in point of amount, and besides it is not stated what is to be paid for the intermediate numbers.

As to the potatoes and turnips, I will not take up the time of the Court with discussing the validity of that payment.

With respect to one shilling and sixpence in lieu of the tithe of rape-seed, when the same is sold in the seed, the cases which have been referred to may throw some degree of doubt on my opinion; but fortified by *Startup v. Doddridge*, it is impossible to consider that a valid modus, both from the uncertainty of it, and the opportunity it furnishes to defraud. It is true, in a late case, that circumstance was not adverted to; we seemed to think a qualification of paying so much of the price when sold might be good, though I do not think that expressed the value; but whether we did or did not then advert to that, this stands on its own ground; if it happens not to be sold, there is nothing to be paid; for it is to pay one shilling and sixpence in the pound, in lieu of the tithe of rape seed when sold. My objection to that accords with what was said in *Startup v. Doddridge*, where so much out of the rent was held to be liable to error, that it was impossible to know what was the rent; or whether or not a fine had been taken to reduce the rent; so that by those means the clergyman might be put to difficulties to know his right; and on a motion for a prohibition, the Court were of opinion, that was of itself a bad modus, as being liable to fraud upon the parson. I do not know [413] how we can say that a man is to have one shilling and sixpence in the pound in lieu of rape-seed; how is he to ascertain the value of it; I know no way but trusting to the man who sold it, and if he gives him a false statement of the price, he can only be detected by going about to all the persons to whom it was sold; and suppose they colluded, and the purchaser was directed to say it was sold to him for so much only, when he agreed to give the seller so much more, how is that to be discovered? It is leading the parson, whom it is the object of the legislature to place in security as to his rights, into a state of uncertainty, and to leave him at the mercy of the person who is to pay the tithes, which the law did not intend; and therefore I think that these moduses are bad.

RICHARDS, Chief Baron. I shall occupy but a very small portion of time, for the case has been so fully discussed by my learned brother Graham, that I should be inexcusable if I wasted any of that time which is so valuable on this day. I agree in general with my brother Graham; and for the reasons which he has stated, except as to the modus covering the lamb; though I concur with him in the reasons which he has given; and I should be of opinion with him entirely, if there had been no issues sent by this Court after the case tried before Lord Manners. But I understand that there has been a subsequent case in this Court, in which an issue was directed to inquire as to the validity of [414] three pence for a lamb (*n*), and that being the case I do not feel myself at liberty to say that this is a rank modus. My Lord Manners certainly did direct the jury as has been stated, and the Court here most assuredly confirmed his direction; and I should have considered it as a determination of the

Court with respect to the invalidity of that modus, if the Court had not subsequently entertained a doubt upon the subject, as they must have done when they sent an issue on the same point: and therefore I must differ from my brother Graham on that part of the case.

With respect to the rape-seed, I do not exactly concur with my brother Graham in the reasons which have satisfied him; but I need not say that I venture to differ from him upon that subject, because it seems to me that there is another conclusive objection here. The modus is for so much of the value of the rape-seed when sold. But when is it to be sold? That is not stated. Suppose it is not sold. Suppose it is kept till the end of the year. How is the vicar to know when the tithe is to be paid? Adding that circumstance to the objections stated by my brother Graham, I am of opinion with him on that part of the case.

With respect to the general question, whether this Court has a jurisdiction and a duty to decide against moduses, if they find that the fact is not [415] proved satisfactorily in favour of a prescription, I shall only say a very few words. Whatever the law ought to be, whatever the law may be expected to be, I take it we are here bound by our oaths to decide according to the law as we find it; I have found it to be the law of England, as it now stands, and I shall abide by it until the legislature orders the contrary. But that, as the law now stands, a Court of equity should decide upon facts as well as upon law, if they have sufficient evidence of the facts to satisfy their minds, the experience of every day proves: and it is nothing to say, that the question of modus is a question of fact, because if it be a question of fact, we are alike bound to decide it, if the evidence is sufficient to enable us to do so. It is like every other fact, and what is called rankness is only matter of evidence; if I see and am satisfied that there is not sufficient evidence to prove the fact of modus alleged by the answer, I am bound to decide against that modus as much as I am bound to decide upon any fact that I see in a cause. If I see the evidence in support of it unsatisfactory, I am bound to decide against it. If I find a modus laid inaccurately, I am also bound to decide against it; thus if I find a modus alleged of a shilling, for that which in the times to which we must refer, according to all the knowledge we have, would not be worth more than a penny, I am bound by my oath to decide that that is a payment of modern usage and not a modus; therefore on all these occasions, as the law stands, the Court is bound to inquire. I have inquired [416] myself, as well as I have been able, in the course of this cause, as I hope I shall on every other, and I am perfectly satisfied with the decision my brother Graham proposes, except with respect to the lamb.

Decree:—An account as prayed,—except as to the titheable matters, for which the following moduses were set up, of 4d. for every messuage and garth,—2d. for every cottage and garth,—1d. for every strip cow,—4 l. for every foal, and 2s. 6d. for every tenth lamb: and as to those payments, the plaintiff having declined to accept issues, the bill to be dismissed, with costs.

End of the Sittings after Trinity Term.

[417] APPENDIX.

The following are the Cases referred to in the cause of *Leonard v. Franklin*, p. 264, on the question of the admissibility of the book produced from the registry of Lincoln.

HALE v. EYSTON. 10th Nov. 1810.

The plaintiff, who was vicar of the parish of Welford, in the county of Northampton, claimed all small tithes by virtue of some ancient endowment, custom or usage, and amongst others, to all the tithes within that part of the parish called the Old Inclosure.

The book having been admitted in that case entirely on the authority of the precedents, it was thought necessary to investigate them, and it has been found that where the book was received, no objection had been taken to it, but in the case of *Harwood (Harward) v. Sims* referred to, it appears to have been objected to, discussed, and ultimately rejected.

The answer admitted the vicar's title to tithe throughout the parish, except as to such parts as were covered by a modus of 17l. 6s. 8d. set up for the lands in the parish called the Old Inclosure, in lieu of all the small tithes; and as to the lands forming what was called the New Inclosure, the defendants claimed an exemption under an award under an Inclosure Act of the 17 Geo. III.

[418] The sole question in the cause was, the validity of the modus set up, and the Solicitor General contended for the plaintiff, that the payment of 17l. 6s. 8d. was a comparatively modern composition merely, and not a modus; and amongst other evidence brought forward at the hearing, in support of the plaintiff's case, the transcript of the original endowment of the vicarage ^{*1}, as taken from the book in question, and which was read, to shew that the payment set up as a modus could not be so considered by the Court, by reason of its exceeding in the value the amount of the tithes of the whole vicarage at the time of its endowment, which was itself within legal memory, whereby it would appear that the amount in value of the vicar's tithes was 51. 6s. 8d. which after deducting what was reserved to the Abbot and Convent, was further reduced to 31. 6s. 8d. The Nona Rolls, 15 Edw. III. The ecclesiastical survey, 36 Hen. VIII. valued the vicarage at 10l. 3s. communibus annis, pensio [419] 40s. leaving 8l. 3s. The parliamentary survey made it 35l. — Pope Nicholas's taxation had it, "Church of Welford, 10l. 13s. 4d. pension to the Abbot of Suleby 2l."

For the plaintiff it was contended, that the documentary evidence was decisive against the fact of the payment being a modus, and particularly that of the book from the registry of Lincoln.

The counsel for the defendants ^{*2} admitted, that they could not dispute the admissibility of the book as evidence, but they insisted that neither that nor any of the other ancient documents were conclusive against the parol testimony of long continued payment, and therefore pressed for an issue, because the vicarage might in point of fact be worth more than their valuation according to the documents.

[In the course of the argument, the Lord Chief Baron observed, that the great question in the cause was the effect of the evidence offered, as to whether tithes had been rendered in kind within time of memory; and his Lordship intimated, that the phrase "minutæ decimæ," used in the ancient documents, was strongly against the existence of a customary payment; and Thomson, Baron, added, that where the value of the tithes is given in such documents, it implies a taking in kind.]

[420] HEEDEN v. FREEMAN AND OTHERS. (Extract from the Decree.) 22d Nov. 1810. — The book of extracts of endowments, tempore Archbishop Wells, alluded to in *Leonard v. Franklin* (ante, page 265), received in evidence. — The defence of

¹ In an ancient book of endowments of vicarages in the time of Bishop Walls, who began to preside over the see of Lincoln in the year 1209, and which book is remaining in the registry of the Lord Bishop of Lincoln.

Norhampton.

Welleford.

Vicar in Ecce de Welleford que est Abbis.

×

& 9 de Suleby an 9 ordin consistit in toto
 Altag dēo Eccli cum minutis decimis que
 valet viij N B Salvis Abbi, & 9 ventui iij
 N B Annuis de eāde de oneribus nihil est
 ordinatum.

(A true Copy),

John Fardell,*

Depy Register.

^{*2} Hollist, and ——— for some of them; and Dauncey, and Wingfield, for others.

* Who was personally in attendance to prove the extract.

a vicarage having been dissolved by a papal bull and re-annexed to the rectory, unavailable against such other evidence as was produced in this cause.

The plaintiff, who was vicar of Norton, in the county of Salop, filed his bill against the defendants, for an account of the small tithes on all titheable matters arising within the ancient inclosures of the said parish, and of corn arising on a farm called Sapsons or Sampsons, in Muscott, within the said parish.

Some of the defendants, by their answer, said, that they did not believe that by ancient endowment, prescription, or usage, the vicar for the time being, from time whereof the memory of man was not to the contrary, or for a great number of years last past, was lawfully entitled to have and receive for his own use, all small tithes from time to time arising, growing, increasing and renewing, within the ancient inclosures of the said vicarage and parish, and the titheable places thereof, and to the tithes of corn arising, growing and renewing on a certain farm called Sapson or Sampson, in Muscott, within the said parish. But the defendants believed, that in an ancient book remaining in the registry of the Lord Bishop of Lincoln, there was an entry respecting the endowment of the said vicarage of Norton aforesaid, in nearly the words and characters, and to the effect, or nearly to the effect in the bill set forth :—said, they apprehended that the said entry was not, nor did contain the endowment of the said vicarage, but was only an entry of the purport or part of the purport of such endowment, and believed that search had been made for the original endowment itself, but that the same had not been found : that they, from the said entry, believed that the vicarage of Norton aforesaid was, in or before the year 1209, endowed of all the altarage with the minute tithes to the church of Norton by Daventry aforesaid belonging, and of the tithes of Garb, of the fee of Sapson or Sampson, in Muscott, and of the tithes of [421] Garb, of Ivoo, of Waleron, in Northampton : and apprehended, that from that time until the year 1451 the vicar of the said parish was entitled to the tithes of which he was endowed as aforesaid ; but believed, and hoped to be able to prove, that in the year 1451 the said vicarage was, at the petition of the prior and convent of the monastery or priory of Daventry, in the county of Northampton (to whom in and before the said year 1209, and afterwards, until the dissolution of the said priory, the rectory or church of Norton aforesaid stood and was appropriate,) and on the petition of his late majesty king Henry the VIth, dissolved by the then Pope Nicholas the Vth, by his bull, on account of the poverty of the said priory, and was appropriated to the said priory ; and by which bull the said pope ordained, that whenever the said church or vicarage should become void for the future, the said church or vicarage should not be governed by perpetual vicars, but by monks of the priory or secular priests, to be instituted and removed at the will of the said prior, and without the licence of the ordinary or the king, or to that effect ; and that afterwards, and until the dissolution of the said priory, which happened in or about the 16th year of the reign of his late majesty king Henry the VIIIth, by means of a bull of the then pope, namely Pope Clement the VIIth, the church of Norton aforesaid was served by monks belonging to the said priory, or other persons appointed for the purpose by the prior of the said priory, and at his will : and defendants insisted, that by means of the said bull of the said Pope Nicholas the Vth, the said vicarage was dissolved or destroyed as a perpetual vicarage, and the said endowment was determined, and the tithes with which the said vicarage was endowed as aforesaid, were restored and re-appropriated to the rectory of the church of Norton aforesaid :—believed and hoped to be able to prove that the rectory and advowson of the said [422] church of Norton, and various other possessions of the said prior and convent, which belonged to them at the time of their dissolution, and were in and about the 17th year of the reign of his said late Majesty king Henry the Eighth, granted and confirmed to the college called King Henry the Eighth's College, in the University of Oxford ; and that they afterwards, and while they held and enjoyed the said rectory, had the church of Norton served, and the duties thereof performed, by their own priests or curates, to whom they allowed a pension or stipend for their services ; and that they having, in the 37th year of the reign of his said late Majesty king Henry the Eighth, surrendered the said rectory and advowson to his said Majesty, his heirs and successors, and the same being in the possession of the crown, his late Majesty king James the First, in the 6th year of his reign, granted the said rectory and the right of presentation to the said vicarage, with various other hereditaments, unto

Francis Phillips and Richard Moore, Esquires, their heirs or assigns, from or under whom ——— Britton, Esquire, in or about the 12th year of the reign of his said late Majesty king James, and before the 15th year of the same reign, became by grant or other lawful conveyance seised in fee simple of the said rectory and advowson or right of presentation:—believed, that although the said ——— Britton was as aforesaid seised of or entitled to the said advowson or right of presentation (in case he thought proper to present a vicar), his said late Majesty king James the First, in the 15th year of his reign, granted a presentation to the said vicarage to William Ward, clerk: and the said William Ward having, under an assertion or claim of right to tithes as vicar of the said parish, taken a lamb, the property of the said ——— Britton, as tithe due to him as vicar, the said ——— Britton brought an action of trover and conversion against the said William Ward, in his Majesty's Court of King's Bench, for the said lamb, and [423] for another lamb supposed to have been taken by the said William Ward, on the trial of which action, a special verdict was found, and that after four several arguments in the said Court, judgment was in Trinity Term, in the 16th year of the reign of his said late Majesty king James, given for the said ——— Britton, on the ground that the said vicarage was dissolved by the said bull of Pope Nicholas the Fifth, and although such judgment was reversed in the Exchequer Chamber on a writ of error, yet that such reversal was founded on an error in the entry of the judgment, and not on the point of law, as by the records of the said judgments, to which defendants referred, would appear: * believed, that although the said vicarage of Norton, as a perpetual and endowed vicarage, was dissolved as aforesaid, yet that after the said William Ward ceased to be vicar thereof, different persons were and had been at different times presented to the vicarage of the said church of Norton, by some of the descendants or family of the said ——— Britton, or some person claiming under him (but whether regularly, defendants were not informed): and believed, that plaintiff was in or about the year 1800, in like manner and on the like principle, presented and instituted to and inducted into the said vicarage and parish church of Norton by Daventry, but deprived of its endowment as aforesaid; and had ever since been and under such presentation vicar of the said parish; but defendants denied, for the reasons herein mentioned, that said plaintiff had ever since [424] been or was well and lawfully entitled to have, take and receive the small tithes of all the titheable matters and things arising, growing, increasing and renewing within the ancient inclosures of the vicarage and parish church of Norton by Daventry aforesaid, or the titheable places thereof, or the tithes of corn of the farm called Sapson or Sampson, in Muscott, in the said parish; but defendants believed that, notwithstanding the said want of title in said plaintiff and his predecessors, appointed vicars as aforesaid, to tithes within the said parish, they had been in the habit of receiving from occupiers of some lands in the said parish (but of no lands within the hamlet of Muscott) payments for or in lieu of small tithes or some kinds of small tithes. The other defendants answered to nearly the same effect.

The plaintiff replied, and the defendants rejoined, and the cause was thereby put at issue; but no witnesses were examined under any interrogatories exhibited for that purpose. The cause came on to be heard in the Exchequer Chamber at Westminster, on the 19th day of November instant, (1810), when, upon opening the matter of the plaintiff's bill by Mr. Cooke, as counsel for the said plaintiff, the answers of the defendants by Mr. Winthrop, their counsel, and upon hearing Sir Thomas Plumer, *knt.* His Majesty's Solicitor General, on behalf of the said plaintiff; and on reading an order made in this cause, bearing date the 15th day of November instant, for leave to prove exhibits *viva voce* at the hearing of this cause, and on reading the following exhibits, to wit, an ancient book of endowments of vicarages in the time of Bishop Wells, in the year 1209, brought from the registry of the Bishop of Lincoln, by Mr. Fardell, the Bishop's register there; an office copy or extract of Pope Nicholas's taxation of the vicarage of Norton; an office copy of the Nonne rolls as to the church of Norton

* The Court had at first held, that as the Pope had at that time lawful jurisdiction in this country, the vicarage was well dissolved by the bull; but it appears by the records of the subsequent proceedings which took place between the same parties in this Court, and which are referred to in page 428, that Ward, the vicar, ultimately succeeded in establishing his claim.

and Throp, with the vicarage, 14th [425] Edw. III. : office copy of the ecclesiastical survey as to the rectory and vicarage of Norton next Daventre, dated 26th Hen. VIII. ; an office copy of the taxation of the vicarage of Norton next Daventre, from the book in the First Fruits office ; an office copy of an enrolment of indenture of bargain and sale, 8th James I., Phillips and Moore to Knightley ; an office copy of institution act of William Ward, clerk, to the perpetual vicarage of Norton next Daventre, dated 9th October 1615 ; an office copy of institution of Joseph Barnard, clerk, to same vicarage, 11th November 1642 ; office copies of several orders and decrees made in this court in certain causes and proceedings between William Ward, clerk, vicar of Norton, and Nicholas Bretton and others, defendants, bearing date respectively 10th November, in the 15th year of king James ; 30th January, in the 18th ; 13th February, in the 19th ; 11th May, in the 19th ; 11th February, in the 20th ; 25th January, in the 21st ; the 30th November, and the 11th February in the 22d years of the same king ; the 6th day of July, in the 1st year of king Charles I. : the last day of January, in the same year ; the 22d day of January, in the 6th ; the 10th day of February, in the 7th ; the 18th November in the 10th ; the 17th April, in the 11th ; the 5th day of June, the 30th June, the 9th February, and the 19th November, in the 17th years of the same king ; the official copies of four terriers brought from the Registrar's office at Peterborough, dated respectively 19th July 1723, 12th August 1726, 21st October 1749, and 19th July 1758 ; an act of parliament, passed in 1755, touching the inclosure of Norton ; office copies of an issue and record in the court of Common Pleas at Westminster, between Nicholas Breton, Esq. plaintiff, and William Ward, clerk, defendant ; office copy of the parliamentary survey in the Archbishop's library at Lambeth, 22d Jan. 1655 ; office copy decree in this Court, in a cause wherein Richard Bowles, clerk, vicar of Norton, bear [426] ing date the 25th day of Nov. 21st Charles II. ; and an agreement signed by the solicitors in this cause as to certain admissions, which were as follows :

"That the plaintiff might be at liberty to produce the office copy of entry from an ancient book tempore Bishop Wells, who presided in 1209, from the Bishop of Lincoln's registry, purporting to be an entry of an endowment of the vicarage of Norton, but subject to the same objections that the defendants would be entitled to make to the original book if actually produced :

"That the plaintiff was duly instituted and inducted into the vicarage of Norton, in question in this cause, so as that the defendants are not to be precluded by such admission from controverting whether Norton is a vicarage or not, or if a vicarage, whether it is now endowed (if endowed at all) with any of the tithes demanded by the bill, and that notices to set out tithe were given to defendants in due time before filing bill :

"That the plaintiff might be at liberty to read in evidence the printed copy of the Norton Inclosure Act, of the 28th George II. and also office copies of the several institutions and presentments from the Register of Peterborough of the vicars of Norton, namely the presentments of Mr. Joseph Bernard in 1642 ; of Mr. Samuel Withers in 1690 ; of Mr. Thomas Henchman in 1701 ; of Mr. Benjamin Francis in 1706 ; of Mr. Thomas Duncombe in 1729 ; of Mr. Thomas Phil. Shepperd, in 1746 ; and of Mr. Thomas Phil. Shepperd, in 1754 ; or any other office copies of presentations or institutions to the said vicarage, subject to the like reservations as before, whether Norton is a vicarage endowed or not ; and also office copies of the terriers of Norton, made in the years 1723, 1626, 1749, 1758, and 1801, subject to all legal exceptions that might be made to the original terriers if produced :

[427] "That the lands in defendants occupation are in the hamlet of Muscote, in the parish of Norton, and no part in the hamlet of Thrupp ;"

And that no tithes in kind for lands in the hamlet of Muscote, have been rendered to the vicar of Norton, in the memory of any person now living.

The further hearing of the cause was adjourned until this day (22d Nov. 1810), when, upon hearing, Dauncey and Cooke, for the plaintiff, Hollist, Leach and Winthrop, for the defendants, and His Majesty's Solicitor General for the plaintiff, in reply, it was ordered, that it be referred to the Deputy Remembrancer, to take an account of what was due to the plaintiff from the defendants respectively, for and in respect of the several titheable matters and things since Michaelmas 1803, on that part of their farms and lands in the pleadings of the cause mentioned, denominated the new inclosures ; and that what should be found due from the said defendants in respect

thereof be answered and paid by the said defendants respectively to the said plaintiff, —concluding with the usual directions

HARWARD, Clerk, *v.* SIMS. 1810. —The book known by the name of Archbishop Wells's book of endowments rejected as evidence at Nisi Prius: the Lord Chief Baron (Thomson), and Mr. Baron Wood having expressed considerable doubt of its admissibility, on the hearing of the cause in the Exchequer, their Lordships treating it as a mere private memorandum, wanting authenticity and originality.

The plaintiff, (vicar of Marston, Oxon,) filed this bill for an account of small tithes and agistment.

The defendants, denying the plaintiff's title, set up a modus of 6d. an acre, payable in lieu of all small tithes.

The money payment was established in evidence by the parol testimony.

[428] In answer to that evidence, the following extract from the book which was the subject of discussion in *Leonard v. Franklin*, and which was called an ancient book of endowments in the time of Bishop Wells, who began to preside over the see of Lincoln in the year 1209.

“Oxon—Merston—Vicar in Eccl^{ie} de Merston que est d^{ec}or prioris & convent^{us} s^{an}c^te Tretheswide auct. concil. ordinat. consistit in omnibus obventionibus altaris cum minutis decimis totius parochie & in decimis bladi & feni provincientib^{us}, de una virgata terre in eadem villa scil^{icet} quam Osbert^{us} fili^{us} Herwardi tenet Hebit etiam vicari^{us} domos & Curiam in quibus Capetlanus manere solebat & valet vicar^{us} v. mar. & total. Eccl^{ie} xviii mar: & sci^{ent}ie expressum fuisse in ordinatione istar triu vicariar^{um} & vicarie de Frethewell q^{uod} sub nomine minutar decimar non continent decime feni seu molendinor.”

And it was contended, that as that document was evidence that the value of the vicarage was, since time of legal memory, only five marks, and the whole church only eighteen, there could not have then existed a modus, for according to the extent of the parish, 6d. an acre would amount to more than double the value of the church.

Leach, for the plaintiff.

The Solicitor General, Dauncey, and Wingfield, for the defendants, objected to the entry read from the book, and contended that it was not evidence.

The Court directed an issue on the strength of the evidence of the money payment; and in delivering judgment, the Lord Chief Baron (Thomson), adverting to the book in question, observed—

[429] That it was clear from the parol evidence that an issue must go: that the 6d. had been proved to have been always paid; that all that remained, therefore, was the effect of the entry in this book, or the valuation. On that evidence his Lordship observed, that there was no proof who made it; that it was a bare memorandum posterior to the endowment, and therefore had not the weight ascribed to it in argument.

His Lordship added, that it was common in those days to undervalue the several vicarages, which was material to affect its authenticity as evidence of the value, and that therefore, on the whole, the payment ought to go to a jury.

Mr. Baron Wood appears to have said, that it was his wish also to express a doubt, whether the entry was evidence at all. And his Lordship said, that if an issue were tried, that question might be decided by means of a bill of exceptions.

An issue was directed, and it went down for trial at the summer assizes, 1811, for the county of Oxford, before Mr. Justice Le Blanc and a special jury, when the same book was offered in evidence by the counsel for the plaintiff, to prove the value of the vicarage since the time of legal memory, and to shew that so large a payment for the small tithes, as compared with the value of the vicarage at that time, could not be a modus, when

Le Blanc, Justice, refused to receive it, observing, that no collection or history compiled by any individual could be admitted: but that, perhaps, if it were shewn to be an official document it might be received.

Mr. Hewlett was then called, who stated that the book was of the hand writing of the time of King John: that it contained entries of endowments: that the [430] collection was the act of the ordinary, but that it was not a judicial act, but an historical collection of matters of ecclesiastical concern: and that the book was known by the name of Archbishop Wells's Endowments.

On that testimony, Jervis and Taunton, for the plaintiff, contended that the book ought to be received, coming as it did from the proper custody, being produced by Mr. Fardell, the register of the diocese of Lincoln, from the registry where it was deposited among the muniments of the diocese: and that it was entitled to equal consideration with the survey of a religious house; but

Le Blanc, Justice, still refused to admit it, saying, that the entry was not shewn to have been contemporaneous with the endowment, or even to have been original; that it was not equivalent to a survey, which was an original and public document taken by authority, whereas the book in question was not proved to have been compiled under the sanction of any authority, but was merely a collection of memoranda, made by some one who was not known, and therefore came within the rule, that a memorandum made by a private person could not be received in evidence.

EXTRACT OF ONE OF THE LATEST LEASES OF SUTTON HOLWOOD, Referred to in
Leathes v. Newitt, p. 355.

Indenture of demise, dated 14th June, 48 Geo. III. between the dean and chapter of Ely and William Charter, for a term of twenty-one years, rent 30l.

Covenant, that Charter, his executors, &c. would "yearly and every year during the said term, pay the tenth of all the profits that shall grow, arise or increase in, by, or throughout the said demised premises, to the vicar of Sutton aforesaid, for the time being."

[431] EXTRACTS OF ONE OF THE LEASES OF MIDDLEMOOR, Referred to in
Leathes v. Newitt, p. 355.

Indenture of Lease, (24th Nov. 41 Geo. III.) between the Dean and Chapter of Ely and their lessees, of all that their several pasture commonly called Middlemoor, lying and being within the parish and bounds of Sutton aforesaid, with all the profits and commodities thereunto belonging or appertaining, in as large and ample a manner as any of the inhabitants of Sutton aforesaid, or certain inhabitants of Blunhsham and Earith, or the right honourable Lord North, or any other person or persons have had, held, used or occupied the same as the tenant or tenants of the said Dean and Chapter or their predecessors, excepting and always reserving out of this present demise, all those parts or parcels of the said pasture grounds, called Middlemoor, late employed by the undertakers about the draining of the lands there, containing fifty acres or thereabouts, to the said Dean and Chapter and their successors, and also one fishing called the Deep, and also ten menmaths called the Reedy Holmes, and all and singular the profits and commodities thereunto belonging, or in otherwise appertaining.

Covenant—that they the said lessees, their executors administrators and assigns, and every of them, shall and will, during the continuance of this demise, permit and suffer the vicar of Sutton for the time being and his successors, quietly and peaceably to have hold and enjoy a piece of ground called the Harp and Gatestead in Sutton aforesaid, from every feast of the Annunciation of the Virgin Mary in every year during the same term, until the first day of August then next following, called Lammas Day, together with the crop thereof coming [432] and growing: and also shall and will from time to time and at all times hereafter from the date of these presents, during the continuance of this demise, permit and suffer the vicar of Sutton aforesaid for the time being and his successors, yearly and every year peaceably and quietly to have hold and enjoy his part belonging to the vicarage-house, together with the tithe of grass and fodder yearly growing, renewing and coming upon the said pasture called Middlemoor, and all other commodities, profits and advantages belonging to the vicarage of Sutton aforesaid, without asking, demanding or receiving of the said vicar for the time being or his successors any sum or sums of money, either towards the charge of the fine paid to the said Dean and Chapter or their successors for the renewing of the lease of the said demised premises, or the rent by these presents reserved to be paid to the said Dean and Chapter and their successors. But if it shall happen by the consent of the lessees and the inhabitants of Sutton aforesaid, or the greatest part of them, that the said pasture called Middlemoor, shall be fed with cattle before Lammas Day, in any of the said years, that then the said lessees and inhabitants, their executors administrators and assigns, shall pay every year, when the same is so fed,

unto the vicar of Sutton aforesaid for the time being, the sum of sixteen pounds of lawful money of Great Britain, at or upon the first day of August in every of the said years, in lieu of the tithe of the said pasture called Middlemoor.

[433] THE PASSAGES OF THE AGREEMENT AND DECREE upon which the main point in the Cause of *Leathes v. Newitt* turned, are set out verbatim in the following extract.

After reciting that theretofore (20th January 1622), Henry Caesar, D.D. Dean of the cathedral church of Ely, and the chapter of the same church, "lords of the manors or lordships of Sutton and Mepall, within, &c." complainants exhibited their bill of complaint in Chancery against Sir Miles Sandys, knt. and bart. and a great number of other persons, concluding with Richard Wigmore, clerk, and Wm. Barwell, clerk, defendants, "being all tenants or commoners in the said manors, or one of them,—That whereas within the said manors or lordships there were large and spacious commons, being fenny and marsh grounds, wherein all the tenants of both the said manors which inhabited in any of the ancient commonable houses or tenements in either of the said manors, have always, time out of mind, both for themselves and their farmers, had common of pasture for all their cattle, levant and couchant, in and upon," &c. "at all times of the year, which said common, fenny and marsh grounds, by reason of such promiscuous feeding of them in common, had theretofore yielded unto the said tenants little or no profit at all;" for that amongst so great a multitude of commoners, there could be no consent in opinion to one and the same kind of husbandry, by reason whereof it had been rather the cause of rotting and starving, than feeding and fattening the cattle depastured there; wherefore, for the benefit of each of them, and the commonwealth in general, by rearing and feeding great numbers of cattle, "the truth of all which manifestly appearing to the ablest and discreetest of the said complainants, tenants within the said manor, as namely, the said Sir Miles Sandys," (and some others of those before named, omitting very [434] many of them and the vicars), these the said last-mentioned tenants, upon due consideration, &c. and knowing that there could be no division of common, &c. without the consent of the complainants, earnestly entreating their assent, therefore, and the better to induce them, voluntarily offered that a competent part of the said common, fenny or marsh ground should, with their willing consent, be allotted unto them the said complainants, in respect of the benefit which they as lords might, by way of agistment or approvement, otherwise raise out of the same, which then by that intended division the said complainants were to lose:—that thereupon articles of agreement were made and set down in writing, on the 28th Sept. then last, between the said complainants and the last-named persons, their tenants, for and on behalf, as well of themselves as of all other the freeholders, copyholders and farmers within the said manor:—1st. That complainants and their successors, in lieu of all such improvements as they might challenge to make in the said fenny and common ground within the said manors, should have and retain always afterwards to them and their successors in severalty, all that fenny ground in Sutton aforesaid, commonly called Little Hollwood Fen, and all the commons within the said manors, to be from thenceforth utterly excluded, &c. as to that fen; and in consideration thereof, that the complainants should be excluded and debarred from all benefit and commodity whatsoever to be raised in, upon and out of all or any of the residue of the said common or fen ground within either of the said manors; all which residue, except Mepall Gall Fen, was to be divided and used as follows: to be laid out and allotted to every manor-house, freehold and copyhold, and farm-house, 14 acres apiece, by statute measure, of the best common fen ground within the said manors respectively; to every other dwelling house, two acres only, to be held and occupied for ever, and not to be [435] severed or aliened from the said houses; to every two acres of upland or arable ground, one acre of low or fen ground, by the 18 feet pole, to be held therewith in severalty for ever; and the residue to be set out for the relief of the poor: Proviso, that every allotment should be set out of the common next adjoining the said several manor houses and demesne lands respectively. No fine to be afterwards paid, on the admission of any copyholder within either of the said manors, for or in respect of any of the said allotments: that any owner or farmer of grounds lying in Sutton Medlands or Mepall Furze Fen, which formally had been several, from the Annunciation in every year until Lammas Day

only, might at any time thereafter, inclose so much thereof, as should please such owners or farmers, to hold in severalty all the year, (leaving sufficient ways, &c. for others to pass to their grounds); and that the rest should be fed in common by the owners of those grounds only, not so inclosed, after the proportion of one horse for every two menmaths, or three bullocks for every four.

They then agreed that the said articles of agreement should be ratified by decree of the Court of Chancery: and for that purpose, many of the defendants put in their answers confessing the complaint, &c., &c. (in the words of the agreement) praying a decree accordingly; and that a commissioner might be authorized to make the allotments.

The defendant, Richard Wigmore, (the then vicar) answered separately. He admitted the complainants to be lords of the said manors and lordships of Sutton, whereof he (Wigmore) was then incumbent vicar, and of Mepall aforesaid; and the defendant, Wigmore, (admitting the recitals of the bill) further said, that he was content, and agreed to the said division, "so that he the said defendant might have, for his part, allotted unto him and the succeeding vicars for the time [436] being, 20 acres by the 18 feet pole between ditches, lying next unto one fen called South Medlands, for and in lieu of his and their right of commonage in the said common, and 20 acres, by the like measure, lying in South Fen, called Beeston, lying next unto one fen called Wentworth Fen, in consideration that he the said defendant nor the succeeding vicars should thereafter demand, in right of his and their said vicarage, any tithes out of any of the said commons, after they should be divided and allotted as aforesaid, except the tithe of milch kine, calves, foals, sheep, pigs, geese and such like, and except the tithe of one fen called Little Hollwood." He then joined in praying the decree for an allotment.

Therefore, in Easter Term, 21st James I. the Bishop of Lincoln, Lord Keeper, ordered and decreed that the said agreement should be ratified and confirmed by decree of the Court, and that a commissioner should be awarded, as prayed, to make the required allotments; and decreeing the prayer of the vicar in the same terms.

The commission being returned, amongst other allotments was the following: Mepall ancient houses shall have Widden Fen for four score acres, and the rest of their lots in North Fen, at Alinseburge and Sotogo, along towards Chatteris division, their ancient houses to be served first, and next unto them that have allotment of eight acres: and further, that the parson shall have sixteen acres in lieu of his tithes in Mepall, in like manner as it is in the decree for tithe for the vicar of Sutton; and the same sixteen acres to be in two parts, all next to the lots which he has to his parsonage-house.

REPORTS of CASES ARGUED and DETERMINED
in the COURT of EXCHEQUER, at Law and in
Equity, and in the EXCHEQUER CHAMBER,
in Equity and in Error, from Michaelmas Term to
Easter Term, 58 GEO. III., both inclusive. Vol. V.
By GEORGE PRICE, Esq., of the Middle Temple,
Barrister-at-Law. London, 1820.

[1] **REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER,
AND EXCHEQUER CHAMBER, MICHAELMAS TERM, 58 GEO. III.**

JAMES v. FRANCIS. Friday, 7th November 1817.—The defendant was held to bail on an action for 25l. He pleaded in abatement as to 12l. 10s. and the general issue as to the remainder.—Verdict for the plaintiff for the latter sum.—On motion for costs under the 43 Geo. III. c. 46, supported by affidavit, that the defendant believed the plaintiff had sued out bailable process for the purpose of extorting from him the whole sum,—held not a case of malicious arrest within the statute.

Jones, D. F. moved for a rule to shew cause why the defendant should not be allowed his costs under the 43 Geo. III. c. 46, s. 3, and that in the mean time proceedings might be stayed, on an affidavit, stating that the defendant was arrested for the sum of 25l. : that being advised by his solicitor, that he had a good defence to the action, he pleaded the general issue, except as to 12l. 10s. part thereof, and as to that he pleaded in abatement, that if the debt were due, it was contracted jointly with another person, and not [2] by defendant alone ; that on the trial, the plaintiff recovered a verdict for 12l. 10s. only ; that the ground of his defence was, that several pieces of timber, charged to him at 13l. 19s. 6d. never had been sold to, or delivered to him, and that for the lot of timber which was delivered, the defendant ought to have been sued jointly with his said partner ; and that he believed the plaintiff had sued out bailable process to extort from the defendant the whole of such demand.

It was submitted, that the facts as detailed in the affidavit supported the present application, on the ground of the arrest having been vexatious.

But the Court were of opinion that the circumstances did not amount to a case of malice within the provision of the statute : and therefore the motion was

Refused.

WATSON v. EDMUNDS. Friday, 7th November 1817.—A Commissioner appointed by the 4 & 5 Wm. and Mary, is not bound by the letter of that act to take no more than 2s. for taking bail, if he have been put to expence by travelling, or has taken extraordinary trouble at the instance of the parties, to effect the taking of the recognizance, or where there are other circumstances in the case which afford reasonable ground for a further charge.—And where more had been received by him by the voluntary payment of the bail, a rule obtained, calling on him to shew cause why he should not refund the extra money, discharged with Costs. In

cases where such an application would be entertained, it must be made by the party who has paid the money.

Jones, D. F. now shewed cause against a rule obtained by Sir Wm. Owen, calling on the Commissioner, who took the recognizance of bail in this cause, to refund the sum of 8s. part of 10s. [3] paid to him for taking such recognizance, with the costs of this rule.

It was moved, on the 4 & 5 Wm. & Mary, c. 14, s. 4, which enacts, that for the taking of such recognizances, the person empowered to do so "shall receive only the sum of 2s. and no more."

The cause shewn was, first, that the money had not been paid by the defendant, but by his bail: for which the case of *Nunn v. Powell* (1 Sm. Rep. 13) was cited, where it was held, that money deposited by bail, or any other person, in the name of a defendant, must be paid to the person so depositing it: and, secondly, that the payment was voluntary.

It appeared by the affidavit of the Commissioner, filed in opposition to the motion, that when the bail called at his house in Birmingham, to procure their recognizance to be taken, he was from home, at a distance of nine miles, and on being sent for specially, he returned on purpose, the bail having waited three or four hours for his return: that when he had taken the acknowledgment of recognizances, one of the bail addressing him said, your charge is a guinea, and asked him to take a pound, as there were two, and the case was a hard one, which he consented to do.

Under such circumstances, the Court (observing [4] that they considered this a harsh application) said, that if there had been nothing else in the case than the mere demand of 10s. for taking the recognizance, there might have been some ground for the motion: that they should always hold it a duty to interfere in cases where attempts at extortion should be shewn: whereas, on the other hand, they would protect persons holding offices, from being harassed by groundless applications against them, as they held the present to be, where it was plain that extraordinary trouble had been taken by the Commissioner to serve the defendant. They observed also, that the application, if there had been any foundation for it, should have been made by the bail, by whom the money had been paid.

Per Curiam. Rule discharged, with costs.

- [5] IN THE MATTER OF INSUPERS SET UPON JOHN BROMLEY AND WILLIAM BAYLIES, joint Collectors of Taxes for the Parish of Welford. Friday, 14th November 1817.—A joint collector of taxes is liable for any deficiency in the collection for the year, in the amount received by his coadjutor, although he has not himself collected during the time, and although his appointment may not have been quite formal, if he has in any manner acknowledged his appointment, or acted or received a share of the poundage at any time.—And the Court will set insuper on him, although a re-assessment have been made on the parish, and the amount of the deficiency collected, and paid over to the receiver-general.—And if he should have procured a rule to be made absolute for discharging a former insuper, and for the restoration of the money levied under it by distringas, without having served the order nisi on the parish, the Court discharging such a rule, will do so, with costs.

William Baylies had obtained an order in Michaelmas Term, 1814, which was afterwards made absolute (as far as regarded him) that the Attorney-General should shew cause, in a week after service of the said order on the solicitors for the affairs of taxes, why the insupers in the said order mentioned should not be discharged, so far as regarded the said William Baylies, and all process thereon stayed: and why the sum of 5l. 5s. 3d. and 110l. 11s. 1d. paid by the said William Baylies into the hands of the then sheriff of Gloucester, should not be returned to him by the said sheriff. A copy of the order was directed to be served on the clerk to the Commissioners of taxes, acting for the division where the said parish of Welford is situate.

Jervis moved, last Trinity Term, on behalf of the inhabitants of the parish of Welford, that that order should now be discharged. That motion was founded on affidavits, stating that though the order of 1814 was served on the clerk to the Commissioners of the district in which Welford is situate, and upon the solicitors for

the affairs of taxes; yet neither of them apprized, either directly [6] or indirectly, any of the tax payers of Welford of their having been served with the said order, so as to give them an opportunity of shewing cause; that therefore the same was made absolute. That although the said orders were made in November and December 1814, the tax payers of the said parish of Welford had no information thereof until the month of January, 1817, when the tax Commissioners of the district made a re-assessment on the parish for the deficiency. That such re-assessment was opposed by the said tax-payers, at a public meeting of the Commissioners, in February 1817, but that after a hearing, nothing was definitively concluded upon until the month of June following, when a re-assessment was made accordingly, under which the arrears had been collected and paid over to the receiver-general for the county. That previously to and from the year 1804, until December 1808, the said John Bromley and William Baylies were acknowledged and considered by the inhabitants of the said parish of Welford as joint collectors of taxes for the said parish, and that the notice was as usual posted on the door of the church of the said parish in each year, of the said John Bromley and William Baylies being so appointed collectors. That at or about Michaelmas 1808, when the taxes for the preceding half year had become due, the said William Baylies deducted what was calculated to be due to him for salary or poundage as such collector, from the amount of his own taxes then due from him as an inhabitant of the said parish of Welford. That after the decease of the said John [7] Bromley, (which happened in December 1808), the said William Baylies observed to Joseph Marshall, an inhabitant of the said parish, that as he, the said William Baylies, was a collector with Bromley at the time of his decease, he the said William Baylies, would collect the taxes for the then current half year, and then he would be sworn in as collector jointly with the said Joseph Marshall; and that in or about the month of June 1809, he was sworn in with the said Joseph Marshall a joint collector of taxes for the said parish of Welford. That the estate and effects of the said John Bromley were, some time after his decease, sold to satisfy the arrears of taxes due from the said collectors, but that there remained a deficiency after such sale, and that a writ of distringas was issued out of this Court against the said William Baylies for such deficiency. That Edward Hodges, another inhabitant of the said parish of Welford, in the beginning of the year 1808, was at the house of the said William Baylies, he (Baylies) made certain observations to him respecting the taxes (the amount of which was in effect an acknowledgment of his being a joint collector with Bromley, of whom he expressed disapprobation as a coadjutor, for that he assumed too much, and of his having acted and received a share of the salary);—and that the said order of the 15th day of November 1814, had been obtained upon the affidavit of William Baylies, stating that he had been appointed such collector as aforesaid for the year ending 5th April 1819, wholly without his knowledge or consent, and had always [8] absolutely refused, and wholly objected to collect the said taxes along or in conjunction with the said John Bromley, and that he had not received any part of the said taxes (except as mentioned in the said affidavit).

Therefore, and in as much as no opportunity had been given to the inhabitants of the said parish of Welford, to shew cause against the said orders, it was prayed that they might be discharged, and that the said William Baylies might pay back to the present sheriff of Gloucestershire the said sum of 5*l.* 5*s.* 3*d.* and 11*o**l.* 11*s.* 1*d.* which were refunded to him in obedience to the said order, and that in default of his so doing a writ of distringas might issue against him for levying the same, and that he might pay the costs of the application.

The Court granted the rule on these grounds, and ordered that copies of this order should be served upon the solicitors for the affairs of taxes, the clerk to the Commissioners of taxes for the district in which the said parish of Welford is situate, and upon William Baylies.

Martin now shewed cause, on affidavits of William Baylies and others, stating that Baylies had been nominated at a vestry in 1807, joint collector of the taxes with Bromley, not only without his consent, but that he had himself on that occasion, after expressing his dissent at the same time, made an entry in the parish book of the names of two other persons, as joint assessors and [9] collectors of the taxes, which entry still remained in the said book:—that finding by the information of his neighbours that Bromley was dangerously ill, he enquired and found that he had collected taxes to the amount of 300*l.* which then remained in his hands, when, having convened

a meeting of parishioners by public notice, given in the church in the usual manner, proceedings against Bromley were determined on, for the security of the parish, and thereupon he procured the crown process to be issued against Bromley's estate and effects, which were sold to satisfy the arrears to an amount which still left a deficiency due from Bromley in respect of the taxes. The affidavit then (referring to the levies made on Baylies, and the order to refund) stated that at a vestry meeting held in February 1817, for making a re-assessment on the parish, after Baylies and other persons had been examined on both sides, on oath, by the Commissioners then present, and in the presence of the inhabitants and tax payers who attended the meeting for the purpose of appealing against such re-assessment, and the business had been thoroughly investigated for two days, the Commissioners being perfectly satisfied, directed a re-assessment, which was accordingly made and signed—and that the arrears had been since collected under that re-assessment, and paid over to the receiver-general.

It was therefore contended, that under these circumstances Baylies was not liable to make good the deficiency occasioned by Bromley's default: [10] for he had not been in fact appointed, and his nomination was not only against his consent, but a subsequent nomination had been made. This Court has held that a mere nominee, who does not act as collector, is not liable for deficiencies.

What had been ultimately done by Baylies was submitted to have been only such an interference as any one of the other tax-payers might have taken on himself, on behalf of the rest, without becoming subject to an insuper. And the fact of a re-assessment having been made on due investigation, was much pressed.

Jervis, in support of the rule, relied on the facts stated in the affidavits filed on making the motion, which he submitted shewed such a recognition by Baylies of his appointment, as made him liable, and that he was not discharged by any of the circumstances relied on by him.

RICHARDS, Chief Baron. I am glad that this discussion has taken place. It is a common practice for one collector to leave the business to be done altogether by the other. But here it appears that they both acted together, and for several years. No objection was at any time made by Baylies on the ground of the insolvency of Bromley, but he complains only of his assuming too much. There is no doubt that Baylies was appointed collector on the particular occasion, or that he knew of the appointment, for he proposes to another person that he should join him as collector. It is true that Bromley may have always received [11] the taxes, for he was the acting collector. On the death of Bromley, however, Baylies himself acts, and the only question is, whether he is, under all the circumstances, liable for any deficiency in the collection made during the life of Bromley. I think he certainly is, unless he could make out a much more satisfactory case than he has done; for, generally speaking, all persons who are appointed collectors, are responsible for the others, whether they receive the taxes or not: and it is any thing but an excuse that they have never themselves actually collected.

I think this, therefore, a clear case, and the affidavit of Baylies is nothing like an answer to the application.

As to the fact of the former rule, moved for by Baylies, having been made absolute, I can only say, that I am sorry for it; for by his affidavit, although it did not state the facts fully and fairly, there appears to have been no ground for the application. Due notice of that rule had not been given to all the parties interested in it. Then there was besides great delay in lying by after the rule was obtained. The parish, on the contrary, have used all due diligence, and therefore I think the rule obtained by Baylies should be discharged, with Costs.

GRAHAM, Baron. We have often discharged the insuper (where, of two collectors who have been appointed, only one has really acted) as [12] against the other; but here Baylies admits that he has acted on some occasions in the collection of the taxes. Whether he was sufficiently formally appointed or not, does not matter. He demanded his share of the salary, and actually collected, as he was entitled to do, on the death of Bromley.

On the last application made by Baylies to this Court, although it is true that the solicitor of taxes had notice, yet that was not notice to the persons ultimately chargeable, and who were entitled to be afforded an opportunity of shewing cause. But the tax payers were long kept in utter ignorance of all the proceedings, and as soon as Baylies acts upon the order, they come to us to discharge it.

WOOD, Baron, of the same opinion. There have been many applications granted for discharging insupers where they have been set on one, who, though appointed with others, has never acted, or in any way recognized his appointment. But here Baylies, whether formally appointed or not, accepted the office, and he actually collected. Then, can any thing be stronger in proof of his acknowledging himself collector, than the fact of demanding half the poundage.

GARROW, Baron, expressed himself to be of the same opinion for the reasons given. *Per Curiam.* Rule absolute, with costs.

[13] WHITE v. THOMAS. Monday, 17th November 1817.—A defendant usually residing in the country, arrested in London, in a town cause, may justify bail by affidavit.

Parke, J. moved to justify, as bail in this cause, certain persons, living at Plymouth, by affidavit.

Wilde, J. opposed the justification, on the ground, that the defendant had been arrested in London, in a town cause, and therefore he submitted that the practice would not admit of a justification of bail (being persons living in the country) by affidavit; and, were it allowable, it would afford a defendant an opportunity of delaying the plaintiff in all cases by so doing, which would be constantly resorted to.

GARROW, Baron. The reason is certainly with what has been done. (Referring to the Master, he certified, that it had been done, and was not without precedent.)

The Bail were therefore admitted.

[14] IN THE EXCHEQUER CHAMBER. (IN EQUITY.) CORAM RICHARDS, LORD CHIEF BARON.

THE MINOR CANONS OF ST. PAUL'S v. CRICKETT AND OTHERS. Monday, 17th November 1817.—The term Rent, as used in the decree made under the stat. 37 H. VIII. c. 12, relating to tithes in London, means the rent, properly so called, actually and bona fide reserved, without fraud or covin, and not the annual value of premises let—the rack rent.—And fines (to whatever amount) paid on the renewal of leases of dwelling-houses, are not to be considered as increase of rent, or to be taken into calculation, in estimating the amount of the tithes due, provided the rent reserved is equal to that at which the houses have been at any time before let.—The 2s. 9d. in the pound therefore is to be paid on the amount of such rent only.

The plaintiffs prayed by the present bill an account of tithes: claiming as parson of the parish church of St. Gregory, a right to demand from the defendants, who were the occupiers of a dwelling-house in the parish (as the executors of their testator the original defendant), a sum of 2s. 9d. in the pound, for the tithes, according to what they submitted was the true construction of the decree under the 37 Hen. VIII. c. 12, which, they contended, had rated the tithes on the improved annual value of such houses, to be estimated by the last increase of the usual fine on renewal, and that they were not to be paid merely on the old, and accustomed rent, or the rent actually, and in fact reserved independently of such fine.

The facts of the case were as follows: The defendants' testator, Crickett, had occupied the premises, for which the increased tithes were now sought, under a lease from the Dean and Chapter of St. Paul's, granted to him on surrendering a former lease, whereby there was reserved a rent of a yearly capon, in consideration of such surrender, and of his paying them a yearly rent [15] of 11. 2s. 6d., and a fine of 30l. It did not appear that any other or larger rent had ever been paid for the house in question, which, it was admitted, was, at the time of instituting this suit, of the annual value of from 30l. to 40l., to be let by the year; and it was also admitted, that the amount of the fines which had been paid from time to time, in consideration of the former renewals of the leases, had been constantly increased. Crickett had afterwards purchased, and at the time of filing the bill was seized of the freehold of the dwelling-house in question.

Wetherell and Hall, for the plaintiffs, contended that, under the fair construction of the statute and decree, they were entitled to take the tithes at a rate of 2s. 9d. in

the pound upon the full annual value : that the fines usually paid on the renewal of leases, although not paid in consideration of a diminution of the previous rent, were in effect what would amount to nearly the same thing in its operation to injure the incumbent, namely, a consideration for not increasing the future rent ; and were therefore fraudulent and covinous within the meaning and intention of the act of parliament : which (they observed), it should be borne in mind, was passed expressly for the protection and benefit of the clergy of London. Such fines are, as it were, a payment of future rent by present anticipation, and those fines are increased on every renewal, in proportion to the increase of the annual improved value of the houses let. That appears from the pleadings, and is in fact admitted. The reading of the second clause of the decree demonstrates, [16] that rent is there used synonymously with annual value ; and such construction is authorized by the decision in the case of *Antrobus v. The East India Company* (13 Ves. 9), where the Master of the Rolls said, that, in the case of *Grant v. Cannon* (2 Ves. 563), the Court considered the word rent in the statute as to be understood in the double sense of "reserved" or "estimated rent;" and his Honor adopted that construction in the case then before him. The second clause distinguishes expressly the rent actually reserved, from the rent which the tenant had been accustomed to pay, and points out how the calculation is to be made, with a view to obviate the consequences of such an arrangement as the present, which it was foreseen might be resorted to to diminish the revenues of the church : or otherwise a fine equal to the value of the fee might be taken, which would deprive all future incumbents of tithes for ever. When this question came before Lord Rosslyn, in the case of *The Canons of St. Paul's v. Crickett* (1 Gw. 299), it was not maturely considered ; but the law on this subject has been subsequently better understood, and the whole doctrine has undergone much change since the case of *Dunn v. Burrell* (2 Gw. 541), and particularly in the result of the case of *Antrobus v. The East India Company* : and, were it otherwise, they submitted that it would tend greatly to impoverish the revenues of the future clergy of London : that it was manifest that such was the object of the fines, from the circumstance, admitted, of their having been [17] increased on the various occasions of renewing the leases.

Agar and Shadwell, for the defendants, contended that, on the words of the decree, and the authority of the cases of *Skidmore v. Bell* (Co. Int. 659), *Dunn v. Burrell*, and *The Canons of St. Paul's v. Crickett*, the decision of the Court must be in favor of these defendants, who could not be called on to pay more than after the rate of 2s. 9d. in the pound on the rent, *qui rent*, actually reserved annually, without fraud or covin. The statute has not, as has been urged, distinguished between the rent reserved, and the rent fairly due generally : for the only distinction there made is expressly confined to two cases, and those are, where a less than the accustomed rent has been reserved, and where no apparent rent is reserved, for purposes of fraud or covin. The attention of the persons appointed by the legislature having been drawn to such cases, there is therefore no ground for surmising that the decree intended any thing which it has not expressed. It has provided, that if less rent shall be taken than has been accustomed to be reserved, the payment of the tithes shall not be thus eluded. It is therefore attempted to be contended, that it must be construed as enacting, that if more be not reserved, the tithes shall still be increased. That is, however, clearly not so. The statute intended, that the tithes should not be diminished, not that they should be positively [18] increased. A strong fact in favor of the defendants is, that it is well known to have been anciently the custom, for ecclesiastical corporations, long before the passing of the act, which authorized this decree, to make leases reserving rents certain, in consideration of fines, which might at that time have been augmented to an amount corresponding with the duration of the term : and terms might before the 13th of Eliz. have been created for any number of years. It was probably that custom which the decree had in view, when it resorted to the criterion of rent as a measure for rating the tithes, lest it should be carried so far as to lessen even the rent which had been previously reserved. That custom it was, which produced the restraining statute (13 Eliz.), whereby, for the sake of the church revenues, spiritual corporations were restricted from letting for more than twenty-one years, and were compelled to reserve a rent equal to that at which the premises were before let.

They contended that the decisions were also in favor of the defendants ; and submitted therefore that there was no foundation for the present suit either on principle or authority.

Wetherell, in reply, insisted that the increasing the fine, rather than the rent, was precisely the letting by fraud and covin intended by the decree to be met and defeated, and therefore the fine ought to be considered as quasi rent, and should be taken into the estimation of the annual rent, [19] because but for that, the rent would have been proportionally increased; for had not such fines been paid, there is no doubt but the rent would have been in the same degree raised in point of fact.

RICHARDS, Chief Baron. Having stated the pleadings and the facts,

This claim of the Canons of St. Paul's is made under a decree founded on an act of parliament of the 37 H. VIII. c. 12*, upon the construction of which very many questions have of late years been raised that have given rise to several decisions, of which there are none precisely applicable to the present case, except that of the same name in Vesey.

The defence is, that Crickett held this house on a lease, under the Dean and Chapter of St. Paul's, at a rent thereby reserved of 1l. 2s. 6d. per annum, and that he is not liable to any thing more than 2s. 9d. in the pound on that rent. There were also fines paid from time to time on renewal; but there has been no attempt made to prove that a larger sum has ever been paid for the house in the way of rent than this sum of 1l. 2s. 6d.

Now the whole question turns on this single point, whether the word "rent" in this decree is to be construed as including the fines customarily payable on the renewal of these leases, and whether [20] the Canons of St. Paul's are entitled to be paid the sum of 2s. 9d. in the pound upon the improved annual value, as measured by the amount of such fines.

There have been many cases wherein it has been properly decided, that the term "rent" is used with a distinction from the general acceptation of it, and on some occasions the word "rent," as employed in some parts of the decree, has been considered as synonymous with the words "annual value." In this case, however, I have no doubt that the word "rent" cannot be construed to mean "annual value," for the words of the decree are "where any lease is or shall be made of any dwelling-house, &c. by fraud or covin, reserving less rent than hath been accustomed or is: or where any such lease shall be made without any rent reserved upon the same by reason of any fine or income paid before hand: or by any other fraud or covin, in every such case the tenant or farmer shall pay for his tithes of the same after the rate aforesaid, according to the quality of such rents as the same were last letten for, without fraud or covin, before the making of such lease." In that view therefore it can only be taken to mean simply the rent actually reserved, and not the possible, annual value.

The argument used for the plaintiffs however is, that "rent" here, where a large fine is part of the consideration, must be construed as tantamount to the annual value, and that it must be estimated by the measure of the increased fine: [21] for, it is said, if a tenant should pay a large fine on entering under a lease, it may be considered by way of metaphor as an anticipation of rent. But that argument is overthrown by the authority of *Dunn v. Burrell* (Gw. 299), which was a case much considered, after having been argued by Serj. More and Sir H. Finch, who were very considerable men at that time. After the first argument the Lord Keeper doubted whether that "imitative" rent, as it was very properly called, was within the evil of the act. In that case the old rent reserved was made payable by the lease, and also a further sum expressly by way of fine and income. It was a lease for five years, at 5l. per annum: and it was also covenanted that the lessee should pay 150l. in the name of a fine and income by several future payments of 30l. each, to be paid at the same feasts at which the rent was reserved to be paid. On the first argument the Lord Keeper said, that there was no colour to bring the reservation within the clause which speaks of the reservation of no rent, or of a less rent: but the only question is, whether this "imitative rent" be a rent within the body of the act? Now, certainly, that was a case of a fine or income reserved, and so reserved as that it was much more like rent than the present fines, yet we have Lord King's authority, that even that "imitative rent" was not within the clause. Then, after the second argument, it was agreed by the Lord Chancellor and the other assistants, that 25l. per ann. reserved by way of fine and [22] income, was not rent. I hold myself therefore a fortiori, bound to consider

* That decree is to be found, at length, in Burn's Eccl. Law, vol. iii. p. 555.

that these fines are not, properly speaking, rent. They are not recoverable by the summary mode of distress, and want other incidents which belong to the nature of rent. Now Crickett has clearly paid a rent of only 11. 2s. 6d. Then the decree says, that where a lease is made by fraud or covin, reserving less rent than hath been accustomed or is, the tenant shall (in that case) pay for his tithes according to the quality of such rents as the same were last letten for, without fraud or covin. Now is this a less rent than had been accustomed or was? or is there any fraud or covin shewn? Fraud and covin is not charged: and if it were, without proof, I could not infer it. In point of fact there might even have been under many circumstances a less rent reserved than had been accustomed, without fraud or covin. It is stated in the answer to have been always of the same amount, and there is very great weight in the argument used by Mr. Shadwell, that, before the time of Queen Elizabeth, probably as far back as Henry the Eighth, ecclesiastical leases were frequently made in consideration of fines; and the rent of this house may have continued the same from that time to the present on that very account. The fines, in those cases, were so much money in the pocket of the parson: and if so, there could be no fraud or covin on the part of the lessee: and as between the lessor and the lessee that ought to be fully proved, before it should be allowed to have any weight in argument.

[23] It is however quite clear from the case of *Dunn v. Burrell*, that such leases are free from fraud and covin, within the meaning of this decree. Here undoubtedly the rent reserved is considerably less than the annual value; but it is as clearly not less than the rent accustomed to be paid. On the ground of fraud and covin therefore the plaintiffs cannot succeed.

It would have been more correct if Crickett had given evidence as far as he could of the allegation in his answer, that the rent alleged by him to have been paid, amounted to as much as had been paid before, because, as the Minor Canons of St. Paul's stand in loco rectoris, they will be entitled to demand an issue on that fact; and this Court cannot now decide on that, because he has given no evidence.

If this case had stood on the authority of that of *Dunn v. Burrell*, and the construction which I put on this decree alone, I should have considered myself bound to decide for the defendant: but when I find this case in Vesey, between the same parties, coming before Lord Rosslyn, under circumstances very similar, I can have no doubt. In that case, as here, the defendant Crickett alleged, in his answer, that he had never heard of a greater rent being paid than that which was paid by him, and on that the decree in his favor proceeded; and what makes that case still stronger, is the circumstance of the other defendant failing, because he had not made the same defence. That [24] case was argued by the Attorney and Solicitor-General of that day, on the part of the plaintiff, and they were not persons likely to give up any point which could be urged in his favor: yet they felt, that, if the defence were proved by evidence, it must succeed, except that the plaintiff might still require an issue to ascertain at what rent the premises were last let for, before the date of the defendants' lease, which was in effect admitting the defendants' answer, and therefore abandoning the point.

[His Lordship then went more particularly into the case cited, and stated that he considered it precisely in point.]

I am of opinion, therefore, that the defendants' construction of the decree is correct as applicable to this case; and I cannot but consider myself bound by the authority of the old decision in the same cause. The bill therefore must be dismissed; and, as in the case before Lord Rosslyn, and on the same grounds, with costs.

Bill dismissed, with Costs.

[25] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

WILLIAMSON, Clerk, v. LORD LONSDALE AND OTHERS. Monday, 17th November 1817.—A modus of one penny payable at Martinmas by every owner of a garden, or garth, within the parish, called a garth-penny, in lieu of tithes of articles produced in such garden, as covering potatoes and turnips, grown in gardens, is a good modus.—A modus of one penny, commonly called a plough-penny, payable, &c. by the several occupiers of lands in tillage, within the said parish, for and in lieu, and satisfaction of, all small predial tithes arising, &c. upon lands so in tillage, as covering field turnips and potatoes, is bad.—A modus of 15s., payable on Easter

Monday, by all the occupiers of land in the township, &c. or some or one on behalf of all, in lieu of the tithe of grass growing within the same township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle, covering the tithe of agistment,—if there be evidence given of its having been paid, and for the tithe of agistment,—will be sent to an issue: for notwithstanding that species of tithe has been not demanded, or recognized till of very late years, yet as it is in fact as old as that of hay: non constat, but that it may have been not so neglected before time of memory, and there is therefore no ground for saying that it may not so long ago have been compounded for: for which reason the Court will not decree an account of such tithe on the ground of the anachronism, where there is strong evidence of the payment, without further inquiry.—Consumption of titheable articles in the family of the land occupier, is not a ground of exemption.—*Quære* as to green peas.

The plaintiff filed this bill in his character of vicar of Kirkby Stephen (Westmoreland), for an account of the tithes of turnips and potatoes, and agistment, from the defendants, occupiers of lands in the parish.

Their defence was founded on the following moduses:

One penny payable at Martinmas by every owner of a garden, or garth, within the parish, called a garth-penny, in lieu of tithes of articles produced in such garden, as covering potatoes and turnips, grown in gardens.

A modus or yearly sum of one penny, commonly called a plough-penny, payable, &c. by the several occupiers of lands in tillage, within the [26] said parish, for and in lieu, and satisfaction of, all small prædial tithes arising, &c. upon lands so in tillage, as covering field turnips and potatoes.

A modus of 15s., payable on Easter Monday, by all the occupiers of land in the township of Winton, or some or one on behalf of all, in lieu of the tithe of grass growing within the same township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle, covering the tithe of agistment, and

The same for two other townships.

In pleading the moduses, the answer stated, that the defendants “insist and hope to be able to prove that,” &c.

Some of the defendants also set up a defence, on the ground of the turnips and potatoes, of field produce, being consumed entirely in their families.

In support of the several moduses the defendants proved the money payments, and the non perception of the tithes sought either in kind, or by temporary composition, as far back as living memory and reputation could carry them: and the plough-penny they proved to have been uniformly paid by all the occupiers of lands within the parish.

It was in evidence that the plaintiff and his predecessors had constantly received the bulk of the small tithes in money payments: and, on the part [27] of the defendants, it was proved, by the depositions of many witnesses, that there were certain moduses and customary payments, called the garth-penny and plough-penny, due and payable by all and every the tenants and occupiers of dwelling houses and lands in the parish: the garth penny in lieu of the tithes of herbs and fruit growing in their respective gardens and orchards, whether or not the same were connected with other lands; and the plough-penny by the occupiers of lands, for and in lieu of the tithes of every thing produced by the plough upon the said lands, except corn and grain, and whether such lands shall or shall not then be ploughed or in cultivation. Customary payments were also proved to have been made during memory for the tithe of grass whether mown, made into hay, or eaten by barren cattle: and that the payments of the moduses for that tithe were contributory among the owners of cattle gates and other lands within the township, and that nothing had ever been paid for agistment, or for turnips and potatoes.

Duncey and Hall, for the plaintiff, submitted that as the vicar had established his *prima facie* title to all the tithes, except corn and grain, the question would be, whether the defences were made out? The garth-penny they did not dispute*. The plough-penny they objected to, as being uncertain as to what tithe it was payable in

lieu of, and by whom it was payable, or what quantity of lands it covered with respect to each, and in the amount [28] of the payment. This kind of modus (they contended) was one which was called in the books a leaping modus, as it must ever be varying, and never could be fixed or certain; and therefore such a modus has always been held to be bad. It might be in one year one penny for all the lands in tillage, and in the next 1000 pennies. And they cited *Turton v. Clayton* (Bunb. 80, and 2 Gw. 628), where the payment of a penny for tithe of hay was held to be bad for that reason. A vicarage would be incapable of being valued where such moduses prevailed; and so unreasonable and uncertain a commutation never could have been acceded to. They also cited *Blackburn v. Jepson* (17 Ves. 473), in support of the objections, and particularly as establishing that 4d. payable by each occupier, having lands cultivated by the plough, &c. was bad for uncertainty.

They objected further, that the moduses were ill pleaded; for it was not alleged in the answers, that there had been in point of fact a customary payment made in lieu of the tithes in dispute; but the defendants had merely said, "they insist and hope to be able to prove" that there hath been and payable, and that they submitted was not such a positive allegation of the matter of the defence as was necessary in pleading.

They next submitted, with respect to the laying of the plough-penny, that there was a variance between the modus as laid in the answer, and the payment as proved by the depositions, so that the [29] defence was not supported by the evidence: the allegation being, that the modus is payable by the several and respective occupiers of the lands in tillage, arising, &c. "on lands so in tillage;" whereas the proof is, that it has been paid by the occupiers of lands (generally), whether in tillage or not, for and in lieu of the tithe of every thing produced by the plough, making it in effect a personal payment. In support of that objection they cited *Scott v. Fenwick* (3 Gw. 1252), *Bishop v. Chichester* (4 Gw. 1316), *The Warden and Minor Canons of St. Paul's v. Morris* (9 Ves. 164), and *Blackburn v. Jepson* (17 Ves. 477, 8). And they suggested that it might be a mere eleemosynary payment to the church, without having reference to any particular article, although the defendants, taking advantage of the name, had chosen to call it a modus covering the productions of plough lands. Cowel, in his *Interpreter* (title *Plow-alms*), describes plough-penny as being an eleemosynary payment, and that such payments are personal, and are payable *de qualibet caruca juncta inter pascham et pentecosten*. And they cited a dictum of Mr. J. Chambre, who held, on the trial of an action in Westmoreland, in 1811 (*h*), where a plough-penny was set up as a defence, and was stated to be in lieu of turnips and potatoes, that such particular prescriptions should be proved to be applicable to the tithe sought to be covered by them. Lastly, they contended that the modus pleaded for grass in the township was, if it could be proved, a mere hay mo-[30]-dus, and could not be held to cover agistment; a tithe never demanded till modern days, to which the payment could never at any time have been applied, and of which for the same reason perception could not have been enjoyed, or be proved on the part of the vicar.

With respect to the defence set up, of the turnips and potatoes, grown in fields, being consumed in the families of the occupiers, they contended, that it was not founded on law; for that there did not exist any such ground of exemption from tithes, or if there were any such, it would hardly apply to such quantities as were produced in fields, and as a fallow crop for wheat, as in this case.

Fonblanque, Martin, and Spranger, for the defendants, in answer to the objections taken to the laying of the modus of the plough-penny, submitted, that that which had been directed to the terms of the answer in alleging the modus, was rather matter of exception to the sufficiency of the answer, than applicable to the questions in the cause at the hearing.

As to the point made of its being a fluctuating modus, and liable to diminution in amount, they insisted (on the authority of *Bennett v. Read* (4 Gw. 1290)) that the objection did not apply: for there the same objection was taken to the tithe being payable by such householder, that the number of householders might be reduced to one, yet in that case the Court (adverting to Lord Hardwicke's [31] words in *Hardcastle v. Smithson* (3 Atk. 246)), said, on the point of the uncertainty of the recompence, and its possible reduction in value,—that the answer given to it at the bar was the true one. The recompence is certain to a common reasonable intent, and more is

not required. The possible reduction of the number of inhabitant householders is too remote a consideration. And the fluctuation (as was said by the Court in *Bennett v. Read*) may operate in favor, as well as to the disadvantage of the vicar. Thus both the objections are answered, in that case, by the Court. Here the recompence is certain, though not in amount; and in fact the argument of possible diminution of the amount would apply to all sorts of titheable matters; for there is no vicarial tithe which may not be diminished by some means or other, as by converting the soil to other purposes.

As to the commutation being unreasonable, that is also answered by the Court in the same case; for Eyre, Baron, there says, "it is no part of our consideration whether it be sufficient in value. That was the concern of the original contractors: we have only to see that the contract is sufficiently precise and certain."

With respect to the alleged variance between the answer and the evidence, if there be any, the proof has enlarged the vicar's right, and shews the modus to be more advantageous to him, though it is substantially the same.

[32] The case of *Blackburn v. Jepson* they distinguished from the present, as not in point on the question of the plough-penny, as objected to by the counsel for the plaintiff; because that modus was held to be bad, solely because there was no averment of what quantity of land a plough consisted, and for no other reason, whereas that objection does not arise here.

The point raised by the defence, whether potatoes and turnips consumed in the family were exempt, they submitted had been too lightly passed over by the counsel for the plaintiff; for the authorities on that subject are strongly in favor of the defendants. Dr. Burn notices the exemption in the case of peas (*Eccles. Law*, vol. iii. p. 436), and in *Ro. Abr.* 647 (A.), pl. 11, the same doctrine is to be found; and if peas are exempt as garden stuff, why not every thing ejusdem generis;—for that is the ground on which vicars themselves claim tithes of articles of modern introduction—on the principle of their being consumed at home. There is also another dictum to be found in the same book (*m*); where it is said, that for sheep fed on a man's own land, and afterwards eaten in his own house within the parish, he shall pay no tithe.

[Richards, Chief Baron. I cannot consider that to be law. I do not see the distinction; for if peas are exempt when consumed at home, why should not the same exemption extend to corn; and if to sheep, on the same principle, why not [33] to oxen and other animals. If it be confined to any specific matters, I shall certainly not be disposed to carry it further.]

To obviate the objections raised in argument to the modus for agistment, the defendant's counsel suggested, that the modus was not set up as covering the specific thing eo nomine, but as being included in the term "grass," which (they submitted) was equally protected by it, whether mown and made into hay, or eaten: and they urged that as such a modus was neither illegal nor uncertain, and as the payment had been proved, and to have been made by occupiers who had no hay, but merely pasture, and as no perception had been shewn, the Court should give the defendants an opportunity of inquiring further into the nature and object of a payment made for so long a period.

Dauncey, in reply, repeated his former objection to the manner of introducing the modus in the answer by the defendant, without stating whether they believed in the existence of the modus pleaded: but

The Lord Chief Baron over-ruled it; holding it to be sufficient to let in the evidence on—that if it were not, it was now too late (at the hearing) to make any such formal defect matter of objection—and that exceptions should have been taken to the answer when it was filed, if it had been thought insufficient in that respect.

[34] He then contended, that the plough penny was eleemosynary, and nothing like a modus in any respect. He opposed to the authority of *Bennett v. Read* the case of *Travis v. Oulton* (3 Gw. 1066), and the decision cited above in *Blackburn v. Jepson*.

He denied the law of the exemption set up for potatoes and turnips on the ground of family consumption, and contended that the strong instances adverted to were rather exceptions, proving the rule to be the other way, than cases establishing the

(m) *Ro. Abr.* p. 647, pl. 10, and *ib.* p. 642 (S.), pl. 5 & 6, "Nota per custome."

doctrine, and that they rested on no principle of any kind, or if well founded, it must extend to all other titheable articles, when consumed by the family.

On what was said as to the grass moduses covering agistment, he urged that the hay was in itself so totally distinct from agistment, both in the nature of the thing and the quality of the tithe, that a payment for either could in no sense be considered as a commutation for the other.

Cur. adv. vult.

RICHARDS, Chief Baron, now delivered judgment.

This bill was filed for an account of the tithe of turnips, potatoes, and agistment: and the main defence is the several moduses which have been set up.—The title of the vicar to the tithes demanded is therefore quite clear: the only question [35] then is whether he may take them in kind, or must receive them *sub modo*, and that will depend on the evidence of the facts entirely.

In the first place, however, the defendants insisted on an exemption from the payment of tithe for all such turnips and potatoes as are consumed in the family of the grower, but it is clear that that ground of defence cannot be maintained. I have never known any instance where potatoes, planted in small quantities about the house even, and used by the family and their cattle, were considered as exempt from tithe on that principle any more than wheat, or any other titheable matter. If there be any such exemption for green peas, it stands alone, and I see no reason for extending it.

The first of the moduses which have been set up is the garth penny, and as that is not disputed there can be no decree for the vicar against that modus.

We have next to consider the plough-penny, as it is called. It is laid as payable by the several and respective occupiers of lands in tillage within the said parish, for and in lieu and satisfaction of all small prædial tithes, growing upon lands so in tillage.

The first question arising upon that is, whether it is, as stated, a good modus in point of law; that is, whether one penny, to be paid for all the lands which the occupier may choose to take into his [36] own hands (which may extend to the whole parish) is a good modus. On that point two cases have been cited, which I confess I cannot reconcile, and I am not ashamed to say so, when I find the same inability acknowledged in the case of *Blackburn v. Japson*, by the late Master of the Rolls, and who on that account declined to decide the question, suggesting that it would be proper in such a case (where there was no doubt as here with regard to the fact of the payment, and the two decisions being at variance on the point) to do what had been frequently done under such circumstances, namely, to postpone the decision of the question of law until it shall be ascertained whether the modus exists in point of fact. I do myself think the modus very objectionable as to its legality, but that is however rendered doubtful by what was said by Lord Chief Baron Eyre, in the case of *Bennett v. Read*.

Then it was objected that this modus was not proved according to the terms in which it is laid. I have looked at the evidence, particularly that of Peacock, which was read by the plaintiff, and am of opinion that it supports the answer.

Another point made was, that this payment of a plough-penny must be taken to be merely eleemosynary, but how can I say that it is an eleemosynary gift, or treat it as if it were, unless there is evidence given to shew that there is some probability that it was, but as none is offered, I cannot order a direct enquiry to be made expressly on that point.

[37] I think, however, the payment itself is sufficiently proved to require the aid of an issue: and I shall therefore follow the example set me by the Master of the Rolls, which I shall always be glad to do where I can, and will not give any decisive opinion on the legality of a modus, which (it not being as yet established in point of fact) may, perhaps, never come in question.

Tuesday, February 10th, 1818.—[His Lordship, however, desired, that that point might stand over for further consideration, and that the decree should be in the mean time suspended. And in the following Hilary term (10th of February 1818) he pronounced the payment not to be a modus, and, countermanding the issue, decreed an account of the tithes.]

The remaining question is, whether each of these townships pays a modus for the tithe of agistment as well as of hay. That they do in fact pay a modus there is no doubt, nor is it denied; but it is contended that that modus is paid in lieu of hay only, and does not cover the tithe of agistment. That certainly seems to be reason-

able; but then there is very strong evidence on the other side, to shew that it included the tithe of agistment. There is no objection made to these moduses in point of form, and there is no doubt that a contract may be entered into for both species of tithe; still the question is, whether it was entered into in point of fact. But then it has been argued that the same modus cannot be payable for both species of tithes, because agistment is a tithe not [38] known, or at least not demanded till of late years. I know well, personally, that that is so, but it is nevertheless matter of argument and reasoning merely, and the fact itself must be decided by evidence; for though it is true that the tithe of agistment has not been required to be paid till recently, yet it is a tithe as old in itself as the tithe of hay, and therefore may have been contracted for in very ancient times, but may afterwards have been neglected, till it had become almost forgotten. Here I find such evidence given on the part of the defendants as obliges me to direct an issue, for I cannot decide against that evidence without, and for aught I know they may have much more to offer.

Decree.—Issues as to all the payments, except the garth penny: and as to that, the bill to be dismissed.

[39] THE KING IN AID OF SOLLY v. ADAM. Saturday, 15th November 1817.

Where defendant's effects have been sold under a venditioni exponas on an extent in default of claim, it does not conclude his assignees under a commission of bankruptcy; and they will be allowed, on application, to enter their claim, and plead in a proper case where the proceedings have gone so far, on payment of costs of the sale and the application and putting the prosecutors of the extent in the same situation as if they had claimed and pleaded in due time.—A short delay (as a month) is not laches in the case of assignees.

Curwood, on a former day, had obtained a rule, calling on the prosecutors of this extent to shew cause why the assignees of the defendant, who had been declared a bankrupt, should not be let in to plead to this extent, notwithstanding writs of venditioni exponas had issued, and why the sheriffs of Surrey, Middlesex, and Kent, should not be ordered to pay over the monies levied by them into the hands of the Deputy Remembrancer, to abide the event of the suit.

The affidavit used on the motion stated, in effect, that the extent issued on the 23d of April, on a debt, alleged to be due on a bill of exchange, dated the 16th of December; but, in fact, drawn, as defendant believed, on the 14th February. That the commission of bankruptcy issued on the 3d of June, and the assignees were appointed on the 24th. That on their investigating the bankrupt's accounts, they had reason to doubt the existence of the debts. That the assignees could not have made this application before; and that notice not to pay over the money levied had been served on the sheriffs.

An affidavit of a former clerk of the defendant also stated some strong facts to invalidate the bill of exchange.

[40] Bauncey now shewed cause, relying on the following facts stated in the affidavits filed in opposition to the rule. That the writ of extent issued 23d April; the inquisition was taken the 14th May; and that the venditioni exponas issued on the 30th, in default of claim. That an inquisition was also taken on the 6th June, whereon the rule to claim expired the 14th, and a venditioni exponas issued on the 20th. That the effects being insufficient, another writ of extent was issued the 18th of June, returnable the 25th June, and tested the 23d April. Inquisition 25th June. Rule to claim expired 25th July, and venditioni exponas issued on the 26th, under which the goods were afterwards sold.

A long affidavit was also read as to the merits.

On those facts it was strongly pressed on the Court that this application was too late, even if there had been merits distinctly shewn, which, however, were negatived (it was said) by the affidavit of the prosecutor of the extent.

RICHARDS, Chief Baron. The assignees ought certainly to be let in to claim. If they have been guilty of any laches, or delay, it has not been more than a month; which, in the case of assignees, ought not to be allowed to prejudice the creditors. In such cases some delay may be unavoidable. Then they have sworn to merits; and although it is denied that they have merits, we cannot take that denial here.

[41] The rule must therefore be made absolute.

The rest of the Court concurred.

The consideration of the costs being mentioned, the Court said that this was a case where the assignees ought to pay the costs of the application.

Per Curiam. Rule absolute on payment by the assignees of the Costs incurred by the prosecutors of the extent on the sale of the property, and of this application; pleading *instanter*, and going to trial at the Sittings after Term.

[42] SIR WATKIN LEWES v. MORGAN AND OTHERS.* 18th November 1817.—Settlement of accounts between attorney and client, not conclusive: the nature of their connection, excepting their accounts from the operation of the general rule in equity. Therefore accounts settled and signed, and where vouchers are delivered up, and a note given for the balance, will be re-opened at a very considerable distance of time after such settlement, where the parties stand in the relative situation to each other of attorney and client, agent and principal: and where the balance is in favour of the former under the peculiar circumstances affecting this case.—On taking such re-opened accounts before the Deputy Remembrancer, it will not be sufficient between such parties that bonds are produced in evidence to prove that the debt for which they were executed existed; and the obligee will be required to give evidence of the actual payment in money of the full consideration expressed. But in a case of so great length of time, the party will be allowed to make oath of the existence of any voucher, which may not be forthcoming on re-opening such accounts.—An attorney acting as agent for

* Complicated as the present case may be in its circumstances, yet as it has in effect produced from time to time from the high judicial characters who have presided in the Court of Chancery, or sat on this Bench for upwards of the last thirty years, with only one or two exceptions, their several opinions on the extent of the jurisdiction which courts of equity may exercise, as between parties who, like these, have been long engaged in mutual dealings in characters whose connection necessarily induces confidence and subjection on one hand, and controul, influence, and opportunity, on the other: it must therefore be considered as one of great importance, and not to be omitted in a collection of exchequer cases. Those opinions, too, have been most elaborately formed, and more deliberately promulgated, than is usual in cases of unanimity. The several decisions are made much the stronger by being founded wholly on the fidelity required by the Courts from persons in the situation of professional adviser to others, by whom great confidence must necessarily be reposed in them, abstracted from and independent of the common considerations, so often forming a material part of such cases, of impotence from infancy or age, imbecility of mind, ignorance from want of education, inexperience in business, and poverty or humility in condition of life,—the plaintiff now claiming the protection of the Court, being free from all such incapacities.

On the particular subject of the case therefore the present series of opinions forms an almost regular treatise; and the Editor presumes to think it may be not the less valuable, appearing as it does through the medium of a report, which adds at least the advantage of developing the course of practice, as displayed in the progress of a suit instituted for restitution of rights lost or injured by consequence of such connection; and probably the difference of opinion which has prevailed on the Bench in this Court, in most of the decisions which have been pronounced (supported as it is by the steady logical ability, for which the judgments of the learned dissentient are on all occasions so conspicuous,) and which will be found to be more referrible to the facts than the law of the case, may have a tendency rather to illustrate and enforce the legal doctrine deducible from it, than to render it the weaker or more doubtful as an authority.

These observations, which the Reporter has ventured to obtrude on the case, have been made with the double purpose of furnishing an apology, if not an excuse, for its length; and of directing the reader's attention, in limine, to the points of which he is ultimately to be possessed, in aid of the usual epitome of the case by means of the marginal reduction.

the mortgagor and mortgagee, in the matter of the mortgage, and as agent and quasi banker, for the mortgagor (that is, receiving the mortgage money, and giving his accountable receipts to the mortgagor), will not be allowed to charge the mortgaged premises with a greater sum, (although actually advanced by him on account of his principal and client, and within the amount of the sum to be borrowed on mortgage) than shall be proved to have been really paid to him in money by the mortgagees, on account of and as agent for the mortgagor: nor will the most minute fraction advanced by him to make up the integral sum of the mortgage money be allowed to stand as a charge on the estates.—An attorney having himself, in quality of banker to his client, received money which he has procured to be advanced to such client on mortgage of his estates by a term of years assigned, for which he gives his accountable receipts, and from which he discharges himself by money actually paid to and on account of the principal, and which appears by an account settled and signed by both parties, will yet not be allowed to charge the mortgage estates with any sum ultra what has been actually advanced by the mortgagees in money, although he seek to charge the estates with no larger sum than the express amount which the term is created to raise, and although there are unsatisfied judgments recovered by him against his client, outstanding at the time when the mortgagor seeks to have the possession of the mortgaged premises delivered up to him, such judgments being held not to be tackable to the mortgages.—On a bill for an account of all transactions between the parties, such account having been decreed, the Court will order, on application, if any of the transactions developed in the course of the investigation appear to warrant it, that the Deputy Remembrancer take a separate account (and report it specially) of the mortgage account, strictly speaking, and if found to have been satisfied, (however less the amount may be than the money actually advanced by the attorney) they will admit the mortgagor to redeem: or where the whole has not been satisfied, on paying what shall not have been already paid. Wood, Baron, *contra*.—Bills of such solicitor for business done, forming items in such account, are still liable to taxation. Instruments (as bonds, &c.) will not, under such circumstances, be permitted to stand as a charge on the mortgaged estates, although expressly made part of the consideration in the mortgage deed, unless it can be shewn that the consideration of such bonds have been actually paid in money by the mortgagee to the mortgagor. All the monies advanced by the solicitor, and otherwise due to him ultra the mortgage money, must go to the general personal account. Wood, Baron, *contra*.—If the attorney (being concerned as well for the mortgagor as mortgagee) have been appointed receiver of the rents and profits of the mortgaged estates, and on the order made for delivery of possession, there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgagees, he will be ordered to pay such balance into Court, notwithstanding the general report have not yet been made, on which there may possibly be found to be a greater sum of money due to him than the balance in his hands.—Wood, Baron, *dissentiente*.

[See *S. C.* in Exchequer Chamber, 1829, 3 Y. & J. 230; and in House of Lords, 1834, 3 Cl. & F. 159; 8 Bligh, N. S. 777. For previous proceedings, 1816, see 4 Drw. 29.]

The various proceedings which have taken place during the course of this long protracted suit have [43] given rise to the discussion of a doctrine, nowhere appearing in the books to have been ever before so [44] fully considered by the Courts, and one of the highest importance in point of law, as affecting the interests of every man of property who may be driven by the pressure of his emergencies to have recourse to a legal adviser, in a season of difficulty. As the whole case depends materially on the very peculiar situation of the parties to the suit, and the nature of their mutual transactions and dealings together, as with reference to their connection in the several relative characters, successively, of attorney and client, principal and agent, banker and customer, mortgagor and mortgagee, obligor and obligee, debtor and creditor, plaintiff and defendant, a succinct and minute detail of the history of that connection, and of those transactions becomes indispensibly necessary, both to a proper understanding of the nature of the case, and to its being called in aid as an authority: for the facts form the ground-work and foundation of all the various decisions which have been from time to time pronounced in the cause.

In the year 1773 it was agreed between the plaintiff and defendant * (who first became acquainted together casually on the occasion of an accidental meeting in Wales,) that the defendant should procure for the plaintiff money from 6 to [45] 8000l. on mortgage of certain estates in the counties of Glamorgan and Carmarthen, of which the plaintiff was seized in right of his wife, at four per cent. which the defendant had professed to be able to do. That sum, when raised, was to be applied partly in discharge of a mortgage, then outstanding on the plaintiff's estates in Pembrokeshire, to Dr. Kent, for 3000l. (which was subsequently increased to 5000l.) with interest at the rate of five per cent. and the remainder was to be paid to, or to the account of the plaintiff. In the mean time and while the defendant was endeavouring to negotiate the various loans which it was intended to procure, he advanced to the plaintiff (as he stated) a sum of 500l. and various minor sums at different times (alleged to be the property of the defendant's brother Chardin, then in the defendant's hands) to meet the expences of the plaintiff, who was at that time engaged in an election-contest for the city of Worcester: for all which several sums consolidated, amounting together, according to an account then taken between plaintiff and defendant, to the sum of 2400l., the plaintiff, at the end of the year, executed a bond to Chardin Morgan, which he delivered to the defendant.

To enable the defendant more readily to procure the loan, the plaintiff and his wife, by lease and release (24th and 25th March 1775), limited and appointed their settled estates in Glamorgan and Carmarthen, to the use of George Morgan and James Morgan, two of the defendant's brothers, [46] for a term of five hundred years, in trust to raise the sum of 12,000l. to pay off the said mortgage of 5000l. and to keep down the interest on the money to be advanced. The defendant at that time however failed to procure any loan on the estates. In the following May, (the defendant being about to be married) an indenture of settlement was executed, whereby, after reciting that part of the fortune of Amelia Farrer, (the defendant's intended wife) consisted of 1542l. and 2154l. East India annuities, and 1442l. 10s. three per cent. reduced annuities, and six fen office bonds for 100l. each; and reciting the aforesaid bonds for 2400l. and 600l.; and that the said East India annuities and reduced annuities had been transferred into the names of the said William Farrer and James Morgan, it was witnessed and declared, that the said William Farrer and James Morgan, their executors, administrators, and assigns, should stand possessed of the said East India annuities, bank annuities, fen office bonds, and the said bonds for 2400l. and 600l. upon trust, to get in the money secured by the said two last-mentioned bonds, and invest the same in Government or real securities, and pay the interest and dividends thereof as therein mentioned. And the defendant John Morgan covenanted, that in case the said trustees should not, within two years, be able to recover payment of the whole of the money secured by the said bonds for 2400l. and 600l. he (the defendant) his executors or administrators, would make good the same; and he also covenanted to pay to the said [47] trustees a further sum of 2500l. as therein mentioned. On the execution of the settlement the defendant prevailed on his said trustees to advance the plaintiff 8000l. on the aforesaid mortgage, which they did in part in the following manner, viz. by assignment of the bond for 2400l. given to Chardin Morgan (and which had been previously, as was stated, assigned by him to the defendant's trustees),—by payment by them of 4209l. 7s. 1d. arising from the sale of the said East India and Bank annuities, and 12s. 11d. added thereto by the defendant, all which were received by the defendant as agent, &c. for the plaintiff, and the defendant gave the plaintiff his accountable receipt for 6610l.; and a memorandum of the whole of the transaction was endorsed on the settlement; and on the 2d June 1775, the term was assigned to the trustees under defendant's settlement, by way of mortgage for that sum. On the same day the plaintiff executed to the defendant a receivership deed, appointing him receiver of the rents and profits of the estates so mortgaged to the trustees (a new appointment having in the mean time been made of Chardin Morgan, as a trustee of the term, in the room of James), with power to bring ejectments: and out of such rents and profits, the defendant was to keep down the interest of the 6610l. and pay the residue to the plaintiff. On the 2d April 1776, the defendant's trustees advanced the plaintiff, by payment to the defendant, as his agent, a further sum of 1200l. for securing which, with 190l. advanced

* By "the defendant" will be meant the defendant John Morgan throughout.

by the defendant himself, the term was further mortgaged by deed poll, [48] indorsed for 1390*l.* for which sum the defendant also gave the plaintiff his further accountable receipt, making a corresponding memorandum on the back of his marriage settlement, declaring thereby that 1200*l.* part thereof was applicable to the trusts therein. On the 3d of the same month Henry Wilder (a trustee under the marriage settlement of James Morgan) advanced on further mortgage of the term 4000*l.* by payment to the defendant, for which also he gave the plaintiff his accountable receipt; and in the following May, the defendant paid off the mortgage for 5000*l.* to Dr. Kent, and interest, amounting to 309*l.* 7*s.* 6*d.* In the ensuing July Chardin Morgan advanced the plaintiff 1000*l.* on an assignment of his interest in a decree in a suit in Chancery, entitled *Lewes v. Popkin*, for which sum likewise the defendant gave the plaintiff his accountable receipt.

In December of the same year the defendant delivered to the plaintiff an account of the application of all the sums so received by him as his agent, making together the sum of 13,000*l.* And on the 24th of February 1777, after a meeting for the purpose, where the said accounts were investigated by the plaintiff, and certain trifling deductions made by him under the stated account in his own hand-writing, having also himself ticked off all the items for the disbursement of which by Morgan vouchers had been produced, the plaintiff wrote under the account the following memorandum, which he signed, "4th February 1777. Settled and allowed the above account (errors [49] excepted), the balance, after deducting 55*l.*, being 567*l.* paid by note of hand;" which note of hand was then given to the defendant, who thereupon delivered up to the plaintiff all his vouchers for the account, and a duplicate thereof, which was signed by him.

Immediately afterwards the defendant (as he stated) lent the plaintiff 200*l.* for which he took his note of hand; and he also lent him 300*l.* more on the credit of the decree already alluded to, for which and other sums amounting to 1142*l.* the defendant afterwards recovered judgment, and took a warrant of attorney, and also for 1547*l.* 19*s.* recovered at the suit of Chardin Morgan, on the sums of 1000*l.* 120*l.* and 300*l.* advanced in 1776 and 1777, and the interest.

In August following, the interest of the mortgage money of 8000*l.* advanced by the defendant's trustees, being in arrear, the defendant filed a bill on the mortgage, and brought ejectments on the term to enable him, as receiver, to enter into the receipt of the rents and profits. In September it was referred to the arbitration of two solicitors, William Parry and Henry Holt, to ascertain what was due from the plaintiff to the defendant on the mortgages and judgments, with a view to the paying off of the whole, and releasing the estates: the proceedings in ejectment to be stayed in the mean time for six months: and the tenants to suffer judgment to be entered up against the casual ejectors, the last day of Hilary then next. [50] In March 1779, the referees made their award, declaring (after reducing the defendant's bills of costs from 1138*l.* to 569*l.*) that there was due to the defendant and his trustees 16,368*l.* 17*s.* 7*d.* on the mortgages and judgments; and the defendant having, in the next Easter Term, obtained judgment for the 569*l.* and executed a writ of fieri facias, on the old judgment for 1142*l.* on timber felled by the plaintiff on the estates, not comprized in the mortgage term. In Hilary 1780, a reference of all matters in difference to Mr. Blake was made a rule of Court by consent, who awarded the timber to be sold, and the proceeds, deducting all reasonable costs and charges, to be paid to the defendant; and that Rhys Davies, of Swansea, should be appointed receiver of the rents and profits of the mortgaged estates, who was to apply the same in payment of the interest of the 8000*l.* and 4000*l.* due to the defendant's trustees, and the costs of the ejectments, and to pay the residue, after deducting the costs of the receivership, to the plaintiff.

Hilary Term, 1783. Bill filed. In Hilary 1783, the plaintiff filed the present bill against the defendant, stating that the sums amounting to 12,000*l.* said to have been advanced, had not been advanced in fact, but merely some small sums on account; that the 5000*l.* mortgage was not paid off till May 1776, and that the plaintiff never executed a bond for 2400*l.* to Chardin Morgan, or, if he did, it was only to raise money on; that the defendant had never delivered any bills of his fees and disbursements, and [51] that there were errors in the account settled 24th February 1777: and he prayed that an account might be taken of all dealings and transactions between the plaintiff and defendant, and James Morgan and Henry Wilder and the

plaintiff, and Chardin Morgan, deceased, and particularly between the plaintiff and the defendant John Morgan, and of what was ready and bona fide due to the defendant and his trustees, and the mortgagee Wilder; and that so much of the several sums of 6610l. 1390l. and 4000l. as should appear to have come to the hands of George Morgan, might be answered by him accordingly, and as to what should appear to have come to the hands of Chardin Morgan, in his life-time, might be answered out of his assets by James Morgan; that the award of Holt and Parry might be declared void; that the defendant's bills might be taxed; and that on payment by the plaintiff to the defendant and his trustees, and the mortgagee Wilder, what should be found due on taking such several accounts, the plaintiff might be let in to redeem the estates comprised in the said term of five hundred years, and that the defendants might be restrained from selling any more of the timber felled: but that the remainder unsold might be sold for the plaintiff's benefit.

To that bill the defendant, the mortgagees, and judgment creditors, duly appeared, and on the 25th of March 1784, the defendants William Farrer and James Morgan, put in their answer, thereby stating that the said bond for 2400l. [52] had been assigned to them as trustees of the marriage settlement of the defendant John Morgan, dated the 5th of May 1775, and which, being added to 4209l. 7s. 1d. other trust money, made 6609l. 7s. 1d. which, with 12s. 11d. paid by the said defendant, made in the whole 6610l. the consideration for the mortgage of the 2d of June 1775; and that some time before the date and execution of the deed poll of the 2d of April 1776, they advanced the plaintiff 1390l. by paying the same into the hands of the said defendant, as his attorney, and the same was secured to them by the deed poll; that they had no interest in the said sums, making together 8000l., save as trustees as aforesaid, the same being money settled on the marriage of the defendant with the said Amelia; and the said James Morgan, by the same answer said, that on the 2d of February 1776, he advanced the said plaintiff 4000l. part of the trust money settled on his the said James Morgan's marriage, by paying the same into the shop of the said Messrs. Hoare, in Fleet Street, in the name of the said defendant, as the attorney to the said plaintiff, yet that no security was executed till the 3d of April following; and he further said, he believed that the said Chardin Morgan in his life-time, advanced the said plaintiff 1000l. 300l. and 120l. and found it necessary to bring an action at law, for re-payment or better securing the re-payment thereof; and that the said Chardin Morgan afterwards dying, the said plaintiff executed a warrant of attorney to enter up judgment against him for principal, interest, and costs, amounting to 1547l. 19s.

[53] On the 19th of May following, the defendant John Morgan put in his answer, thereby denying all the material allegations in the bill, and also denying that the consideration money for the several securities were not advanced, or that there were any errors, overcharges, or omissions in the account of the 24th of February 1777; and also denying all fraud whatever on the part of himself, or the trustees or mortgagees.

Henry Wilder, by his answer, stated that he was trustee of the marriage settlement of the said James Morgan for the said 4000l. And George Morgan, by his answer, said that he executed the aforesaid mortgages as trustee for and by the direction of the plaintiff, and believed that the said sum of 12,000l. was bona fide advanced to or for the use of the plaintiff.

On the 2d June 1788 (the defendants having in the mean time made several motions to dismiss the plaintiff's bill for want of prosecution) the cause came on to be heard on bill and answer only, the plaintiff not having examined any witnesses in support of his bill, when the only question which was made was, whether the judgments were tackable to the mortgages; and the Court declared that the judgments were tackable: and that therefore the Court could make only the usual decree for redemption, on payment of principal and interest and costs, and recommended the counsel, on both sides, to draw up heads of a decree to be presented to the Court on the 5th of June; [54] but counsel not agreeing, nothing further was done.

On the 10th of April 1794, a report was made in the cause of "*Lewes v. Popkin*," by Mr. Eames, then one of the Masters of the Court of Chancery, in pursuance of an order of reference to him respecting the aforesaid sums of 1000l. and 300l., whereby he certified the aforesaid indenture of the 11th of July 1776, and the indorsement thereon of the 8th of March 1777, and that he had computed interest on the said sums

of 1000l. and 300l. to the 8th of March 1794, which amounted to 1105l., whereto being added 5l. 17s. 6d. for interest from the said 8th of March 1794, to the 10th of April then instant, they made together, to be due to the said James Morgan, on the said 10th of April, for principal and interest, 410l. 17s. 6d., which report was, by order dated the 20th of May following, absolutely confirmed.

By an order made by the said Court of Exchequer, in the cause of "*Lewes v. Morgan*," on the application of the plaintiff, dated the 10th of July 1795, it was ordered that Messrs. Kent and Co. should be at liberty to let and set the said estates, but they were to pay the rents and profits thereof to the defendant John Morgan.

In April and May 1796, the cause came on again to be heard, when the answer of the said defendants William Farrer and James Morgan, stating the actual payment of the 1390l. into the [55] hands of the defendant John Morgan, being read, and the defendant's marriage settlement of the 5th of May 1775, with the indorsements thereon, being produced, whereby the component amount of the aforesaid sums of 6610l. and 1390l., as agreed upon between the defendant and his said trustees, appeared, and counsel having been heard on both sides,

2d July 1796. —MACDONALD, Chief Baron, now delivered the judgment of the Court. Having adverted to the facts of the cause, and emphatically marking that the defendant was, during the whole time, the plaintiff's sole legal adviser—his having demands for costs amounting to between 3000l. and 4000l.—and his having been in possession or receipt of the rents and profits of the plaintiff's estates for ten years—"And now, said his Lordship, he (the defendant) claims 16,000l. to be due to him from the plaintiff."

"Thus stands the case as between the plaintiff and his friend and law adviser. It manifestly appears, that the plaintiff trusted the whole management of his money affairs to the defendant, and that he possessed his entire unsuspecting and absolute confidence. On the ground of that connection, the plaintiff resorts to this Court, that the defendant may be compelled to satisfy the Court as to the real foundation of his claims. And we are of opinion, that he must account for the sums alleged to have been advanced of 6610l., 1390l., and 4000l., and for all sums of [56] money received by him by the rents and profits of the estates, as being the plaintiff's attorney, and in whom as such he placed his sole confidence. This is a case of attorney and client. An attorney has often been described to be an officer of the Court, and in that character responsible for the protection of his client, from all acts which may prove detrimental to his interest. It is his duty to apprise him of the legal consequences of his actions, and he ought to be able to lay before the Court, when called upon, a ready account of all their mutual transactions, and to be able to corroborate them by evidence; and the Court may refer them to the Deputy Remembrancer."

"In the case of *Walnesly v. Booth* (2 Atk. 25), Lord Hardwicke said, that an attorney's receipt for the amount of his bill of costs was no bar to his client's taxation of them; that a bond or mortgage given by his client for the amount was cognizable in a court of equity, in consideration of his power and influence. And so Lord Loughborough held in the case of *Bowman v. Pappu*, and that a Court to whom an attorney is accountable as well as to his client, would not suffer such security to stand for more than the amount when taxed."

"The objections made by the counsel for the defendant to the opening the accounts of their transactions are, 1st, that there are no specific errors charged by the plaintiff's bill; 2dly, that the ac[57] counts are settled; 3dly, that the vouchers are delivered up; 4thly, that the award of Messrs. Holt and Parry was set aside by the award of Mr. Blake; and, 5thly and lastly, the length of time elapsed since the accounts were settled. As to the awards, they only shew, that in the opinion of one attorney, the charges of another attorney were very great. With respect to the first and second objections, it must be admitted, that the plaintiff's bill is not a strong one in respect of charging errors; for there are none specifically stated; but, on the other hand, on comparing the answers with the schedules, there appears to be no sort of accuracy in the accounts. Some are without dates, and they are so contounded as to have materially varied the balance, and so much irregularity and obscurity prevails, as to baffle investigation. As to the third objection of the vouchers having been delivered up to the plaintiff, where the objection to the accounts themselves are so manifest and strong as here, it may be doubted if the vouchers would verify them: at the same time, the danger of calling on a party disarmed of his vouchers to account, cannot but

be a serious proceeding. It is however to be presumed that an attorney keeps regular accounts, to which great weight must be given; and the other party must give an account of what has become of the vouchers, or produce them. The plaintiff's counsel admit that the vouchers were delivered up, and consent to be satisfied with the defendant's verification of them on oath. In *Langham v. Lloyd* that was not considered an insurmountable objec-[58]-tion. There they were so supplied, and so they may be here, by the defendant's oath."

"The circumstance of the plaintiff's situation in life—his being a barrister, an alderman, and a magistrate of the city of London—his having been sheriff and mayor of London—can have no weight against the single clear fact of his having delivered himself up to the defendant, as his confidential adviser and attorney."

"The last objection made by the defendant's counsel to the opening the accounts is the length of time since they were settled. This bill however was filed in 1783, and the plaintiff then complained of having been ruined in his property, and embroiled in every species of litigation; whereas in the commencement of his connection with the defendant it was very much otherwise with him. On that part of the case I shall refer to what was said by Lord Hardwicke, in the case of *The Drapers' Company v. Davis* (2 Atk. 295), that the behaviour of the solicitor in taking a judgment for his bills of costs, on the face of which were many extraordinary items and improper charges, warranted the Court, notwithstanding the length of time (which was from 1725 to 1742, seventeen years), in referring them to the Master to be taxed, and ordering the securities to be delivered up."

"On the ground therefore of complicated deal-[59]-ings, and the confidential relationship in which the defendant stood as to the plaintiff, the unsatisfactory accounts delivered of the bills of costs, and all the other circumstances, we are of opinion, that the several dealings and transactions between the plaintiff and defendant ought to be investigated and examined by the Deputy Remembrancer. There must therefore be an account of all such dealings and transactions, and of all monies received by the defendant as agent, both to the plaintiff and the mortgagees, and the application thereof, making all just allowances. The bills of costs to be taxed. The plaintiff to produce all vouchers, or where any one is not forthcoming, and is sworn to have been delivered to the plaintiff, it must be received as an established fact that such voucher did exist. An account must also be taken of the rents and profits of the mortgaged estates, and of the estates not in mortgage, and of the timber felled thereon."

It was accordingly decreed

That it be referred to the Deputy Remembrancer to take an account of all dealings and transactions between the said plaintiff and the defendant John Morgan, in the pleadings mentioned, and of all sums of money received by the said defendant, as agent to the said plaintiff, and also to the mortgagees, and when and how such sums of money were paid or applied to their accounts respectively, and to tax the several bills of costs claimed to be due to the said defendant from the said [60] plaintiff, as his attorney, solicitor, or otherwise; and to report what he should find due from the said plaintiff to the said defendant on account thereof; and to take an account of the rents and profits of the mortgaged estates in the pleadings mentioned, and of the timber which had been felled thereon, and on the estates not in mortgage received by the said defendant, or by any other person or persons, by his order, or for his use, or which, without his wilful default, he might have received, and the times when he or they respectively received or might have received the same; and to take an account of the rents and profits of the said plaintiff's estates not in mortgage, and of which the said defendant then was or had been in possession under the several executions in the pleadings mentioned, or otherwise received by him, or by, &c. (as before). And the Deputy Remembrancer was to make to all parties all just allowances, and all parties were to be examined on interrogatories touching the several accounts and bills of costs, as the Deputy Remembrancer should direct, and were to produce before the Deputy Remembrancer (upon oath, if required) all books, deeds, evidences, papers, writings, and vouchers, in their, or any or either of their custody or power, relative to the several matters thereby referred. And it was ordered that if, in the taking of the said accounts, and the taxing of the said bills of costs, it should appear that any one or more voucher or vouchers in support of any one or more article or articles in the said accounts, and bills of costs, had been lost, or could not be found, [61] then the said defendant should make oath before one of the Barons of that Court, that such voucher or vouchers

did theretofore exist, and of the contents and purport thereof, and that the same had been delivered up to the said plaintiff. And it was further ordered, that the directions and provisions in the order of the 10th day of July 1795, should continue and remain in full force, as if the same were herein contained, and made part of this decree. And it was ordered, that the consideration of interest of monies received by the said defendant, or which, without his wilful default, he might have received until the actual payment or application thereof, and the consideration of the costs, and all further directions touching the matters thereby referred, should be reserved until the Deputy Remembrancer should have made his general report touching the said matters: and in the mean time all or any of the parties were to be at liberty to apply to the Court, as there should be occasion.

That decree, having been drawn up, was delivered to the said plaintiff for perusal; but it was not passed till November 1797.

On the 11th of July 1798, the plaintiff gave notice of motion for the 13th, that the said William Farrer and James Morgan, the mortgagees for 8000*l.*, might be directed to deliver up the possession of the mortgaged estates, on the ground, that the 8000*l.* had been paid off by rents and profits, when the counsel for the mortgagees and [62] judgment creditors, submitted, that the motion could not be granted while the subsequent mortgage for 4000*l.*, and also the judgments for 1547*l.* 19*s.*, 1142*l.*, and 569*l.*, which were decided to be tackable to the mortgages, remained unpaid. An order, agreeable to one part of that application, was made on the 13th (July) referring it to the Deputy Remembrancer to appoint a proper person to be receiver of the rents and profits, who was to pay the same half yearly to the defendant John Morgan, till further order.

In November 1799 the defendant put in his examination to interrogatories exhibited by the plaintiff, and in the schedules thereto he set forth an account of all monies received by him as agent to the plaintiff, and to the mortgagees, and of the interest due thereon, and an account of the receipt of the rents and profits, and the application thereof.

On the 17th of June 1801, the plaintiff moved that the Deputy Remembrancer might be at liberty to make a separate report of all dealings and transactions between the plaintiff and the defendant, as far as related to the monies actually received and paid on account of the mortgages and judgments in the bill mentioned, and of all sums received by the said defendant, as agent to the said plaintiff, and also to the mortgagees, and when and how such sums were applied to their account respectively; and of the rents and profits of the mortgaged estates in the pleadings in [63] that cause mentioned, and of the timber felled thereon, and on the estates not in mortgage, received by the said defendant, or by any person or persons by his order or for his use, and the times when he or they received or might have received the same; and also of the rents and profits of the said plaintiff's estates not in mortgage, and of which the said defendant then was or had been in possession, under the several executions in the said pleadings mentioned, or otherwise received by him, or by any person or persons by his order, or for his use; and the times when he or they received or might have received the same. And on the 20th an order was made in the words of the notice.

In December 1801, and in January, February, March, April, and May, 1802, the parties attended the Deputy Remembrancer on the reference to him under the last order. And on the 16th July the Deputy Remembrancer made his separate report, and thereby certified

That the plaintiff had applied to the said defendant to raise him money on mortgage, on his and wife's estates in Wales, and that, pending the negotiation for such loan, the said defendant had advanced the said plaintiff divers sums of money, the property of Chardin Morgan, in his hands, and took the plaintiff's bonds to the said Chardin Morgan for the same, which bonds were afterwards consolidated by a bond for 2400*l.*, the [64] component parts whereof were set forth in the first schedule.

That the money advanced on the said bond for 2400*l.* was the proper money of the said defendant, and he certified the indenture of the 4th of May 1775; the indenture of settlement of the 5th of the same May; the indentures of lease and release of the 24th and 25th of March 1775; the deeds poll of the 31st of May and 1st of June 1775; and the indenture of assignment of the 2d of June.

That the 6610*l.* was made up of the said bond for 2400*l.*, and of the aforesaid

4209l. 7s. 1d. and 12s. 11d., and that the said bond was deposited by the aforesaid William Farrer and James Morgan with the said defendant, and the said 4209l. 7s. 1d. paid into his hands as agent to the said plaintiff; and therefore he had charged the said defendant with the whole of the said 6610l., composed as aforesaid, as monies actually received by him, as agent both to the said plaintiff and the mortgagees.

And he certified the aforesaid deed poll of the 2d of April 1776, for 1390l., and he found that the said 1390l. was made up of 1200l., arising from the sale of trust funds, vested in the said William Farrer and James Morgan, and of 190l. added thereto by the said defendant out of his own proper monies, and that the said 1200l. was received by the said defendant as agent to the said [65] plaintiff and the mortgagees, and he certified the indenture of the 3d of April 1776, for 4000l., and that the said 4000l. was received by the said defendant as agent to the said plaintiff and the said Henry Wilder, the mortgagee, making together 12,000l.

And that the said defendant had paid to the said plaintiff, or to his use, the whole amount thereof in manner set forth in the second schedule, amounting to 12,000l., which he had allowed, exclusive of the costs of the trustees of the term of five hundred years, in the execution of the trusts thereof; in which schedule was comprized the several sums of 2400l. and 13l. 19s. 5d., which the said defendant, on the aforesaid 2d of June 1775, had applied in discharge of the principal and interest then due, in respect of the said bond for 2400l., and which bond was on that day delivered up to the said plaintiff to be cancelled.

And he certified the indenture of the 11th of May 1776, for 1000l., and that the said defendant, as agent to the said plaintiff, received the same 1000l. of the said Chardin Morgan for the use of the said plaintiff. And he certified the aforesaid deed poll of the 8th of March 1777, for 300l., and the aforesaid warrant of attorney of the 6th of July 1778, for 1547l. 19s., composed of the said 1000l. and 300l., and of 120l. and interest; and that the said defendant had paid and applied the said 1000l. to or to the use of the said plaintiff in manner stated in the third [66] schedule, amounting to the sum of 1000l.; 652l. 2s. 1d. whereof consisted of money paid to or to the use of the plaintiff, which he had allowed, and 347l. 17s. 11d., residue thereof, he found the defendant had retained in or towards the discharge of bills of costs claimed to be due to him.

And he certified the warrant of attorney to enter up judgment for 1142l., and that the same was composed of the sums stated in the fourth schedule, amounting to 1142l.; 530l. whereof he found to have been money paid by the said defendant to and on the account of the plaintiff, which he had allowed, and the residue thereof consisted of the particulars in the same schedule stated.

And he certified the aforesaid judgment for 569l. And he found, that over and above the sums thereinbefore mentioned to have been received by the said defendant, as agent to the said plaintiff, and on his account, he had received the several sums mentioned in the fifth schedule, amounting to 1340l. 4s.; and that he had thereout paid to several persons on account of the said plaintiff several sums, to the amount of 790l. 0s. 9 $\frac{3}{4}$ d., which he had allowed, and 550l. 3s. 2 $\frac{1}{4}$ d., residue thereof, he found the said defendant had retained in or towards discharge of bills of costs, the particulars of which payments and applications were set forth in the sixth schedule, amounting to 1340l. 4s. And he found that the defendant had received for rents and profits the several sums mentioned in the [67] seventh schedule, amounting to 16,669l. 18s. 1 $\frac{1}{2}$ d., and had disbursed for taxes and otherwise several sums amounting to 1471l. 10s. 9 $\frac{1}{4}$ d., which he had allowed, the particulars whereof were set forth in the eighth schedule.

And he found the defendant had received for rents and profits of the estates not in mortgage several sums mentioned in the ninth schedule, amounting to 1818l. 2s. 6d., and had disbursed thereout for taxes and otherwise several sums mentioned in the tenth schedule, amounting to 76l. 6s. 11d., which he had allowed.

And he found that the defendant had received for timber several sums mentioned in the eleventh schedule, amounting to 739l. 15s. 7d.

And he certified that he had taxed the costs of the ejectments at 182l. 17s. 8d., and the costs of the judgments at 55l., but had not taxed the costs of proceedings on the said judgments—conceiving that he was not authorized so to do.

To that report the plaintiff took ten several exceptions, 1st. That there was no evidence that the several sums, the component parts of the said 2400l., were advanced by the said Chardin Morgan, or the defendant John Morgan, and, if advanced, they

appeared to have been the money of the said defendant; and therefore ought not to have formed any part of the account directed by the order of the 20th of June 1801, which was [68] confined to such monies only as were received and paid on account of the mortgages and judgments, or received by the defendant as agent to the plaintiff and the mortgagees.

2dly. That the money advanced on the said bond for 2400l. was, if advanced at all, the proper money of the defendant, and had no relation to the account directed by the order of the 20th of June 1801.

3dly. That the only consideration of the mortgage for 6610l., or the only money received by the defendant as agent aforesaid, in respect to that transaction was, 4209l. 7s. 1d.; the said bond for 2400l. having no relation to the said mortgage, and being an item in the general account, and not within the meaning of the said order, and that the 12s. 11d. was never paid.

4thly. That there was no evidence respecting the receipt of 1200l., part of the 1390l., by the said defendant, as agent aforesaid, or of the payment of 190l., the remainder thereof, by the defendant, out of his own proper monies, or that any part of the said 1390l. was advanced on account of the mortgage for that sum, except a memorandum indorsed on the marriage settlement of the 5th of May 1775; and if the said 1390l. was paid by the said trustees to the defendant, it was not received by him as agent to the said plaintiff in respect to that mortgage, and must therefore be considered like any other money belonging [69] to the said defendant, and afterwards advanced to the said plaintiff, and could only be referred to the general account, and therefore not within the terms of the said order; and the said 4920l. 7s. 1d. and 4000l., making together 8209l. 7s. 1d., constituted the total amount of monies received by the defendant, as agent to the said plaintiff and the mortgagees.

5thly. That the Deputy Remembrancer ought not to have allowed or included in the second schedule the said 2400l., and the sum of 31l. 19s. 3d. for interest thereof.

6thly. That there was no evidence of the payment of 1000l. (part of the aforesaid 1547l. 19s.) by the said Chardin Morgan to the said defendant, as agent of the said plaintiff, except the production of the assignment and judgment.

7thly. That the Deputy Remembrancer ought not to have certified the warrant of attorney of the 6th of July 1778, for 1142l., or the composition thereof, as the same had no relation to the accounts directed by the order of the 20th June 1801.

8thly. That the Deputy Remembrancer ought not to have set forth the judgment for 569l. for the same reason.

9thly. That for the same reason the Deputy Remembrancer ought not to have certified the [70] receipt by the said defendant of monies amounting to 1349l. 4s., nor the application thereof.

Lastly. That the Deputy Remembrancer ought to have certified that the sum of 1818l. 2s. 6d., received by the said defendant for rents and profits of the estates not in mortgage were received by him as agent to the said trustees (the mortgagees).

In November and December following, the exceptions were argued; after which and before the Court had pronounced judgment there, the plaintiff, on the 15th of July 1803, obtained an order by consent, whereby he was to be at liberty to pay, on or before the 7th of November then next, to the defendant, and to the mortgagees, 16,000l., being the amount of the principal and interest claimed to be due upon the aforesaid several mortgages for 6610l., 1390l., and 4000l., and the aforesaid two several judgment debts of 1142l. and 569l. over and besides the monies after mentioned. And it was ordered, that on such payment the mortgagees should reconvey or assign the mortgaged estates to the plaintiff; and it was ordered that John Phillips, the then receiver of the rents and profits, should be discharged, and John Brown, of Caermarthen, gentleman, appointed in his stead; and that the said John Phillips should pay to the defendant, pursuant to an order of the 11th of July then instant, 1618l. 4s. 7d., balance of account to Michaelmas then last.

[71] On the 9th of February 1804, the Court overruled all the ten exceptions, the Lord Chief Baron (M'Donald) pronouncing the judgment of the Court as follows:

"The delay of twenty years and upwards has entangled this matter to such a degree, that there can be no surprise that men not intuitively gifted with the power of unravelling folly, stupidity, extravagance, absurdity, carelessness, and every thing that can tend to entangle an human transaction, can understand this cause. I have

not myself such faculties as to be able, without infinite pains, trouble, and difficulty, even to comprehend it. We are not here in the case of an infant, but in the case of an adult—a barrister—a magistrate—one who has been sheriff of Middlesex, and one of the sheriffs of the city of London, and chief magistrate of that city, one who has settled accounts over and over again, and has executed deeds, solemn instruments, of which he was a perfectly competent judge, and has in subsequent instruments ratified those prior instruments so brought under his view and to his understanding repeatedly.”

“I presume I need not say, that however large, extensive, and almost infinite, the powers of a court of equity are; in the case of attornies, in bringing them to account, they are yet to be bound by a reverential awe of disturbing solemn instruments repeatedly recognized, and of which the parties themselves were peculiarly competent judges. I need not say, that such instruments are not to be [72] disturbed at the distance of so many years; I need not call to mind the reverential awe, for I will repeat the words, that is due to marriage-settlements, under which children are purchasers, if there be any; but whether there be or not, that makes no difference, for the effect of the parties is equally solemn, and the intent of the instruments is the same; I need not say that mortgages of a great many years standing, since the time the contract with respect thereto was entered into, are not to be trifled with. Absolute demonstration would be necessary to overturn such instruments; but as between Sir Watkin Lewes and Mr. Morgan, these mortgages must never be touched, they have been solemnly entered into and acted upon, and have never been complained of for between twenty and thirty years from the time of their execution.”

“We have here a case in which the transactions began as far back as the year 1774, thirty years from the moment in which I am speaking. It seemed to me in the argument for the plaintiff, that it was supposed that he had never spent a shilling; that all the expenditures that were imputed to him were all false, from the beginning to the end; but, on the contrary, it was admitted by his counsel, that enormous sums were spent in election projects. We all know that a man does not serve the office of sheriff of London gratis—the office of mayor gratis—much less can a man make a considerable figure in the world gratis: it is impossible. And now the drift of these exceptions to the Deputy Remembrancer’s report, is to enter [73] into every part of the items at the distance of twenty-four or twenty-five years, and to enquire respecting large sums advanced upon mortgages, the mortgagees being in many instances trustees under marriage-settlements.”

“It is said in the present instance, that the mortgage money is compounded of various sums, and of bonds, of which bonds the Deputy Remembrancer states one bond to amount to 2400*l.*, and that the Deputy Remembrancer ought to have entered into all those sums. This bond for 2400*l.* composes part of the sum that was settled by the defendant John Morgan, on his marriage, upon his wife and children; it was delivered by him to the trustees of such marriage-settlement, and they delivered it again to him as the agent of the plaintiff, to be cancelled. And in a subsequent mortgage to Mr. Wilder, this very transaction reciting this very bond, is again recognized, and that instrument is executed by the plaintiff at the distance of some time; and now it is asked to enter into all the component parts of that bond as against the mortgagees. I believe so violent a thing was never done. But let us see whether there is any authority for doing it. The order of the Court for making this separate report directs, &c.” [read the order on the Judgment of 1796, ante, p. 59].

“In the execution of this order, the Deputy Remembrancer seems to me to have done precisely what he ought. The three first of these exceptions all relate to the same subject: and the sum [74] and substance of the transaction is neither more nor less than this, that certain sums of money being necessary for the plaintiff’s occasions, 12,000*l.* was to be raised, and of this 12,000*l.*, 2400*l.* is the part most objected to. I have already given the history of that: and it should seem to me, that the idea of its now being to be taken from the account of the mortgages, and made an item in the general account between the defendant John Morgan and the plaintiff, would be the greatest injustice to the mortgagees and the cestui que trust of those mortgagees. The effect of the order for a separate report does not reach any such transaction; it has been in that order studiously avoided. It unquestionably never was the intention of the Court to disturb the mortgages: as well might it be supposed it was intended that the judgments should be disturbed; that certainly was not the case: and the

Deputy Remembrancer well understood the order, by proceeding upon the foot of those solid instruments executed at the distance of so many years."

"Without travelling minutely through every one of these exceptions, with respect to the other sums, the same observation applies; that they are all comprehended in solid instruments which have been executed long ago, and which the party himself, a professional man, has had the revision of again and again, and never made the least objection to till within these few years, although the transaction upon which they are bottomed is as old as 1774."

[75] "The only further observation I will make, is upon the objection to certain retainers by the defendant John Morgan for his bills of costs; and these amount to large sums: one item, 300*l.* and upwards; another, 500*l.* and upwards. We are going over a great length of time—for a great number of years. We know that election contests are expensive matters. When these matters are brought into a sheet of paper, the sum seems large; but when the situation and condition of the parties, and length of time, be considered, the sums appearing to have been expended in litigation and the various transactions for thirty years back, though they may startle the eye at first perhaps, yet, when considered, there may be a more reasonable foundation for them than appears at first sight. With respect to this, I have understood all along that these bills of costs are to be taxed."

"The Master has properly stated what the defendant John Morgan has accounted for, namely, his receipts in his quality of agent for the plaintiff, or in his quality of agent for the plaintiff and the mortgagees: he therefore states that these sums are received. There are certain bills of costs which were paid to other attornies; but these I take not to be costs as between the defendant and the plaintiff, they are not bills to be taxed as against the defendant, and therefore these are proper charges; but what he has retained in the application of the plaintiff's money which came to his hands for his own bills of costs, that is still [76] the subject of taxation: and therefore the only question is, whether those sums are to be struck out of his report or not? In either case they would be the subject of taxation."

"Then let us consider whether they ought to be struck out in this case. It is true, an attorney has no claim for his costs till they are taxed, if a party wishes they should be taxed; but in transactions begun thirty years ago, is it to be supposed that a man is to lie out of his money, because his client never calls upon him to have his bills taxed? It would be impossible for any man of business to go on in that way; and therefore it seems to me just, that the defendant John Morgan should for the present retain the money for those bills of costs, and the other items in the account not objected to for so long a time. But at the same time the plaintiff will have the benefit of the taxation of these bills, and whatever the Master deducts from them, will be placed to his credit. In so complicated a business, it would be needless to go into a detail: We are all clearly of opinion, considering all the circumstances of the case, that this is such a report as is proper, and that the exceptions must be over-ruled."

Against so much of that order as related to the 1st, 2d, 3d, 4th, 5th, 6th, and 10th exceptions, the plaintiff appealed to the House of Lords, stating, that the defendant had prevailed on him to execute the several mortgage securities without his [77] knowing the contents thereof—that the considerations thereof were not paid—that no bond for 2400*l.* ever existed; and if it did, that no consideration was ever paid; and that at the time of the execution of the said bond, and of the several other bonds before mentioned, the defendant had in his hands considerable sums of money belonging to the plaintiff.

In January 1807 the appeal was heard, when the appellant's (plaintiff's) counsel admitted, that the decree did not direct any account of the mortgages, or any inquiry into the component parts of the bonds, consolidated by the bond of the 28th of February 1775; but they contended that the Court did not mean to consider the said bonds as conclusive evidence of the advancement of the consideration thereof. In answer to which the respondent's (defendant's) counsel insisted, that the plaintiff did not, at the hearing of the cause in 1796, impeach or attempt to impeach the mortgages; but, on the contrary, admitted them to be valid; insisting that the defendant should be charged with the whole 12,000*l.*, as actually received by him, as also with the 1000*l.*; and the counsel for the defendant, and for the mortgagees, further contended, that the bonds were vouchers and evidence, unless fraud or imposition were proved; whereas

no such thing either was, or was even attempted to be proved; and that the Court of Exchequer, by unanimously confirming the report, had in effect declared such to be the true intent and meaning of the original decree.

[78] On the 20th of February following, the House of Lords delivered judgment as follows:—

LORD REDESDALE. [Having stated the facts of the case—the decree of the Court of Exchequer of the 2d of July 1796 (on the motion by the plaintiff of the 20th of June 1801, for a separate report as to the mortgage account, made with a view to found an application thereon, to be let into possession of the mortgaged estates)—and the report of the Deputy Remembrancer (16th July 1802)—proceeded as follows:]—“To that report several exceptions have been taken, which have already been the subject of much discussion. The main drift of those exceptions is, that the Master has proceeded to charge Sir Watkin Lewes on the foundation of certain securities, which ought to be regarded as suspicious, and therefore ought not to be considered as conclusive evidence, to which no objection could be made.”

“The 7th, 8th, and 9th exceptions, which were taken by Sir Watkin Lewes, are not under the consideration of your Lordships. The 10th exception stands on totally distinct grounds, and applies to the manner in which certain sums of money were received by Mr. John Morgan. The first exception applies to the sum of 2400l. and the manner in which that comes under your Lordships’ consideration is this; the first mortgage amounted to 6610l. one of the items which compose that sum is clearly Chardin Morgan’s bond amounting to 2400l. It is insisted on the [79] part of Sir Watkin Lewes, that no such sum of money as that stated on the part of the respondents before you was ever advanced.” Then (stating the 1st exception) his Lordship continued—“I should observe, that the order of the Court of Exchequer for a separate report so obtained by Sir Watkin Lewes, raises a considerable degree of difficulty in considering the question, whether the exceptions taken to the Master’s report, be founded or not; those exceptions having been over-ruled by the Court of Exchequer, we must therefore endeavour to get out of the difficulty as well as we can.”

“Now one part of those exceptions is, that the sum of 2400l. for which a bond was given by Sir Watkin Lewes, was not the money of Chardin Morgan, but was the money of Mr. John Morgan; and on looking into all the evidence that exists on that subject, it is perfectly clear, that until Mr. John Morgan gave in his answer to the bill of Sir Watkin Lewes, it was not pretended, that it was the money of Mr. Chardin Morgan; and the marriage settlement of Mr. John Morgan shews that it was not the money of Mr. Chardin Morgan, but the money of Mr. John Morgan himself. It is most clear that the transaction was of such a nature that it is extraordinary that Mr. John Morgan should ever have pretended that it was the money of Chardin Morgan, because, if it had been money advanced by Mr. John Morgan out of the money belonging to Mr. Chardin Morgan, that is, if it had been [80] actually the money of Chardin Morgan and not of John Morgan, there must exist accounts between those two persons, which would have shewn the nature of the transaction; and such accounts must be within the power of Mr. John Morgan. No such accounts however are produced.”

“But when we come to look at the different sums which form the component parts of the 2400l. it is perfectly clear, that part of that sum was not the money of Mr. Chardin Morgan, and it is perfectly clear, that the representation contained in the answer of Mr. John Morgan, cannot be true; because, first, with regard to the sum of 500l. he says expressly in his answer, that that sum of 500l. was advanced by Mr. Chardin Morgan, and received by Sir Watkin Lewes. And he produced before the Deputy Remembrancer, a small slip of paper, as evidence to shew, that he advanced that sum of 500l. ‘1774, January 31st. —Advanced Sir Watkin Lewes, on bond, 500l. N.B.—1000l. was borrowed of Walter by Holt, and 20 guineas paid, and thereout 500l. advanced Sir Watkin Lewes in bank notes; and he paid out of it 10 guineas.’—Your Lordships see therefore, that this sum of 500l., which is admitted to be the 500l., which is alledged to have been advanced by Chardin Morgan, was the sum of 500l. part of the sum of 1000l., which was borrowed of Walter, and out of which 10 guineas were paid by Sir Watkin Lewes. It is manifest therefore, that the representation contained in the answer of Mr. John Morgan, on the subject of that bond, is not true, and that the said [81] 500l. was not procured in the manner in which it is there stated; and this sum of 500l. which is stated to have been advanced

Sir Watkin Lewes on bond (if it was advanced at all) must have been advanced by Mr. John Morgan himself. And if your Lordships look at the appendix, which contains the accounts as taken on the part of Mr. John Morgan, it is perfectly clear, that though he states in his answer that Sir Watkin Lewes was debtor to Mr. Chardin Morgan, yet in his books he states him to be debtor to himself. The account runs thus—January 31st, 1774, advanced Sir Watkin Lewes, on bond, 500l., and he paid 10 guineas out of it. February 10th. —Do. by accepting draft for 50l. payable at thirty days, and by paying Thomas Morgan, Esq. 50l. £100 0
 February 19th. To Mr. Skinner 80 0
 May 13th. Do. on Bond 220 0
 24th. Do. Note of Hand 10 10
 27th. Do. on Bond 120 0'

"All these are evidently entries in Mr. John Morgan's own books of his own transactions, without one word being said that this was the money of Mr. Chardin Morgan, and which should have corresponded with the fact. I take it to be clear, if this sum had been ever advanced, it was advanced by Mr. John Morgan; and Mr. Chardin Morgan's name was made use of in trust for Mr. John Morgan. And it is utterly inconceivable, if this in fact had been Mr. Chardin Morgan's money, that John Morgan should have executed an instrument, in which it was stated that this [82] was originally and from the beginning the money of Mr. John Morgan, and not the money of Mr. Chardin Morgan. And that is stated by the Master in his report as a fact, the consequences of which are serious with respect to this case; for, if in truth this money was advanced by Mr. Chardin Morgan, and the bond given for that sum, was really his bond for his own benefit, the consequence would be, that Mr. John Morgan had no interest in it, till he became a purchaser of it by assignment; but if this was a transaction in which Mr. Chardin Morgan's name was only used as a trustee for Mr. John Morgan, the result would be, after this being a debt of Sir Watkin Lewes to Mr. John Morgan, the latter had in his hands during all this time money belonging to Sir Watkin Lewes, and nothing would be more unjust than to charge Sir Watkin Lewes interest, as for money advanced by other persons, while, at the same time, Mr. John Morgan had in his hands money belonging to Sir Watkin Lewes, for which there was no interest paid. That fact can be ascertained as I apprehend, and it ought to be ascertained. And that colour should not have been put on it, which has been given to it by Mr. John Morgan's answer, and which has been contradicted, I apprehend, by other evidence in the cause. If these things be so, with regard to the first exception, I submit that your Lordships should allow it so far for the purpose of having it stated, whether the sum of 2400l. was advanced by Mr. Chardin Morgan to Sir Watkin Lewes; and whether that sum was due to [83] Mr. John Morgan originally, and not to Mr. Chardin Morgan. In taking this account, the Master will consider how far the acceptances and bonds executed from time to time by Sir Watkin Lewes to Mr. Chardin Morgan, are conclusive evidence of the fact, that the several sums of money alledged to have been comprised in the several bonds, constituting 2400l., and for which the bond to that amount was given, were actually advanced. Now, I apprehend, that in the dealings and transactions of parties of this description, and when an account of those dealings and transactions has been ordered to be taken by the Court, a person standing in the situation of solicitor, agent, general manager, and director, and having the whole concerns of the other party, and having made such other party execute instruments of this sort, which are therefore liable to suspicion, it becomes necessary not merely to rely on the instruments themselves, but to shew that the advances were actually made; and the nature of this decree shews, that such was the original intention of the Court. It directs the Deputy Remembrancer to take a general account of the dealings and transactions between these parties. The first exception applies to the Master's report, founded on what, he conceives, constitutes the component parts of the sum of 2400l., and the component parts of certain bonds said to have been executed by Sir Watkin Lewes, of the payment of the consideration of which bonds there is no evidence whatever, and there are circumstances in this case [84] which tend strongly to raise suspicions with respect to the ultimate payment of this bond."

"I do not think necessary to go further into that enquiry. The Deputy Remembrancer has clearly done wrong in taking the instrument as conclusive evidence on the subject."

"Now, what I would propose to your Lordships on this point is, that, as to the first exception which respects the bond for 2400l. said to have been advanced to Sir Watkin Lewes by Mr. Chardin Morgan, the evidence appearing to me sufficiently decisive that this never was the money of Mr. Chardin Morgan, the Master should review his report, and particularly enquire and certify, what sums of money were advanced by Mr. John Morgan, on his (Chardin Morgan's) account, to Sir Watkin Lewes. Your Lordships' order will draw the attention of the Deputy Remembrancer, to that which seems the proper way for him to proceed in investigating these transactions."

"The second exception is an exception to that part of the Master's report, which states, that the bond for 2400l. was afterwards for a full and valuable consideration, brought up from Mr. Chardin Morgan, by his brother Mr. John Morgan. That is the substance of this second exception. If your Lordships should concur in opinion with me, with respect to the first exception, then this second exception ought also to be wholly allowed. [85] The Master has reported, that for a valuable consideration, this bond was bought up by Mr. John Morgan of Mr. Chardin Morgan: whereas that bond never was his property: and it therefore never could have been so bought up; and there is no trace of any such transaction, except in the assertion of Mr. John Morgan, and therefore I conceive the second exception ought to be allowed."

"The third exception is, that the Deputy Remembrancer has by his separate report further certified, that the sum of 6610l. the consideration for the mortgage in the said report mentioned, consisted or was made up of the bond for 2400l., and the sum of 4209l. 7s. 1d. arising from the sale of certain trust funds, vested in William Farrer and James Morgan, as trustees, named in the marriage settlement of the said John Morgan and Amelia, his wife; and of the sum of 12s. 11d. added thereto, by the said John Morgan: and that the said bond for 2400l. was by the said William Farrer and James Morgan, deposited with the said John Morgan: and that the sum of 4209l. 7s. 1d. was by them paid into the said John Morgan's hands: and that the bond so deposited, with 4209l. 7s. 1d. paid into the hands of the said John Morgan, were so respectively deposited with, and paid to him as the agent, both of the said Sir Watkin Lewes and the said William Farrer and James Morgan, the mortgagees: and therefore he had charged the said John Morgan with the whole of the sum of [86] 6610l. composed in manner aforesaid, as money actually received by him as agent, both to the said Sir Watkin Lewes, and the said mortgagees; whereas he ought to have certified by his report, that the only consideration for the said mortgage for 6610l. proved before him, was the said sum of 4209l. 7s. 1d. or that the said sum of 4209l. 7s. 1d. was, and constituted the only monies actually received and paid on account of the said mortgage, for the said sum of 6610l."

"My Lords, with respect to the sum of 2400l. the observations which have been already made, I think will shew that this exception is well founded as to so much of the 6610l."

"With respect to the 12s. 11d. that is certainly a very trifling sum, but it seems to be material to take notice of it, for the purpose of the principle on which you should proceed. That sum is a sum thrown in to make the round sum, as it is alleged, of 6610l., which Mr. John Morgan chuses to charge himself with. Now, the object of the order for the separate report, is to state the facts of this mortgage transaction, to ascertain what was the real transaction between the parties. It is therefore impossible to allow Mr. John Morgan to bring in this small sum of 12s. 11d. because he might, on the same principle, bring in a sum to any amount, if he had chosen to say he had advanced any further sum; instead of saying the trustees had advanced 4000l., he might have said, they only advanced 2000l., and that the other 2000l. he had [87] advanced himself: and therefore, it does seem to me that you should notice that sum, and should allow the exception so far as it concerns that sum. It does appear, that that sum was not the money of the trustees, and was not advanced by them, and consequently ought not to make part of the sum, for which the mortgage for 6610l. was given, the mortgage purporting that this whole sum was the money of the trustees."

"With respect further to the aforesaid sum of 2400l. the Master ought also, under this exception, to be directed to review his report, according to the directions before given on the first exception."

"But it has been stated by the Master in his report, that the bond for 2400l. was

delivered to Mr. John Morgan, as agent to Sir Watkin Lewes, and also to William Farrer and James Morgan, the mortgagees. It seems therefore to be important, that the component parts of this bond should be ascertained, and that the Master, in reviewing the matter of this exception, should particularly enquire and certify how and in what manner this sum of 2400l. was constituted, and whether the bond was ever cancelled and delivered up to Sir Watkin Lewes."

"With respect to the fourth exception, the same sort of reasoning, that applies to the sum of 12s. 11d. on the former exception, will apply to the sum of 190l. mentioned in this fourth exception."

[88] "The exception is, for that the Deputy Remembrancer had, by his separate report, further certified, that the sum of 1390l. mortgage money therein mentioned, consisted or was made up of the sum of 1200l. arising from the sale of other trust funds, vested in the said William Farrer and James Morgan, as trustees as aforesaid; and of the sum of 190l. added thereto, by the said John Morgan, out of his own proper monies."

"Now, my Lords, that sum of 190l. said to have been advanced by Mr. John Morgan, should fall under the same consideration as the small sum of 12s. 11d. before mentioned. There is no evidence but the assertion of Mr. John Morgan himself that he made himself debtor for that sum, that any such sum was actually advanced by the trustees: and if not, it ought to have made no part of the mortgage. This puts the mortgagees in a different situation from Mr. John Morgan: I therefore conceive, that the exception as to the sum of 190l. ought to be allowed."

"Then, my Lords, with respect to the sum of 1200l. it seems to be extremely questionable, whether such a sum was ever advanced: at least there is no evidence of it; for, as to the sum of 600l. part thereof, which is stated to have been money secured by a bond, given by a person of the name of John Adams to Chardin Morgan, and which bond is stated to have been cancelled, and in the hands of Mr. John Morgan, if that bond had been a productive bond, it ought [89] to have been found cancelled in the hands of Mr. Adams. But it is produced as cancelled, and in the hands of Mr. John Morgan. And this is to be made evidence of 600l. being actually received by the trustees, and advanced to Sir Watkin Lewes. Now this 1200l. is said to consist or be made up of six fen office bonds, for 100l. each, and the bond from John Adams to the said Chardin Morgan for 600l. and which latter bond is handed over to Mr. John Morgan, as agent for Sir Watkin Lewes. This transaction appears certainly not in the way one would expect. There is only assertion instead of the proof of facts, and certainly it is a suspicious circumstance, that Mr. Adams's bond is not in the custody in which it ought to have been. It was thrown out, that Mr. Adams was a person not very capable of having paid this bond. But still the fact of paying it does not at all appear, neither does it appear that such bond was purchased by Mr. John Morgan. There is not the slightest evidence whatsoever of that, and therefore I should submit to your Lordships, that the Deputy Remembrancer be directed also to review his report with respect to that bond, and particularly to enquire and certify, whether the trustees in the marriage settlement of Mr. John Morgan, ever, and when, and in what manner, received this money, to the amount of 600l. for which this bond was given to Mr. Chardin Morgan, and to enquire into all the circumstances of this bond of Mr. Adams; for it is a very extraordinary transaction as stated on the part of Mr. John Morgan. The Deputy Remembrancer will [90] therefore enquire, whether Mr. Chardin Morgan advanced the said 600l. to Mr. Adams, and when, and in what manner. My Lords, these are the directions I would give to the Master on the whole of this transaction, which seems to me, in all probability, to be a mere fabrication; this mortgage to Mr. John Morgan, through the medium of the trustees in his marriage settlement, seems very extraordinary. No sum of money has been actually advanced by him for the use of Sir Watkin Lewes; but there is a charge on Sir Watkin Lewes for interest for giving credit for sums said to have been paid."

"The fifth exception applies to the application of the sum of 12,000l., said to be advanced on the mortgages that have been mentioned. That exception is, for that the Deputy Remembrancer has, by his separate report, further certified, that he found, in respect to the application of the said sum of 12,000l. that Mr. John Morgan, as agent to Sir Watkin Lewes, paid to him and to his use the whole amount thereof, in

manner particularly mentioned and set forth in the second schedule to his report annexed: and in such allowance are comprised the sum of 2400*l.* and 31*l.* 19*s.* 5*d.*, which the said John Morgan, on the aforesaid 2*d.* day of June 1775, applied in discharge of the principal and interest then due, in respect of the aforesaid bond of 2400*l.* dated the 28*th* of February 1775, and which bond was on that occasion delivered up to Sir Watkin Lewes to be cancelled: whereas the Deputy Remembrancer ought not, for the reasons [91] stated in the aforesaid exception, to have allowed or included in the second schedule to his report, the said sums of 2400*l.* and 31*l.* 19*s.* 5*d.*, for principal and interest on the said bond, in respect of the application of the monies which the said John Morgan had received, as agent to the said Sir Watkin Lewes and the said mortgages; nor ought he to have allowed or included in the said second schedule to his separate report, the sums following, the sum of 21*l.* 5*s.*, 86*l.* 15*s.*, 289*l.* 10*s.*, 96*l.* 10*s.* 6*d.*, and 42*l.* 6*s.* 11*d.*."

"Now, my Lords, on looking into this state of the application of the 12,000*l.* the first thing that I have to observe is, that there is in that application a material difference from another statement, as to the application of 2400*l.* That of itself would tend considerably to invalidate this statement of the application of 12,000*l.* And you will find with respect to several sums of money, that they ought to have been carried to a totally different account, that is, to the general account between Sir Watkin Lewes and Mr. John Morgan, different and distinct from the mortgage money, and therefore it is not possible that the money charged for interest on those sums can be considered as an application of this mortgage money. If the Master had adverted to that, I think it is impossible he could have reported as he has done; but I say, that as to this bond of 2400*l.* supposing it to be a just debt, it is a debt due to Mr. John Morgan himself. If you will take the trouble to cast up the sums of money which he charges Sir Watkin Lewes with, [92] and which follow the 6610*l.*, beginning on a certain day in June 1775, you will find that he discharges himself by subsequent payments, including this sum of 2400*l.* which he states to have paid on the 18*th* of July, and you will also find, that the stated account quite contradicts what the Master has stated by his separate report; for that sum of 2400*l.* which was really and truly the money advanced by Mr. John Morgan to Sir Watkin Lewes, is made first of all part of the consideration of the mortgage, which is to bear interest: and then, of that mortgage money, a considerable part, viz. 2400*l.* is not paid till after interest had been paid to Mr. John Morgan himself, and part of the application of the money is taken out of the money advanced."

"It does strike me therefore, that it is necessary, for the purpose of obtaining justice between these parties, that the report ought to be very strictly reviewed by the Master."

"Now what I should propose on this subject, is to refer it to the Master to review his report, and to certify how far the application of the mortgage money set forth in the second schedule, referred to by the report, is correctly and truly set forth. The result of all this will be, to shew that the application that is set forth in the Master's report, ought not to be considered as the true application of that money, and the Master must vary his report in that respect. To review his report will be sufficient for that purpose."

[93] "It seems extremely problematical, whether any of these transactions took place precisely as stated in the Master's report. With respect to the sixth exception, the evidence on that subject appears to me to be extremely deficient: it consists entirely of the assertions of Mr. John Morgan, that such advances were made by Mr. Chardin Morgan. And what I should also propose to your Lordships would be, for the Master to review his report, with respect to that exception, in regard to the 1000*l.*, 120*l.*, and 300*l.*, and to ascertain in what manner those sums were received of Chardin Morgan, by his brother John Morgan, for the use of Sir Watkin Lewes."

"The tenth exception depends on a totally different question. It refers to this: Mr. John Morgan had brought actions of ejectment for the purpose of obtaining possession of the estates of Sir Watkin Lewes, on the several demises of the trustees in his marriage settlement, who were the mortgagees of the said estates: and he included in those actions of ejectment, estates not comprised in the mortgages as well as those that were, and of which he had no right to obtain the possession: and by the means stated in the bill of Sir Watkin Lewes, he got judgment and possession. The rents and profits received, were partly for estates in mortgage, and partly for

estates not in mortgage. In taking the account, the Deputy Remembrancer has charged the rents and profits of the estates in mortgage, against Mr. John Morgan, as agent of William Farrer and James Morgan, [94] the mortgagees. But with respect to the estates out of mortgage, he has charged them against Mr. John Morgan himself; the effect of which would unavoidably be to carry them to the general account, and not to the account of the mortgagees. Now, I should observe to your Lordships, that although tortious possession was taken of these estates by Mr. John Morgan, yet considering the previous transactions that had taken place, he must be responsible in his character of agent, and therefore those rents and profits ought to have been put to his account as agent of the mortgagees, and not against the separate account of Mr. John Morgan."

"My Lords, these are the observations which occur to me, upon the exceptions which have been taken to the Master's report; and if your Lordships concur in the opinion which I have formed of this case, it will be for the Court of Exchequer to give such further directions as may be necessary for giving effect to it."

ERSKINE, Lord Chancellor. "My Lords, concurring in opinion with the noble and learned lord, in the propositions which he has stated on the subject of this appeal, I shall only state in a very few words, the principle on which I proceed on this occasion; because, I am ready to admit, it is not on light grounds a Court of Equity, or any other Court, should question securities that have been entered into by persons of full age, and delivered under their hands and seals, for the purpose of securing the [95] payment of debts that are due by them, and by which such debts are acknowledged to be due. But when a Court of Equity does on such occasions from all the circumstances before them, make such a decree as the Court of Exchequer did, and Mr. Morgan not appealing against that decree, if there was any foundation for it, it became necessary for the Deputy Remembrancer to take the accounts on the principle on which the decree directed them to be taken. And unless the Court of Exchequer had seen good reason for not holding the deeds, conclusive evidence against the party who had executed them, they would not have directed an account to be taken of what was due on account of the mortgages, distinct from the other money which had been advanced by Mr. John Morgan. The Court, however, did not see such reasons, because of the circumstances that appeared in the cause, and on account of the relative situation in which Mr. John Morgan stood towards Sir Watkin Lewes."

"It therefore became necessary for the Deputy Remembrancer to pursue the principle of that decree, and not to receive the deeds and instruments which were so questionable, as conclusive, just as if there had been no such decree. And therefore most undoubtedly in that respect the exceptions ought to be allowed which question the mode in which the Deputy Remembrancer proceeded in the execution of the duty imposed on him by the Court of Exchequer."

[96] "And here I may observe, that the mode of reviewing the proceedings in Courts of Equity, is very different from that of reviewing proceedings at law, for, in the latter case, there is no question of fact to be considered. The facts are not for investigation. In proceedings at law the jury are in the habit of ascertaining them, and in writs of error from those Courts they appear upon the record. But here the duty is to investigate facts, and I must consider it to be very unfortunate that it is so: and perhaps it well deserves consideration, whether some remedy might not be found; as whether a jury might not be had to apply their attention in Courts of Equity, to the examination of facts, as well as in Courts of common law, which would relieve you in appeals from Courts of Equity from the burthen now cast upon you of investigating facts as well as law."

"The Deputy Remembrancer had jurisdiction to examine the facts given him by the decree of the Court of Exchequer, and the Court of Exchequer having applied to his report a construction, which is in a manner inconsistent with a correct view of the evidence, and inconsistent with the principle of the decree, the consideration now before the House is, whether, on all the evidence before the Deputy Remembrancer, he has drawn the proper conclusion in point of fact, looking at the decree of the Court of Exchequer, which was the foundation of it. I conceive that he has not, and therefore I entirely concur with the noble and learned lord in the observations he has made on the evidence, [97] and in the propositions which he has submitted to the consideration of your Lordships."

Therefore the House of Lords ordered that so much of the decretal order com-

plained of in the said appeal, as over-ruled the 1st, 2d, 3d, 4th, 5th, and 10th exceptions, taken by the appellant, should be reversed, and

As to the 1st exception, that it be allowed as to the Deputy Remembrancer's having certified that the defendant had advanced the plaintiff divers sums, the property of Chardin Morgan : and that it be referred back to the Deputy Remembrancer, to review his report, and enquire and certify what sums were advanced by the defendant to the plaintiff, as the consideration of the bonds alleged to have been consolidated by the bond of the 28th of February 1775, for 2400l., and when such sums were paid, and by whom, and to whom and in what manner.

The 2d was wholly allowed.

As to the 3d—allowed, as to the 12s. 11d. ; it appearing by the report, that such sum was not advanced by the trustees ; and as to the remainder, that the Deputy Remembrancer should review his report respecting the 2400l. and inquire and certify, when and in what manner the said bond for 2400l. was cancelled, and whether the same was ever, and when, delivered up to the plaintiff.

[98] As to the 4th, allowed, as to 190l. (part of the 1390l.) for the same reason. The Deputy Remembrancer therefore was ordered to review his report, and enquire and certify, whether the trustees did ever, and when, and in what manner, receive from Chardin Morgan 1200l. or any other or what sum of money for the fen office bonds, and bond of John Adams ; and whether the said bonds were duly assigned and delivered to the said Chardin Morgan, and when and in what manner ; and if the said trustees did receive the said 1200l., or any part thereof, from the said Chardin Morgan, whether they advanced the same, or any, and what part thereof, to the plaintiff, or the defendant, as his agent, and in what manner.

As to the 5th. That the Deputy Remembrancer should review his report, and inquire and certify, how far the application of 12,000l. set forth in the second schedule to his report, was consistent with or different from the account set forth in the answer of the defendant to the plaintiff's bill, and in such answer said to have been stated and settled by the said defendant with the said plaintiff.

As to the 6th exception. That the Deputy Remembrancer should enquire and certify, whether the several sums of 1000l., 300l., and 120l. were ever, and when, and in what manner, received by the said defendant, from the said Chardin Morgan, for the use of the said plaintiff, and when, [99] and in what manner, the said defendant first gave credit to the said plaintiff for such sums.

The 10th exception was allowed.

On the 2d of June following (1807), the plaintiff applied to the Court for re-possession of the estates, on a suggestion, that the rents and profits had paid off the 8000l. and interest, when the Court declared, that as the case was not a case of mortgagee in possession ; but that the plaintiff having himself by deeds under his own hand appointed the defendant receiver, and chalked out the mode of the application of the rents, namely, to keep down the interest of the 8000l. and 4000l., and pay the residue to himself, and that as such deeds had not been in any way impeached, and that the defendant had applied the rents accordingly ; and the plaintiff having acquiesced in such application for nineteen years—he could not, after such a length of acquiescence, apply to vary the mode of application.

On the 17th (June) the plaintiff again applied to the Court for re-possession, proposing at the same time the payment of 600l. per annum, as interest of the 12,000l. ; but without prejudice to any question in the cause, when the Court, noticing, that besides the mortgages, there were judgments which affected the plaintiff's life estate, declared they could make no order out of the regular course, and refused the application.

[100] On the 2d of July following, the plaintiff applied to the Court for an order, directing the Deputy Remembrancer to take an account of the 8000l. mortgage money and interest, and apply the rents and pay off the same ; and afterwards a like account of the 4000l. and interest, and apply the rents to pay off the same. When the Court again observed, that there were judgments as well as mortgages, and that the bill prayed a redemption on payment of all money due ; that the duty of the receiver was to apply the rents and profits in payment of the interest of the judgments, as well as of the mortgages, as they equally affected the estates, and therefore refused the application.

On the 10th of May 1808, the Deputy Remembrancer made his second separate report *¹.

[102] To that second report the plaintiff took five several exceptions *².

*¹ And thereby certified as to what sums were advanced by the defendant to the plaintiff, as the considerations of the several bonds, consolidated by the bond of the 28th of February 1775, for 2400l. the several sums mentioned in the first schedule, were advanced by the defendant John Morgan, or through his hands, to or for the use of the plaintiff, in part of the considerations of the said bonds at the several times, to the several persons, and in the manner therein stated, amounting to 1976l. 19s.

And that over and above the principal money, secured by the said several bonds consolidated by the said bond for 2400l. the consideration of that bond consisted of the sums advanced by, or through the hands of the defendant, to or for the use of the plaintiff at the times (23d March and 1st April 1775), and in manner (as stated in the report), although subsequent to the date of the said bond, (amounting to 209l. 14s.) and he certified, that no evidence had been laid before [101] him of the cancelling of the said bond; but he found that the same was on the 24th February 1777, delivered up to the plaintiff by the defendant.

And he certified, that no evidence had been laid before him, that the trustees received from Chardin Morgan, the aforesaid 1200l. for the fen office bonds, and bond of John Adams, or that the same were assigned to Chardin Morgan; but he found that the bond of John Adams, for 600l. was, on the 4th of May 1775, assigned by the defendant and Chardin Morgan, to the trustees in the said settlement, as part of the money agreed to be advanced by the defendant for the purpose of such settlements, and was, on the 6th of July 1775, paid off by John Adams, into the hands of the defendant; and that the fen office bonds, amounting to 600l. were, on the 5th of May 1775, delivered to the trustees as aforesaid, for the said Amelia, the wife of the defendant, then Amelia Farrer, spinster, as part of the money agreed by her to be advanced for the purposes of the said settlement, and some years afterwards sold by the defendant.

And he found that the application of the 12,000l. as set forth in the second schedule to his former report, was different from the account set forth in the answer of the defendant in manner stated in the second schedule to that his then report, but not inconsistent with the said answer.

And he certified, that no evidence had been laid before him, of the aforesaid 1000l. 300l., and 120l. being received by the defendant John Morgan from Chardin Morgan, otherwise than that in April and July 1772, Chardin Morgan sold 3500l. bank 3 per cent. annuities, and in January 1773, 508l. 6s. 8d. like annuities, and 200l. and 50l. bank 3 per cent. annuities, of the year 1726, and that the money arising by such sales, amounting to 3752l. 6s. 3d. was deposited by Chardin Morgan, in the hands of the defendant; and he did not find that the defendant gave credit to the plaintiff for the said 300l. and 120l.; but that on the 1st of July 1775, the defendant gave credit to the plaintiff for the said 1000l. in the account set forth in the answer of the defendant, and settled the 24th of February 1777.

And he certified, that he had reviewed generally his former report, and saw no reason to change his opinion respecting the matters stated therein; and that he had been and still was much impressed with the difficulty on the part of the defendant of substantiating at so late a period the considerations of the several securities, and that there was a total want of evidence on the part of the plaintiff to shew either fraud or imposition in the mode of obtaining them.

*² 1st. That the Deputy Remembrancer ought not to have certified that the several sums of money mentioned in the first schedule, were advanced by or through the hands of the defendant, in part of the considerations of the several bonds, consolidated by the bond for 2400l.; but ought to have certified that it did not appear to him that any money was ever advanced by the defendant to the plaintiff, as or for the considerations of such bonds.

2dly. That the Deputy Remembrancer ought not to have made any report as to the sums, composing the 209l. 14s. (21st March and 1st April), there not being any order or direction for him so to do; and, moreover, if such sums were advanced, the same were advanced on a general account.

3dly. That the Deputy Remembrancer had not certified, that he had reviewed his

[103] [Before the arguing of those exceptions (21st of June following) the plaintiff again applied to the Court for re possession of the estates, on the ground of the former motions, and which was refused for the same reasons.]

On the 20th of December, the Court, by the Lord Chief Baron, pronounced judgment on the exceptions, the substance of which was as follows :—

“The great object the Court has had in view, has been to endeavour to possess themselves clearly of the meaning of the House of Lords, and comparing that with the report which has been made, to see whether it has satisfied the exigency of the order. The great anxiety of the House of Lords, seems to have been to ascertain with as much correctness as possible, the facts and transactions which have taken place as between these parties, and they seem to have thought, that the Deputy [104] Remembrancer had not gone with sufficient minuteness into all the circumstances that belong to every part of the case, and that he was too general in his report.”

[His Lordship then proceeded to compare the two sets of exceptions, 1st, 2d, and 3d, (the old and new) and the subsequent report of the Deputy Remembrancer, observing, that it was the opinion of the House of Lords, that the bonds of which the 2400l. was composed, were not in a case of this sort sufficient of themselves to shew, that there was good consideration for that consolidated bond, and that the House expected that it should be stated what advances were actually made by John Morgan, with all the circumstances, and that therefore the report was not in such strict compliance with the order as had been required.] “Then (continued his Lordship) the House of Lords complain that the evidence is not stated: therefore we must require from the Deputy Remembrancer the same report, as they would have required if made to them directly, and not through the medium of this Court. Our order must be, that the Deputy Remembrancer shall state all the circumstances, the evidence of the times when, and the occasions on which such sums were severally and respectively advanced and paid, and by whom and to whom, and in what manner, for the manner will be extremely material, particularly with respect to those subsequent payments.”

[105] “Whatever monies were personally advanced ought not to have made any ingredient in this special account, according to the principle acted on by the House of Lords, who have directed, with respect to the 4th and 5th exceptions, that every branch of those shall be minutely reported, having it in view to dissect every item complained of in the whole exceptions, and therefore we must give such directions as shall best effect that object.”

As to the 1st and 2d exceptions, it was referred back to the Deputy Remembrancer to review his report, and enquire and certify what sums of money were advanced by the defendant to the plaintiff out of his own proper money, as the considerations for the several bonds, consolidated by the bond for 2400l., and when such sums were advanced and paid, and by whom, and to whom, and in what manner, and to state

report, with respect to the 2400l. part of the 6610l. according to the directions in the said order, whereas that he ought to have certified that the only consideration for the mortgage for 6610l. proved before him, was 4209l. 7s. 1d., and that the same was the only money received by the defendant, as agent to the plaintiff, and the said trustees and the mortgagees, in respect to that transaction.

4thly. That after certifying that no evidence had been laid before him, that the trustees did ever receive from Chardin Morgan 1200l. for the said ten office bonds, and bond of John Adams, he ought to have certified, that the said trustees did not advance the said 1200l. to the plaintiff or to the defendant, as his agent, and that the sums of 4209l. 7s. 1d. and 4000l. received by the defendant of James Morgan, on behalf of the said Henry Wilder, made 8209l. 7s. 1d. which constituted the whole amount of the monies received by the defendant, as agent to the plaintiff and the mortgagees.

5thly. That he had not certified that he had reviewed his report as to the matter of the fifth exception, whereas he ought to have certified, that he had reviewed his report as to the matter of the said fifth exception: and that he found that the defendant, out of the said 8209l. 7s. 1d. paid to the plaintiff 7681l. 5s. 6d. only, and that no more was advanced by the defendant, to or for the use of the plaintiff, and that the said 7681l. 5s. 6d. was the only principal money that was ever due from the plaintiff on account of the mortgages.

to the Court the evidence of such payments having been made to the plaintiff, or for his use.

And, as to the 5th exception, it was referred back to the Deputy Remembrancer to review his report, so far as might be necessary on reviewing his report as to the several other exceptions aforesaid.

On the 13th of June 1809, the Deputy Remembrancer made his third separate report, and thereby [106] certified, that he had reviewed his report according to order *1.

[107] To that third report the plaintiff took seven several exceptions *2.

*1 And he certified, that the sum of 500l. was advanced to the plaintiff by Chardin Morgan, through the hands of the defendant, on the 31st of January 1774, the day of the date of the bond for that sum, in one gross sum.

And that the defendant did advance the several sums mentioned in the second schedule, amounting in all to 1141l. 16s. to the plaintiff, out of his own proper monies, as the considerations pro tanto, of the several bonds for 220l. 120l. 950l., and 400l.

And that the defendant, out of his own proper monies, paid to the Reverend Henry Kent, on account of the plaintiff, in respect of interest money, due from the plaintiff, 112l. 10s. by a bill of exchange, which was paid by Messrs. Hoare, on the 1st of April 1775; and that the defendant, out of his own proper monies, advanced to the plaintiff 16l. 4s. by draft on Messrs. Hoare, which was paid by them, on the 23d of March 1775.

And that the aforesaid sum of 2400l. was part of the aforesaid 6610l. and that the same was paid or advanced by the trustees to the defendant, as agent to the plaintiff, on the 2d of June 1775, by the said bond for 2400l. being delivered up to the defendant as such agent by the trustees.

And that the bond of John Adams was, on the 6th of July 1776, paid off by him into the hands of the defendant, and that the fen office bonds were, some time after the date of the mortgage of the 2d of April 1776, sold by the defendant, and the produce was received by him.

And that he had reviewed his former report, and that it appearing thereby that the defendant had received the several sums therein mentioned, making together 12,000l. as agent to the defendant and the mortgagees, he did not find himself warranted by any evidence produced before him, to make any alteration in the said finding.

And that he had reviewed his report of the 10th of May 1808, and had referred back to his report of the 16th of July 1802; and that it appeared thereby, that he did thereby find, that the defendant, as agent to the plaintiff, had paid to him or to his use the whole amount of the 12,000l. in manner set forth in the second schedule to that report.

*2 1st. For that the Deputy Remembrancer ought to have certified, that no evidence had been laid before him, to shew that any sum of money had been advanced by the defendant John Morgan, to the plaintiff, out of his own proper money, as the consideration of the bond of 500l.

2dly. For that there was no evidence before the Deputy Remembrancer of the advancement of the several sums mentioned in the second schedule on account of the said bonds, and even supposing them to have been advanced, they appear to have been advanced by the defendant upon a general account with the plaintiff; and the Deputy Remembrancer ought to have certified that no evidence had been produced before him, to shew that any money had been advanced by the defendant to the plaintiff, out of his own proper money, as and for the considerations of those bonds.

3dly. For that he ought not to have made any report as to the several sums of 112l. 10s. and 61l. 4s. (part of the sum of 209l. 14s.) there not being any direction so to do; and there was no evidence before him, that the said sums were advanced as part of the consideration of the bond for 2400l. and the sums, even supposing them to have been advanced, were advanced on a general account with the plaintiff; and therefore ought not to form any part of the particular account directed by the order of the 20th of June 1801, which was confined to such monies only as related to the mortgages and judgments, or were received by the defendant, as agent to the plaintiff and the mortgagees.

4thly. For that there was no evidence of the delivery of the bond for 2400l. by the trustees to the defendant, as agent to the plaintiff, or any thing to shew that the plaintiff had agreed that the same should form part of the 6610l. And further,

[108] On the 28th of May 1810, the Court gave judgment on the said exceptions, and thereby allowed the 1st, so far as the report stated the advance of 500l. to the plaintiff by Chardin Morgan, and re-[109]ferred it back to the Deputy Remembrancer to review his report as to the other part of the said exceptions, and state to the Court all the evidence adduced before him as to what money was advanced by the defendant to the plaintiff, as the consideration of the bond for 500l., and when, and by whom, and to whom, and in what manner.

And to review his report generally as to the 3d and 4th exceptions, according to the directions before given on the 1st exception.

The 5th exception was over-ruled.

As to the 6th and 7th exceptions it was referred back to the Deputy Remembrancer to review his report, so far as should be necessary on reviewing his report in regard to the reference back to him of the other exceptions.

On the 11th July 1810, the following order was made on motion by consent :— That it should be referred to the Deputy Remembrancer to take an account, and make a separate report of the principal and interest due to the defendant, and to James Morgan and H. Wilder, upon the securities, together with the costs directed by the decree to be taxed, with legal interest from the filing of the plaintiff's bill in 1783, deducting and giving credit for the rents and profits of the estates, and other monies received by them. And that in taking the said accounts the usual half [110] yearly rests to be made, and the surplus applied, after keeping down the interest of all the said monies, in reduction of the principal monies; and that upon payment of what should be found due upon taking such accounts, with the costs, that the defendant and the mortgagees should deliver up possession of the estates, and execute a proper re-conveyance to the plaintiff by a short day to be appointed by the Court.

On the 25th of June 1811, the Deputy Remembrancer made his 4th separate report .

because the Deputy Remembrancer had before found (though unwarranted) that the advances made by the defendant on account of the consideration of four of the bonds comprising in part of the said bond for 2400l. were personal advances by the defendant, and in part only of the considerations thereof, and consequently not within the meaning of the order of the 20th of June 1801; but the Deputy Remembrancer ought to have certified that the only consideration for the said mortgage for 6610l. proved before him was the said 1209l. 7s. 1d., and that the same was the only money received by the defendant, as agent to the plaintiff and the trustees, in respect to that transaction.

5thly. For that the Deputy Remembrancer ought not to have certified that the bond of the said John Adams was, on the 6th of July 1776, paid off by the said John Adams into the hands of the defendant, or that the fen-office bonds were some time after the date of the mortgage of the 2d of April 1776, for 1390l., sold by the defendant, and the produce thereof received by him, the same having no relation to the enquiry directed by the order of the 20th of June 1801.

6thly. For that the Deputy Remembrancer ought to have certified that the said 4209l. 7s. 1d., with the aforesaid 4000l., making 8209l. 7s. 1d., constituted the total amount of the mortgage money received by the defendant, as agent as aforesaid, in respect to the mortgage transaction.

7thly. For that the Deputy Remembrancer ought to have certified that the said defendant had, out of the 8209l. 7s. 1d. paid to the plaintiff 7681l. 5s. 6d. only; that no more was advanced by the defendant to or for the use of the plaintiff, and that the said 7681l. 5s. 6d. was the only principal sum of money that was ever due from the plaintiff on account of the several mortgages.

* He thereby certified, that he had reviewed his report with respect to the 1st exception, and according to the evidence adduced before him, he found that the sum of 500l. was advanced to the plaintiff as the consideration of the bond, dated the 31st of January 1774, by the defendant John Morgan, out of his own proper money, on the 31st January 1774, in bank notes, and paid into the hands of the plaintiff.

And that he had reviewed his report as to the 2d exception; and that though he found that the several sums mentioned in the second schedule to his former report, amounting to, 1141l. 16s., were advanced by the defendant to the plaintiff, yet that he did not find that any of the sums were advanced as the particular consideration for any of the bonds in his report mentioned, no evidence of that fact having been produced

[111] To that report the plaintiff took five exceptions *.

[112] On the 6th of June 1812, the Deputy Remembrancer, in pursuance of the decree, and of an [113] order of the 6th of May then last, made his report of the costs by the said decree directed to be taxed, and thereby certified that the defendant brought in before him at different times, and left in his office, his bills of costs (thirty in number), and that he had been attended by the clerk in court for the defendant, and by the defendant in person, and by the clerk in court and solicitors for the plaintiff, and in their presence had considered of the bills of costs, which bills, amounting together to the sum of 4245l. 3s. 3d. he had taxed at the sum of 3829l. 0s. 6d., in respect whereof he found the defendant to have received several sums of money and securities for money, amounting in all to the sum of 2034l. 1s. 1d., leaving a balance of 1794l. 19s. 5d. due from the plaintiff to the defendant, in respect of the several bills of costs; and that he had in the second schedule thereto annexed, set forth an account of the several sums of money and securities received by the defendant in respect of such bills.

[114] That report having been confirmed, the defendant required the Deputy Remembrancer to proceed on the order of the 11th of July 1810, but he refused to do so pending the separate report.

5th July 1813.—The Court now pronounced judgment on the exceptions taken to the fourth separate report, which had been argued in April 1812, delivering their opinions seriatim.

WOOD, Baron. “In this cause of *Lewes v. Morgan*, as there is a difference of opinion, it becomes necessary to give our reasons separately. This comes on by way of exceptions to the Deputy Remembrancer's report as to the money due upon three mortgages. Exceptions have been multiplied upon exceptions, till the case has become almost unintelligible; but still, I think, there is no difficulty in the merits of the case. Sir Watkin Lewes's attempt is to strike out of the mortgage-money for 6610l. the several

before him, and none of the said bonds corresponding with the sums for which such bonds were given, and none of the said advances appearing to have been made at the respective times such bonds bear date, excepting in one instance, namely, where a sum of 25l. appears to have been advanced on the 18th of November 1794, on which day the bond for 750l. bears date.

And that he had reviewed his report as to the 3d exception: and although from the evidence adduced before him as to the advance of the two sums of 112l. 10s. and 61l. 4s., he found that the said two sums were advanced by the said defendant to or for the use of the plaintiff: yet that he did not find that the same were advanced as the consideration of the bond for 2400l., no evidence of that fact having been produced before him.

And that he had reviewed his report as to the 4th exception, and was still of opinion, from the evidence set forth in the fourth schedule to that his then present report, coupled with the nature of the dealings between the plaintiff and the defendant, all in conformity with the answers of the mortgagees and the defendant, and uncontradicted by any evidence on the part of the plaintiff, that the delivery up of the bond for 2400l., on the part of the mortgagees, was, by consent of the plaintiff, part of the consideration of the mortgage for 6610l., and that the other part was 4209l. 7s. 1d. and 12s. 11d., and that the said 4209l. 7s. 1d. was the only money received by the defendant, as agent to the plaintiff and the trustees (the mortgagees), in respect to that transaction.

And that he had reviewed his report as to the 6th and 7th exceptions; and in consequence of having reviewed his report as to the subject matter of the other exceptions, and having referred to his report of the 16th of July 1802, and to the order of the 20th of February 1807, and it appearing by the order that the sums of 12s. 11d. and 190l. were not advanced by the said trustees, he had deducted the same, and also the 2400l., making together 2590l. 12s. 11d., from the said 12,000l., making a sum of 9409l. 7s. 1d., which he found constituted the amount of the mortgage-money received by the defendant, as agent to the plaintiff and the trustees (the mortgagees) in respect to the mortgage transactions.

The whole of which 9409l. 7s. 1d. with the 2400l., 190l., and 12s. 11d., making in all 12,000l., he found to have been applied by the defendant, as agent to the plaintiff, in manner stated in the second schedule to his report of the 16th of July 1802.

1st. For that the Deputy Remembrancer ought merely to have stated the evidence adduced, and read before him, as to what money was advanced by the defen-

sums of 2400l. and 12s. 11d., and totally to set aside the mortgage or 1290l., making together 3790l. 12s. 11d. But the mortgage for 4000l. the plaintiff's counsel say, they do not dispute. On what ground does the plaintiff attempt to dispute the other monies? Not because the money has not been advanced, for every shilling has been advanced. He has allowed that under his own hand. But he says, 'part of the consideration was personally advanced to me by the defendant John Morgan, for his clients the mortgagees, William Farrer and [115] James Morgan; and he being my solicitor also, therefore that part of the consideration ought to be struck out of their mortgages, and constitute a separate account between myself and the defendant;' or, in other words, he desires that the sums advanced by the defendant may be, if I may be allowed the expression, reduced to a simple-contract debt between the defendant John Morgan and himself, and that the defendant may be left without any security, and to recover it as he can, and that the plaintiff may be let into possession of the estates. This is the plaintiff's equity. On what principles of equity or justice this can be done, I am at a loss to discover."

"Now, for the better understanding of these exceptions, it will be necessary to state the general dealings between the plaintiff and the defendant, which gave rise to this suit, and also some of the antecedent proceedings."

[His Lordship then entered at large into a minute detail of the various transactions of the case, and stated the pleadings fully; upon which, as he went along, he commented much to the same effect as in the judgment delivered at the conclusion of the present report, and therefore that part of the present judgment, which is of considerable length, is omitted.]

[Having brought the case down to the decree of 1796] his Lordship observed, "If the plaintiff had [116] thought fit to have proceeded upon that decree, there is

dant to the plaintiff, as and for the consideration of the bond for 500l., and when such money was advanced and paid, and by whom, and to whom, and in what manner; and the Deputy Remembrancer ought to have certified that no evidence had been produced or laid before him, by which it might or did appear that the said 500l., or any money had been advanced by the defendant to or for the use of the plaintiff, out of his own proper money, as and for the consideration of the said bond.

2d. For that the Deputy Remembrancer was not directed or required by the said order of the 24th of May 1810, to give any opinion upon the evidence adduced and read before him, but merely to review his said former report as to the matter of the 4th exception taken by the plaintiff thereto, according to the direction therein before given on the reference back of the 1st exception thereto; and it appeared that the evidence stated in the fourth schedule to his former report, coupled with the nature of the dealings between the plaintiff and the defendant, were not all, or in all respects, in conformity with the answers of the mortgagees and the defendants.

3d. For that the Deputy Remembrancer ought to have deducted from the 9409l. 7s. 1d. the sum of 1200l. arising from the sale of six fen-office bonds and bond of John Adams, in as much as no evidence had been laid before him, to shew that the trustees did ever receive the said 1200l., or that the same was paid by them to the plaintiff, or to the defendant, as his agent: and he ought to have found that 8209l. 7s. 1d., being the remainder of the said 9209l. 7s. 1d., after deducting the said 1200l., constituted the total amount of the mortgage-money received by the defendant, as agent to the plaintiff and the mortgagees, in respect to the mortgage transactions.

4th. For that the Deputy Remembrancer ought to have found that the defendant, out of the said 8209l. 7s. 1d. paid to the plaintiff 7681l. 5s. 6d. only, and that no more was advanced by the said defendant to or for the use of the plaintiff: and that the said 7681l. 5s. 6d. was the only principal money that was ever due from the plaintiff on account of the said several sums of money.

5th. For that the Deputy Remembrancer had not set forth all the evidence produced and offered to be read before him, respecting the matters of the 6th and 7th exceptions to his report of the 13th of June 1809, and particularly respecting the sale of the fen-office bonds, and the application of the monies arising by such sale: and had also omitted to state many material evidences respecting the said fen-office bonds, which had been discovered since the order of the 24th of May 1810, and which evidence were offered to be produced before the Deputy Remembrancer by and on behalf of the plaintiff.

no doubt that he would have acted wisely and properly, and by this time might have been in possession of his estates; but he did not think fit to carry it into execution: he made an application to the Court for a separate report, and in June 1801, there was an order for a separate report, which order is, 'That the Deputy Remembrancer should be at liberty to make a separate report of all dealings and transactions between the plaintiff and the defendant, so far as related to the monies received and paid on account of the mortgages and judgments in the bill mentioned, and also of all sums of money received by the said defendant as agent to the plaintiff, and also to the mortgagees, and when and how such sums of money were applied; and also an account of the rents and profits received by the defendant.' When the order for this separate report was made, I have no doubt it was obtained upon a misrepresentation of the merits of the case; it must have been represented that the said defendant was keeping possession of the estates, not merely to satisfy the mortgages and judgments, but also for other monies which were no lien on the estates: if that had been the case, it would have been right that he should not keep such possession, but that the plaintiff should be let into possession upon paying the monies that were a lien upon the estates; but there was no ground for such suggestion, because the defendant was not let into possession of the estates for the security of any thing [117] but what was a real burthen and lien upon those estates. Could the Court ever imagine that by the order for that separate report, the money advanced forming a part of the mortgages, should be struck out of the mortgages, and be reduced to a simple-contract debt? The order, I apprehend, does not import any such thing; but that is the use that is attempted to be made of this order and report, and which, I think, is a perverted use of it. In July 1802, the Deputy Remembrancer made his separate report accordingly, in which he charged the defendant John Morgan with the whole of the mortgage money of 12,000*l.*, as actually received by him for the plaintiff's use; and on the other hand, he allowed him in his discharge all the money he had actually paid and disbursed on the plaintiff's account. Is not this perfectly right? He certifies the facts of the case to be thus--that the plaintiff had applied to the defendant to raise money upon his estates, and that the defendant had advanced to the plaintiff property belonging to his brother Chardin Morgan, and took the plaintiff's bond to the said Chardin Morgan for securing the re-payment thereof with interest; which bonds were afterwards consolidated by the plaintiff's executing to Chardin Morgan a bond, dated the 28th of February 1775, for payment of the sum of 2400*l.*; and he then finds that the plaintiff gave a mortgage for 6610*l.*, which consisted of this bond for 2400*l.* among other sums. The plaintiff, I think, took ten exceptions to this report. The Court overruled all those exceptions. The plaintiff appealed to the House of [118] Lords, and the House of Lords allowed some of the exceptions, but directed further enquiry with respect to the others; and upon that it now comes for the consideration of the Court."

[His Lordship then investigated minutely and elaborately the merits of the different reports as brought under the revision of the Court by the several exceptions taken to them; but, on account of the great length to which that investigation was extended, and its relating in the result entirely to the enquiry of the facts, as to what sums or parts thereof had been advanced to the defendant as agent for the plaintiff, it may be sufficient, for the purposes of this case, to observe generally that his Lordship considered the reports well founded, both as to the evidence of the facts, and the conclusions deducible therefrom--that it could make no difference who advanced the money provided the defendant paid it over to the account of the plaintiff--that the distinction taken between the separate and general report, as it might affect the estates, was unfounded in reason or equity; for that the estate was pledged for the whole 12,000*l.* actually advanced by Morgan--that the exceptions, as far as they went to impeach the truth of reports, were founded on fallacies--and that whatever might have been the intention of the House of Lords, it could not be that the estates should be exonerated from any of the sums within the amount of the 12,000*l.* advanced by Morgan himself on account of Sir Watkin--his Lordship holding, that the money paid by Morgan for Sir Watkin Lewes up to the 12,000*l.* ought to [119] be all repaid before the estates could be redeemed, whether advanced by Chardin Morgan or John Morgan, or the remotest stranger.]

[As to the evidence his Lordship considered, that it was abundantly sufficient to sustain the reports, and he particularly adverted to the settled account (by which it

appeared, that the defendant had accounted for every farthing of the money), and to Morgan's books and the slips of paper, and he insisted that the delivery of the fen-office bonds, and the bond of John Adams, by the trustees to the defendant, and his having accounted to the plaintiff for the amount, was equivalent to a payment of so much money to him by the trustees for the use of the plaintiff.]

"Through the whole of this long cause (said his Lordship), it has appeared to me that the plaintiff has been labouring to deprive the defendant John Morgan of a considerable part of a just demand. Upon the order for a separate report, and upon the decision of the House of Lords upon the exceptions to the first separate report, it has been stated to us, that this is a peculiar and extraordinary case; that the defendant John Morgan was attorney to the plaintiff; that he was his banker, and that he was agent for the mortgagees; and that filling all these characters, we must infer that he is a rogue. It has been said, you must necessarily infer fraud from his situation. That is rather uncharitable, and I think it is not equitable. I know no principle either in law or equity, that requires me to [120] infer that an attorney must charge his client, or an agent his principal, or a banker his customer fraudulently: or that a solicitor who happens to be concerned for both mortgagor and mortgagees must necessarily act fraudulently. I know that, in certain cases, a Court of Equity will not permit an attorney to sustain all these characters: and that I can understand as founded upon good and sound principles of policy. But I know of no principle either of law or equity prohibiting an attorney from lending money to his client, or a banker to his customer, and taking a bond as a security, or entering it in his own name, or in the name of any other person, either at the times the money was lent, or at subsequent periods. What difference can any of these circumstances make to the borrower, if he has the money for which he gives the security? What matters it to the plaintiff in whose names the bonds were taken, or from whom he received the money, if he has received it, or has had it applied to his use? It has been argued, as if the House of Lords had decided, that the sums of 2400*l.*, 1390*l.*, and 12*s.* 11*d.*, were to be struck out of the mortgages, and reduced to the degree of a simple-contract debt, as not constituting any part of the sums secured by the mortgages: and that the lender of those sums was not to have the security for which the mortgages were made. This, in my understanding, is not the meaning of the expressions of the House of Lords: and I rather apprehend, my learned brothers and myself differ more upon the meaning and effect of this order of the House of Lords, [121] than upon the real merits of the case. Lord Redesdale has certainly gone upon the supposition, that there were two accounts between the plaintiff and the defendant; one a mortgage and judgment account, and the other a general account uncovered by the particular securities; and Lord Redesdale supposed that this Court, by ordering a separate report, meant that the Master in taking the mortgage and judgment accounts should distinguish them, and that he should also distinguish how much of the money was personally advanced by the defendants, the mortgagees, and how much was personally advanced by the defendant. The House were of opinion, that the Master had not done that according to the meaning of this Court, and they direct the Master to enquire, whether the 2400*l.* was advanced by the defendant John Morgan; and they declare that the small fractional sum of 12*s.* 11*d.* to make up the sum of 6610*l.* was not advanced by the defendants William Farrer and James Morgan, but by the defendant; and they further declare, that the sum of 190*l.* was not advanced by them, but by the said defendant; and they direct an enquiry, whether the 1200*l.* was advanced by the defendants William Farrer and James Morgan to the plaintiff, or whether it was advanced to the defendant as his agent, and for his use. Lord Redesdale certainly found himself under difficulties, on account of the separate report, and the want of the general report; and therefore he says, the Master has charged the plaintiffs with sums of money, [122] under circumstances, and on the faith of instruments, which this Court considered to be suspicious. But his Lordship does not suppose that this Court meant to set the securities aside, or that the securities ought not to be received as evidence, and therefore further inquiry was to be made as to the effect of them. I should observe here, that the order for the separate report, obtained by the plaintiff, involved their Lordships in considerable difficulties: for if the whole of the case had been considered in one point of view, the objection I have stated, namely, whether the 2400*l.* was the defendant's money, would not have occurred: but that order having been made, and this Court having over-ruled the exceptions to

the first separate report, their Lordships had only to decide whether they were well founded; and we must endeavour to get at that as well as we can. If Lord Redesdale had meant that the money advanced personally by the defendant should be struck out of the mortgages, his Lordship would have said so, and any inquiry whether the money was advanced by the said defendant would have been perfectly useless. Now I conceive the order of the House of Lords imported no more than this—inasmuch as we do not consider those monies in point of law as proved, let the Master state what money has been advanced by the defendants, the mortgagees, and by the defendant John Morgan, forming the consideration of the mortgages, and thereby enable this Court to make their ultimate decree. The Master upon clear evidence has [123] found, that all these sums were duly advanced by the defendants, the mortgagees, or paid by the defendant, and the evidence in my judgment warrants this finding. I have looked at the order of the House of Lords, and I will state what it is they ordered, and what I take to be the meaning of it: [Here his Lordship read the order as far as relates to the 1st and 2d exceptions, p. 97.] Thus all that the House of Lords say is, that the money which is stated in the report to be the property of Chardin Morgan, was not the property of Chardin Morgan, but was the property of the defendant. The Deputy Remembrancer has made his report, and has stated particularly when and how, and in what manner it has been advanced. The House of Lords then go on and say, that the sum of 12s. 11d. was not advanced by the defendants William Farrer and James Morgan, the trustees in the marriage settlement of the defendant John Morgan and his wife—that is, the sum of 12s. 11d. which was added to make up an even sum of 4210l. They also say that this was not advanced by the defendants the mortgagees, but by the defendant John Morgan. Be it so—still it makes a part of the consideration: it is a fractional sum personally advanced by the defendant to make up an even sum. [His Lordship then read the rest of the order allowing the other exceptions.] The Master has reported that the whole of that 12,000l. has been advanced for the use of the plaintiff, and therefore, in my opinion, he has complied with every thing that was intended by the House of Lords. The [124] House of Lords have not in any part, that I can find, directed that the money advanced by the defendant should be expunged; the House of Lords have not directed what we are to decree, nor what the ulterior decision should be, and we must make that decree which upon consideration of the whole case we may think we ought to make; and I have no hesitation in saying, that I think the plaintiff's exceptions ought to be disallowed, and that he cannot be let into the possession of the estates but upon payment of the 12,000l.; and this, I think, is not contrary to the decision of the House of Lords."

THOMSON, Baron, was absent.

GRAHAM, Baron. "It is not to be wondered at that a case of this sort should present itself in different views to those whose duty it is to decide upon it, and a case which, really considering the various proceedings that have taken place, I may fairly say, almost exceeds the comprehension of the human mind. I will endeavour to be as short as I can, because, perhaps, the shorter one is upon a subject of this sort, the more distinct and clear will the decision appear, and that is the more necessary, when there is a probability that the judgment we may form may undergo discussion elsewhere. It is undoubtedly true, that this bill, in its original shape, did not seem specifically to apply itself to those circumstances, which a further investigation of these numerous accounts have disclosed to us. The bill, as it was originally framed, [125] does undoubtedly pray a general account of all the transactions between the parties, that Sir Watkin Lewes may be let in to redeem his pledged estates, upon the terms of what should appear on the general account to be due to the parties: but although the bill was so framed, and prayed such relief, I, for one, am by no means disposed to say, that if the party, unable to distinguish all the circumstances that attended that case, should impose upon himself and his property improvident terms, and if, in the result a Court of Equity should be of opinion, that he had so incautiously pledged his estate for that for which it was not liable to be pledged, the Court should hold the party strictly to the tenor of the bill; and still less where he sues not only for himself, but for his infant child, towards whom, unquestionably, in its utmost rigour, those terms could not be supposed to extend; but whatever was the original object of the bill, it began to take a new complexion when the cause came on for hearing, and although the decree does not so directly point to a separate consideration of the several

mortgages and judgments, I could, but for an unwillingness to take up the time of the Court, advert to specific directions of that import to be found in the decree, which cannot, in my apprehension, be controverted. But passing to the order for the special report, I am utterly at a loss to account for the directions which are given with regard to that report, but upon the supposition that at the time when that order was made, the Court did see very strong reasons to suppose that the whole of this sum of [126] 6610l. and the whole of the 1390l. had not, in point of fact, been advanced by the trustees, to whose credit they are placed in this cause. Those particular directions, according to my apprehension, are not otherwise to be construed than in that view, and it is not, perhaps, to be wondered at, that at the time of making the decree and the special report, the Court did not see the cause in that point of view, in which the subsequent inquiry has presented it, because, at the time of making the decree, the Court might not see so distinctly as it does at this moment what the case was. It was a case in which John Morgan himself, and his trustees, positively swear to an actual advance of 6610l. paid by themselves in trust, and they swear, that the trustees of John Morgan actually paid down 1390l. at the date of that mortgage in 1776, and placed it in his hands; and when the Court at that time saw the strong *prima facie* evidence, that presented itself, from the deed of mortgage executed by the parties, and from the settled account (about which so much has been said, and to which so little credit ought to be paid) it was impossible, till these items were gone into under the order for the separate report, that the Court could see the grounds on which they afterwards thought that the whole of the money had not been advanced by the trustees. It was clearly the direct object of that separate report, to divide the case into two distinct subjects of investigation. One, the account of monies advanced by the trustees, and the other, the general account between all the parties in the cause. Why it was [127] that Mr. Morgan was induced to consent to that separate report, I cannot say, but it did of necessity lead to a partial view of the general circumstances of the transaction, and that was complained of in the House of Lords; but at the time when the cause was set down, and at the time when the order for a separate report was made, perhaps neither party was aware of the consequence, or that it would involve monies which belonged to the general account in the transactions between the parties. But whatever may have been my view of this case in its original shape upon the order, and upon the special report, it appears to me, that we have nothing further to do with that, than to understand distinctly how it has been adopted by the House of Lords, and how it has been acted upon there. Most undoubtedly the order for the special report was obtained on the idea that 6610l. had been advanced by the trustees, and while the subject was in dispute, ten exceptions were taken, and every one of them went to the 2400l. and the 1390l. With regard to the 1390l. they go to say, we dispute your advancing that sum either by Chardin Morgan or any body else, and if it was even advanced by you or Chardin Morgan, we still say, if it was the advance of Chardin Morgan for your benefit, and that that, as well as the 2400l. never constituted part of the mortgage money, because it never was the property of the mortgagees: that is the ground of all these exceptions, and part of these ten exceptions now come on before us, our former judgment having been cor-[128]-rected by the House of Lords (when, before we had the advantage of my brother Wood's assistance in this Court, we had over-ruled all those ten exceptions), on an appeal by the plaintiff upon the 1st, 2d, 3d, 4th, 5th, 6th, and 10th exceptions. It now seems to me, that in all the perplexity of this complicated matter, and the different conceptions that have occurred to different minds, the great and the only point for us to consider at present is, what is the effect of the judgment of the House of Lords, and what they have decided; because the view which they have taken upon this subject must be the basis of all our subsequent decrees, and of the ultimate disposal of this cause; and therefore I have, perhaps, wasted time in shewing what my view of the original transaction was; but though I was not a party to the original decree, I wish it to be understood, that my opinion is, that the decree was well founded; however, I now take my stand upon the order of the House of Lords. Perhaps it may be a matter of some kind of doubt, whether we are truly informed as to the particular language, and the particular opinion of any one member of the House, and I shall therefore forbear from stating it; and no man knows better than myself, the justness of comprehension, and the intelligence of the mind that was exercised upon this complicated subject; but I will not interpose his authority at all, on the

present occasion, but simply guide myself, and abide entirely by what the House of Lords have done."

[129] Now, we must first observe that at length Mr. Chardin Morgan is entirely out of the case, and the defendant is standing in a variety of relations, all of which require, on his part, a just and perfect accuracy in his statement of accounts: because, calling upon him particularly for that account from the first to the last, even up to this period, it has been sworn again and again, that the advances in the name of Chardin Morgan were of his money, and that goes a great way to impeach the settled account. Then we have a subsequent report, in which it was represented to be the money of Chardin Morgan, and it was not till a new set of exceptions were filed in this Court that that was got rid of: and then the report states that no part of the money was advanced by Chardin Morgan. We thus, therefore, after a great expence, have got rid of that. [His Lordship then took a view of the general object of the exceptions, which he considered as founded on the doubt, which the House of Lords entertained, of the advance of the money by the defendant, and as to which the order directed an enquiry, observing particularly on the disallowance of the 12s. 11d., and the reason given for it—that it was not advanced by the trustees: making the same observations as to the disallowance of the 190l. part of 1390l. apparently part of the mortgage, and for the same reason: and then he adverted to the defendant being appointed receiver to the estates, and being engaged in business for Sir Watkin Lewes, as his attorney, when he was paying himself by money in hand, although [130] he was charging him with interest at 5 per cent. under the name of his trustees, on the money said to be advanced by them. And his Lordship declared his opinion of the object of the House of Lords, as to the other exceptions, to be, to direct an enquiry, whether the trustees were ever, in point of fact, at any time possessed of these fen-office bonds, and the bond of John Adams, and whether they converted them into money, and whether they cashed those bonds, and whether, having done so, they did, on the 2d of April 1776, pay the money actually over in cash to Morgan.]

"Now, with regard to that (continued his Lordship), there is not in my view of the case a tittle of evidence to prove those facts, or that the trustees of this marriage settlement ever did, in point of fact, receive the money from Mr. John Adams, or when they did receive it. I perfectly agree with my brother Wood, that the money might have been advanced, but there is no assignment whatever to the defendant. What was there to prevent him, when he had advanced the 1390l. from getting a declaration from the trustees, that they were his own advances, and that he had advanced the 1390l.? The House of Lords therefore say, let us know that it was a *bonâ fide* transaction; the sequel of the cause is, that they did not advance the 1390l. in money; it was Mr. Morgan's personal advance, and he shall not be allowed to come in under cover of a trustee, and receive interest at 5 per cent. when this is the state of affairs between him and [131] Sir Watkin Lewes. But it is said, and undoubtedly with great weight, if the House of Lords, in saying that 12s. 11d. and 190l. shall be disallowed, as making part of the mortgage, what had that to do with enquiring what advances were made upon the 1390l. It is quite clear the House of Lords could not have been of opinion, whether the money was advanced by the trustees, or whether it was advanced by John Morgan, that it should nevertheless stand as part of the mortgage, because then they would have said so. But if the House of Lords had considered Sir Watkin Lewes bound by these various mortgages, (stating them) and the supposed settled account, why, all these enquiries? Can we—when the House of Lords have totally set aside these instruments, as not concluding Sir Watkin Lewes, having ordered them to be particularly enquired into, to the extent of the 2400l. and the 1390l.—take upon ourselves to say, No, we will do what you ought to have done, and we will bind the party by the instruments."

"Then, under what circumstances is this settled account made?"

"In the first place, it purports to be a general account, signed by Sir Watkin Lewes, on the 24th February 1777, and it appears, that Mr. Morgan had contrived that all his money should pass through his hands. At the time he was supposed to be settling these accounts with the mind a man should have, who would look into accounts so complicated, he was himself a creditor of Sir Watkin [132] Lewes, for the sum of 622l. for which he was ready to bring his action, or to have snapped a judgment when Sir Watkin Lewes was unassisted by any one. It is admitted that the defendant was the agent of the plaintiff, and the agent of the trustees: he appeared in all these

characters, and he assumes himself also to be the banker of Sir Watkin Lewes, and, as I apprehend, much against his will : for he appears to have been desirous of getting the money out of his hands : but the defendant, acting in all these situations, and the plaintiff not having possession of any one book that could assist him, can what was done under such circumstances be supposed to be binding upon Sir Watkin Lewes?"

[His Lordship then went into the account in much the same manner as in his judgment of the 18th November, instant, and drew the same conclusions.]

"Now, with regard to these exceptions, I am disposed to over-rule the first ; for I have been furnished with no objection to the fact of the consideration of the first bond having been advanced. With respect to the 1141l. 16s. I am likewise disposed to over-rule the exception to that, for I do not think that there is any fault to be found with the report on that ground. Then the third exception is, that John Morgan, out of his own money, had paid the sum of 112l. 10s. and 61l. 4s. With regard to these advances, I am not prepared to say there is any objection. Then comes the fourth [133] exception, and the reason that is given is, that there was no evidence that the 2400l. forms a part of the consideration. Now, the Deputy Remembrancer answers that exception, by reporting that he does find evidence that it was so agreed, so that the whole of the argument that goes to over-rule this exception is, that the Deputy Remembrancer has found ground for some of these instruments, and that the plaintiff did agree that the 2400l. should stand as part of the 6610l. I agree that the Master has answered satisfactorily, and that a very bad reason was given for the exception : but the substantial ground of the exception was, (following the order of the House of Lords) that it ought not to have been reported at all ; and certainly the answer that was given to the argument against this exception, seems to me to be perfectly sufficient, viz. that it never was referred to the Deputy Remembrancer, to enquire, whether any such agreement was come to : the reference was, whether such sum of money was advanced, and whether it constituted, under the circumstances of the case, part of the 6610l. And therefore, with regard to that exception, as to his having allowed the 2400l. to stand as part of that mortgage, I am of opinion that it should be allowed."

"Then, with respect to the 5th exception, as to the 1200l. I think that should be allowed. The reason of my opinion is, that there is no evidence to shew, that the trustees were possessed of the 1200l. in clear cash. On that account, that must not stand as part of the money advanced on the [134] mortgage. Therefore, with respect to the 5th and 6th exceptions, I am disposed to allow them. The 7th and last exception, I think may be overruled. My opinion therefore, as it is applied to these different exceptions is, that the 2400l. and the 1390l. must be expunged from the mortgage, and that, in other respects, the report may stand."

MACDONALD, Chief Baron. (Having said that he had intended to have written something more methodical than he should probably be able to state from memory, but was prevented from the state of his eye-sight.) "In my consideration of this case, as far as the present subject is concerned, it is not very intricate ; for it seems to me, that the only duty that I am at present called upon to perform is, to see whether the sums which the House of Lords have thought absolutely necessary to charge on Sir Watkin Lewes's estates (not on himself, but his estates), and which I shall presently mention, have been shewn to the Court by the Deputy Remembrancer to have been actually advanced, as a substantial ground for the opinion that he has reported to us. (His Lordship then stated the original transactions.) I take the House of Lords to have reasoned upon those facts thus. This mortgage, as far as the 2400l. goes, rests upon the bond due to that amount, but no such sum of money was actually paid as the consideration for [135] the mortgage. They say too that the bond itself consists of the five component sums said to have been advanced on former bonds. They then lay the axe to the root, and say, we must see not merely that those bonds were executed, for undoubtedly they were : but we must see, that a good consideration in money was paid for those several bonds, and that is the gravamen of this point on the part of Sir Watkin Lewes : and I cannot agree with those who think it is the same thing, whether these bonds were given in the course of an account current, between the defendant and the plaintiff, or whether hard cash was given upon

* His Lordship appears to have taken into consideration the exceptions to the third separate report, at the same time, as being the ground-work of the exceptions to the fourth.

each occasion, when these bonds were executed; because that would make a great difference in point of interest, but, besides that, the House of Lords meant it as a test, to see whether the transaction was true in point of fact. Then he it that the mortgage was executed: he it that Sir Watkin Lewes consented that the 2400l. should form a part of the mortgage, still the present purpose is to enquire, whether there is sufficient to shew, that at the time these bonds were executed, the money was actually paid. According to my own opinion, the evidence of that fact is not carried one jot further than it was when the case was before the House of Lords. I shall not take up each exception one after another, but advert to the two great sums, which constitute the subject-matter of the four principal exceptions, namely, the 2400l. and the 1390l. With regard to the 2400l. the first of these bonds that were given to make up that sum, is a bond of 500l. [136] Now upon what evidence does that stand? I would first of all observe, that the existence of the bond, and all the evidence relating to it, is quite out of the question, and that the accounts are not kept in such things as are called books: but they are kept upon scraps of paper in such a way as no man of business would keep accounts, and interest is charged upon them. I admit that that constitutes a vast body of the evidence now before us; but granting all that, the question still recurs, which the House of Lords have put. Was there a pecuniary and valuable consideration paid for these bonds at the time they were executed? With respect to the 500l. what was the evidence? I do not stop here to say any thing upon the admissibility of Mr. Morgan's own books, or the scraps of paper that have been given in on his part. The House of Lords have adverted to it, but I think it is of no consequence at all to this question. The first piece of evidence is a small scrap of paper, amounting to no more than a mere assertion of Mr. Morgan, that this money was paid to Sir Watkin Lewes. It is a very dark transaction. Who borrowed the money? Who gave the security for it? We have no insight into these things at all; the rest of the evidence goes to shew, that in other books and papers it was treated as an existing bond; but that does not solve the doubt, whether the money was advanced for the plaintiff. So much for that bond. There was no evidence of any consideration having actually passed to Sir Watkin Lewes, when the bond was executed. With respect to all the others they stand upon one simple [137] ground. The Deputy Remembrancer has reported, and properly reported, that the monies were advanced; but there is nothing to shew that any money passed at the several times when the bonds were executed. Now, let me read the requisition of the House of Lords to the Deputy Remembrancer." (His Lordship read the order.)

"Does not that order intimate that the House of Lords were of opinion that this was not like any other transaction of bonds executed, where the money is actually paid at the time? That requisition can never be satisfied by producing a long catalogue of sums, such as has been produced here. It appears to me most manifest, that the House of Lords considered this an allegation on the part of the defendant, that the money was actually paid down at the time these bonds were executed; and that is not proved, as I said before, by giving us that which is mere assertion. This, I conceive to be by no means shewing to the Court, in the manner that was expected by the House of Lords, what money was bona fide advanced in any one instance at the time these bond transactions took place. I pass on therefore to the 1390l. Of that the House of Lords have disposed of 190l., and struck it out of the account, as being a personal advance by the defendant. Now, with respect to the two 600l. bonds, the House of Lords have considered that Chardin Morgan should have come with 1200l. in his hand, and handed it over to Sir Watkin Lewes, or his agent. Then the only evidence they have given with respect to [138] that is, that these bonds were some of them paid, and others were assigned; but according to the view the House of Lords have taken of it, what has the plaintiff to do with what became of those bonds after the defendant became the purchaser of them? If he bought them, he was master of them, as soon as they were assigned by Chardin Morgan. The only question therefore is, whether he received the 1200l., and of that there is no evidence but assertion, in the form of a memorandum upon the back of the marriage settlement. Sir Watkin Lewes knew nothing of it, and the trustees did not concur in it. Mrs. Morgan has not signed it, who would naturally sign what Mr. Morgan presented to her as proper for her to sign. No man can, on this evidence, believe that this 1200l. was received and handed over at the time."

"For these short reasons, I am clearly of opinion, that the requisition of the

House of Lords has been by no means complied with. The four first exceptions therefore should be allowed; but the other is perfectly unintelligible, and therefore must be disallowed."

With respect to such of the exceptions as were allowed, the Deputy Remembrancer was ordered to review his report; and it was ordered that he should compute interest on the principal sums of 4209l. 7s. 1d. and 4000l., and that he should take an account of the rents and profits of the estates in mortgage and not in mortgage, received by the [139] defendant, for the trustees and mortgagees, and also an account of money received for timber cut down on the estates, which were to be carried on from the foot of the account mentioned in the report of the 2d July 1802, to the mortgage accounts, and the amount to be set off against what should be found to be due for principal and interest on the several mortgages.

Against that order the defendant appealed to the House of Lords, contending, that it was departing from the general tenor of the suit, as instituted by the plaintiff for the relief prayed, and the decree thereon, and that whatever equity the plaintiff might have to found an application upon for redemption of his estate, it could only be on payment of the 12,000l. actually advanced on his account, all of which must be taken to have been advanced on the security of the term of 500 years.

The respondent (the plaintiff) contended that he was entitled to redeem on paying what had been found due by the separate report on the mortgage account only, and that all ultra the amount was to go to over the general account, as being properly the subject-matter of the general report.

1st April, 1816.—ELDON, Lord Chancellor, now delivered judgment. [Having adverted to his personal recollection of the facts of the case—the decree of this Court, whereby the separate report was ordered:—which he said was founded on a bill which prayed not only an investigation of the accounts said to [140] have been settled, but of all dealings and transactions between the parties; and therefore the object of that decree must have been to have required evidence to be given of the consideration of the bonds, or it would have been confined in its terms to the surcharging and falsifying particular accounts relating to particular securities. Then noticing former order of the House of Lords thereon.] That order (observed his Lordship) proceeded on the principle in the case of *Laughan v. Lloyd* (which he recognized), that securities taken from a client by an attorney for money proposed to be advanced by the latter are not conclusive evidence, as in other cases, of the consideration having been actually paid: for, in all such cases, it is incumbent on the attorney to shew that he acted as much for the advantage of his client as of himself.

"The original decree (said his Lordship) of the Court of Exchequer, as modified by the subsequent order of this House, is calculated to afford the respondent extraordinary relief, going beyond the common course, in cases of redemption of mortgaged property, to a general account of all dealings and transactions that may have at any time taken place between the parties. In the mean time there has been a separate report of the mere mortgage accounts ordered to be taken as distinct from the general account between them, which general account yet remains to be taken. That separate account must first be disposed of, that the mortgage accounts may be first cleared, which must have been the object of it, and then the general account may be taken, and what may be [141] disallowed the appellant in the separate report may still be allowed him on the general account. That may be the case with respect to the 2400l., which has been hitherto disallowed by the Deputy Remembrancer, acting under the order of this House, declaring that those securities were not to be taken as evidence of the consideration for them having been advanced, and as not being admissible as an item in the mortgage account, because not supported by other evidence; but, on the contrary, falsified by the accounts as far as they related to them. If, however, the money were actually advanced at any time, justice may yet be done to Morgan by the general report."

"Then Morgan has taken in execution on his judgments, timber felled on the mortgaged estates. The mortgagor himself has no right to cut timber, whereby he lessens the security, and commits trespass. Can Morgan then be allowed to take in execution for a debt due from the mortgagor, the timber which the mortgagor cannot enter to take, merely by the effect of any privilege arising from his situation

as solicitor to both mortgagor and mortgagee? He certainly cannot. I am therefore of opinion that in that respect the order of the Court of Exchequer is substantially right, and with some alterations as to the exceptions, and further directions may be affirmed."

"It was objected that the Court of Exchequer had given further directions on the hearing of the exceptions, which, it was contended, they had no right to do; but as the directions related wholly to [142] the separate report only, to which the exceptions were taken, I think there is nothing in that objection. There are no directions given as to the judgments, but they are not a necessary part of the present separate report."

REDESDALE, Lord, (corroborating the Lord Chancellor's view of the grounds of the former decision of the House) put the present case on a footing of distinction from the common and simple one of mere mortgagor and mortgagee.

"This (said his Lordship) is the case of an attorney, who acts as general agent and legal adviser of his principal and client, obtaining his bond; he is therefore bound by a very strict rule of law to prove by other evidence the actual advance of the whole consideration. That principle was recognized in the case of *Vaughan v. Lloyd*. The actual mortgagees, however, have a right to have the £209l. accounted for to them, whether that money was applied by Morgan to the account of Lewes or not, which one of the exceptions implies a doubt about. They have nothing to do with that which is a matter between Morgan and Lewes altogether."

"The want of accuracy in Morgan's books of accounts is not to be used in his favor. It is his business to keep regular accounts, and if he suffers any loss by not doing so, it is his own fault. That was so held in *Vaughan v. Lloyd*, in which I was of counsel, and I believe that Lloyd did suffer a loss in consequence; but it would be monstrous to allow a man to avail himself of that [143] irregularity, so as to enable him on that account to charge another by his mere assertion."

"The argument founded on the accounts having been settled, cannot be of any avail in a case of this sort; and in point of fact, when they are submitted to investigation, they contradict themselves. The decree of the Court of Exchequer is right therefore in effect, although some few of the circumstances of the case may have been overlooked by the Court."

"The produce of the timber account ought to go in discharge of the mortgage account. Morgan has no right to take it on account of his debts. As to the judgments, they were probably included in the separate account, to enable the mortgagees, if it had been necessary, to have availed themselves of them."

"As to the objection of the Court of Exchequer having given further and other directions, or the hearing of the exceptions, as the whole related to this separate report, I think that they had a right to do so."

ELDON, Lord Chancellor. "I am desirous of stating that the proceedings on this record establish the principle, that in the case of an attorney who takes securities from his client, they cannot be used as conclusive evidence of their consideration as expressed, but require extrinsic evidence of the money having been actually advanced to prove the transaction to have been *bonâ fide*."

[144] It was therefore ordered,

As to the 1st exception. —That the said order of the 5th of July 1813, complained of, so far as thereby the first exception taken by the said respondent to the said report of the 25th of June 1811, was allowed, be affirmed as to so much of the said exception as excepts to the said report, for that the Deputy Remembrancer thereby certified, that he found that the sum of 500l. in the said exception mentioned, was advanced to the said respondent, as and for the consideration of the bond bearing date the 31st of January 1774, and that the same was paid into the proper hands of the said respondent, it appearing by the Master's report, that no evidence had been produced before him of the actual advance of the said 500l., as and for the consideration of that bond.

And that the said order be reversed, so far as the rest of the said first exception was thereby allowed, and that the rest of the said exception be over-ruled, without prejudice to any question which might arise upon the matter thereof.

As to the 4th exception. —That the said order be affirmed, so far as thereby the fourth exception was allowed, with this addition, that such allowance of such fourth exception was to be without prejudice to any question which might arise in taking

the general account between the said appellant and the said respondent, directed by the decree, whether the sum of 8209l. 7s. 1d. in that exception mentioned, was ever, and when, and in [145] what manner, advanced by the said appellant to or for the use of the said respondent.

And that so much of the said order of the 5th of July 1813, as describes the two several sums of 4209l. 7s. 1d. and 4000l., as the principal money that would appear after the revision of the said Deputy Remembrancer's said report, in respect to the said respondent's exceptions, be varied, by inserting in the said order instead of such description, after the words "four thousand two hundred and nine pounds seven shillings and one penny, and four thousand pounds," the words "which in consequence of the allowance of the said respondent's exceptions, would appear to be the principal money advanced to the said respondent, as and for the consideration of the mortgages for 6610l. and 5390l., making together 12,000l. in the said report mentioned."

On the 11th of May following that order was made an order of the Court of Exchequer.

On the 17th of July following, the plaintiff applied to the said Court of Exchequer for re-possession of the estates, when the Court declared, that the order for a separate report to take an account of the mortgages and judgments was part of the decree, and could not vary therefrom, and that no variation could be made in the decree, but on a re-hearing; that the said order, as worded, had plunged the case into almost inextricable difficulties, that it was separating a matter in its nature inseparable, and that re-possession [146] could not be ordered till after the general report, wherein an account of all dealings and transactions between the parties would appear.

On the 1st of February 1817, the Deputy Remembrancer made his fifth separate report.

Certifying as to the 1st exception, that no evidence had been produced before him of the actual advance of 500l. as the consideration of the bond, dated the 31st of January 1774 (part of the consideration for the bond of 2400l.).

As to the 2d exception—that the consideration for the mortgage for 6610l. proved before him, appeared to be 4209l. 7s. 1d., which was the only money received by the appellant John Morgan, as agent to the said William Farrer and James Morgan, in respect to that transaction.

As to the 3d exception—that the aforesaid 4209l. 7s. 1d., together with 4000l., received by the said appellant of the said James Morgan, on behalf of the said Henry Wilder, making together 8209l. 7s. 1d., constituted the total amount of the mortgage money received by the said appellant as agent to the said respondent and the mortgagees, in respect to the mortgage transactions.

As to the 4th exception—the order having affirmed the allowing of the fourth exception, with the addition that such allowance of such fourth exception was to be without prejudice to any question which might arise, in taking the general account between the said appellant and the said respondent, directed by the decree of the 2d of July 1796, whether the sum of 8209l. 7s. 1d. in the said exception mentioned was ever, and when, and in what manner, advanced to or for the use of the said respondent; he therefore further certified, that he considered himself not at liberty in and by that his separate report to enquire into the disposition of the said 8209l. 7s. 1d., the same being referable to the general account between the said appellant and the said respondent.

And he further certified, that he had proceeded to compute interest on the principal sums of 4209l. 7s. 1d. and 4000l., and to take the account of rents and profits, and monies received for timber from the foot of the account mentioned in his report of the 16th of July 1802, and had carried the monies so received to the mortgage account, and set the same off against the said principal and interest.

And that, on the 3d of September 1804, the monies so received exceeded the said principal sums, and interest thereon to that time, by 999l. 7s. 10d.; he had therefore not carried down the calculation of interest beyond the said 3d of September 1804, and found that since the said 3d of September 1804, and previous to the 6th of June 1810, beyond which latter period the said respondent had not brought down his charge, the said appellant had received, in respect of subsequent rents and profits, several sums, amounting, with the said 999l. 7s. 10d., to 4993l. 10s. 10 $\frac{3}{4}$ d.

[148] And he certified, that he had in the schedule annexed set forth an account of the interest allowed by him on the said principal sums of 4209l. 7s. 1d. and 4000l.

and also an account of the particulars of the rents and profits, and of money received for timber (referring to an annexed schedule).

To that fifth report of the Deputy Remembrancer the defendant filed two exceptions*.

10th November 1817. -The exceptions now came on to be argued, when the whole were over-ruled by the Court.

[149] It was then moved on the part of the plaintiff, that the defendants Francis, James, and John [150] Morgan, might be restrained from receiving the rents and profits of the estates and premises in mortgage and not in mortgage. And that the said defendants and George Morgan, might deliver up to the plaintiff, the possession of the several estates and premises, and the title-deeds and writings relating thereto. And that the sum of 4993l. 10s. 10d. by the report of the Deputy Remembrancer,

* 1st. For that the Deputy Remembrancer had certified, that on the 3d of September 1804, the monies received by the defendant John Morgan for rent and profits, and timber, exceeded the principal sums of 4209l. 7s. 1d. and 4000l., and interest thereon, to that time, by 999l. 7s. 10d., and he had therefore not carried down the calculation of interest beyond the 3d day of September 1804, and that since the said 3d of September, and previous to the 6th of June 1810, beyond which latter period the plaintiff had not brought down his charge, the defendant had received in respect of subsequent rents and profits, money amounting, together with the 999l. 7s. 10d., to 4993l. 10s. 10³/₄d.

Whereas the Deputy Remembrancer ought not to have so certified, he not having been directed or warranted to make such stop in the computation of interest, nor in the account of rents and profits, and money received for timber, but ought to have carried on the computation of interest, and the accounts of rents and profits, and money received for timber, down to the time of making his said report, and then to have set off the amount of principal and interest against the amount of the monies received for rents and profits, and timber, and ought to have certified as the fact was and is; and although the plaintiff had not brought down his charge of rents and profits received beyond the 6th day of June 1810, yet that the defendant had brought in the accounts of monies received for rents down to December 1816, whereby the Deputy Remembrancer was enabled to bring down such accounts to that time, and the Deputy Remembrancer ought to have carried down such account accordingly.

2d. For that the Deputy Remembrancer had certified, that he had, in the second schedule annexed, set forth an account of the interest allowed by him on the principal sums of 4209l. 7s. 1d. and 4000l., and also an account of the particulars of the rents and profits, and timber, money received as aforesaid.

Whereas the Deputy Remembrancer ought not to have so certified, nor to have annexed such schedule, but he ought to have carried on the calculation of and allowed on the sums 4209l. 7s. 1d. and 4000l. down to the time of making his report, and the schedule to such report ought to have contained an account or calculation of such interest, and of such rents and profits accordingly.

And the plaintiff took the following single exception:

For that the Deputy Remembrancer had certified, that he had proceeded to compute interest on the principal sums of 4209l. 7s. 1d. and 4000l., and to take the account of rents and profits, and of monies received for timber from the foot of the account mentioned in his former report of the 16th of July 1802, and had carried the monies received for such rents and profits, and timber (all which he found to have been received by the defendant), to the mortgage account, and set the same off against the principal and interest; and that he found, that upon the 3d day of September 1804, the monies so received exceeded the principal sums of 4209l. 7s. 1d. and 4000l., and all interest thereon, to that time, by 999l. 7s. 10d., and since the 3d day of September 1804, and previous to the 8th of June 1810, beyond which latter period the plaintiff had not brought down his charge, the defendant had received in respect of subsequent rents and profits, money, together with the 999l. 7s. 10³/₄d., to 4993l. 10s. 10³/₄d.

Whereas the Deputy Remembrancer, on taking the account, had omitted to make rests, when the rents and profits received exceeded the interest, and had calculated such interest at 5l. instead of 4l. per cent., and had allowed to the defendant sums of money for repairs, rates, and taxes.

reported to have been received by the defendant John Morgan, in respect of the rents and profits up to and subsequent to the 3d of September 1801, over and above the two principal sums of 4209l. 7s. 1d. and 4000l. and interest, might be paid to the plaintiff without prejudice to any other matter in question in the cause.

Dauncey and Raithby contended, that so very important a motion, which went in effect to decide the merits of the cause at once, could not be entertained in this stage of the proceeding, nor until the general report should have come in, when alone the true state of the accounts, as in fact subsisting between the parties, could be known, and they went at great length into the circumstances of the case, and dwelt much on the existence of the outstanding judgments.

Agar and Blake submitted, in substance, that as it was the manifest intention of this Court, and of the House of Lords, by ordering a separate report to be made as to the mortgages, to exonerate the estates as soon as the mortgage debts were discharged, the time was now come when the plaintiff having been shewn to have paid off those [151] debts, might demand possession of his estates from the defendant, who could have no further right to withhold them from him, whatever might be the state of the general account.

18th November.—The Court then delivered their several opinions as follows:—

GRAHAM, Baron. —“The present motion consists of two parts,—that the defendant may be restrained from receiving any further rents and profits of the estates of the plaintiff, as well those in mortgage as not in mortgage: and that the defendant may be ordered to deliver up possession of the estates, and to pay to the plaintiff the sum of 4993l. 10s. 10 $\frac{3}{4}$ d.”

“And this application is made in consequence of a fifth report of the Deputy Remembrancer, after frequent exceptions taken to his former reports in this Court, and two appeals thereon to the House of Lords, in which last the House state definitively, that the sums to which the consideration of the Deputy Remembrancer was to be solely directed, were such as had been actually advanced by the mortgagees, on the mortgages, and they were ultimately reduced to the amount actually received by the defendant, in cash, as agent for the plaintiff, from the original mortgagees. The Deputy Remembrancer finds, that that sum was 8209l. 7s. 1d. the disposition of which by the defendant is referred to the general account. He then finds, that the defendant had at the time down to which the plaintiff had brought down his charge (June [152] 1810) received for timber, and by rents and profits of the estates from 1802 to 1807, 4993l. 10s. 10 $\frac{3}{4}$ d. more than the principal money actually advanced as the consideration for the mortgages, and all the interest thereon, down to September 1804, when he finds, that the mortgage money was all paid off. That sum therefore is a balance in favor of Sir Watkin Lewes, on that account, now in the hands of Morgan. He himself alone can claim no right against the estates, independently of that of the mortgagees whose agent he was, and a balance being once found in his hands, the pledge which he holds must be delivered up.”

“Many arguments have been used, founded on the peculiar circumstances of this case which arises on a bill filed so long ago as the year 1783, by which it has been endeavoured to be shewn, that the defendant is the injured person.”

[Here his Lordship adverted to the leading facts of the case, and noticed the result of the different reports ultimately finding that the 12,000l. originally found to have been money advanced on the mortgages, ought to be cut down on going into proof of the items to 8209l. 7s. 1d. the surplus having been peremptorily disallowed by the House of Lords, as a pretext, tending to work the injustice of holding the estates chargeable for monies advanced or due, if advanced or due at all, on the plaintiff's personal responsibility.]

“I also adopted the same view, and therefore we [153] referred it back to the Deputy Remembrancer, and when it came again before the House of Lords, they said we do not direct any enquiry into the particulars of the monies advanced, other than as to those on mortgage, or of the sums constituting the bond debt of 2400l. for those latter sums must not be allowed to be made a charge upon the estate: but must go over to the general account. Now, it is a most singular argument to use, that the House must be understood by that decision to mean, that though the defendant can have no claim on the estate for the money composing that particular sum, if not advanced *bonâ fide*, on the mortgage: yet he shall be put in a still better situation, in consequence of his having been guilty of a legal fraud in so mixing the sums

together, and shall be allowed to charge the estate with the whole of his claim. It would be trifling with the judgment of the House of Lords so to construe it. The necessary consequence is, that with respect to those sums they must not be considered as forming any part of the enquiry on the separate report, but must go over to the general account, and if that or any part of it be due to the defendant, he may still be a creditor *ab initio* : but it must not be made a charge on the mortgaged estates."

"Another argument was, that we cannot take the estates from the defendant, because he is in possession under his judgments, which it has been contended were tackable to the mortgages by virtue of his possession : but that is not true. He is, in [154] truth, in possession, in the character of receiver under the deed. Then it is said, that as it is a mere term, he is entitled to keep possession on the ground of his general lien. But it would be absurd to hold, that a formal fiction adopted in conveyancing for technical purposes, should be so construed as to work such an injustice. The term was enacted for a particular purpose, and after his receivership should be at an end, there would also be an end of his term. It is unintelligible how he got into possession ; but being in he could not enforce his *elegit* against his own possession. As soon as the mortgages are discharged, his receivership is gone. The argument of his having been appointed receiver by this Court is, if possible, more meagre still. The pressure of distress compelled Sir Watkin to submit to that appointment, and when the last receiver broke and run away, Morgan availed himself of the occasion, to enter again into the receipt of the rents and profits in which he has continued ever since."

"If the judgment for 1142l. be investigated, how was it obtained ? It was founded on the alleged balance of accounts. But that account has been broken up : and how that settled account, as it has been called, could have blinded any man of common sense for a moment, is perfectly astonishing. That settlement was also one of the advantages which were taken of the plaintiff's distress. As to the *elegit* set up, it is quite absurd : for Morgan was himself in possession at that time as receiver."

[155] "It was at one time pretended, that the monies advanced from time to time, for which the bond of 2400l. was ultimately given, was the proper money of Chardin Morgan : but the House of Lords repelled that attempt to mislead them with indignation : and they said, that that sum should be carried to the general account, if there had been any thing really advanced. At another time it was contended, that the judgments were tackable to the mortgages : but that could not be, because they were obtained in a different character from that of mortgagee. The defendant was in possession as agent to the trustees merely, and they had nothing to do with the judgments. Had they indeed been obtained in the same character, there might have been something in it, but in this case that was clearly not so."

"On the fact of the mortgage to Dr. Kent having been paid off, the defendant founds this extraordinary argument. If you cut down the mortgage debt of my trustees, they will have paid so much less on that account, than I should otherwise have received, and I having paid off Dr. Kent's mortgage, and expended the remainder in payments, did it with my own money, and therefore, I am entitled to stand in the situation of Kent, and become by that payment a mortgagee for the 5000l. so paid to him. But the fact is, and it appears even by that very account wherein the payment of that mortgage is made one of the principal items, that the defendant had at that time abundant money of the plaintiff's in his hands, [156] with which he might have paid it : and really this attempt at imposition is altogether the most candid I ever heard of. By that account (and it is curious enough that he states it during the years 1775 and 1776) it appears, that after the payment of the 5000l. to Dr. Kent, the defendant had actually in his own pocket much more than that sum of the plaintiff's money : but then he adroitly discharges himself of the rest by business done ; but business at that time in embryo I believe. And are we to permit a man to make himself a mortgagee by availing himself of such a shuffle ?"

"Then the final settlement of the accounts is the only argument that remains : but that has been answered again and again, by the fact of the peculiar circumstances in which these parties were situated. That therefore amounts to nothing."

"There was indeed another argument founded on the representation, that there were large sums of money due to the defendant, on advances not charged on the estate, which during all this time he has been unable to make available : but Morgan had no charge *ultra* the money of his trustees, that could give him a right as against the estate, for there was no *elegit* executed, and therefore he could have no lien.

That therefore can only be applicable to that part of the motion, which requires the defendant to pay over the money in his hands to the plaintiff. But surely the defendant has no right to complain of his hands being tied up, for to whom, but himself, has this unexampled liti-[157]-gation been owing, and that founded on a fictitious claim, which has been reduced in the ultimate result of various enquiries in a proportion of nearly one half of its present amount. If therefore he has suffered, it is his own fault; but let it be also observed on the other hand, that from 1775 Sir Watkin Lewes has not during so many years touched a shilling of the rents and profits arising from these valuable estates."

"Ex debito Justitiæ, the Court would have done right in granting this application long ago; but they have been prevented by points of form. The consequence is, that Morgan has been receiving interest for so long a series of years on the whole of his claim, as if the whole had been in point of fact due on the mortgages, whereas it has been in the end reduced in the way I have stated, and there is a balance actually found to be at this moment in his hands. Is he then the person entitled to complain? Sir Watkin Lewes, indeed, on the contrary, might well complain of the effects of these proceedings."

"But giving him credit for the advances which he says he has made, they would make but a poor figure, if the usual rests were allowed."

"The only part of the motion about which I entertain any doubt is, that which requires the money to be paid to the plaintiff. I could almost be bold enough to say, that it ought to be granted; but on that point I shall defer to the opi-[158]-nion of my brothers. I am however quite clear in the opinion, that the mortgaged estates ought to be delivered up. For that there needs no precedent, it is matter of pure justice, and I would take it on my own responsibility to make the order. I would also extend it to the estates not in mortgage, for the mortgage accounts having been sifted to the bottom, it appears that the defendant has been paid over and over again. I think, however, that the 4993l. 10s. 10d. if not ordered to be paid to the plaintiff, ought to be brought into Court. Thus there may be some prospect of ending this protracted cause, and of relieving the Court."

WOOD, Baron. "I am also for concluding this cause; but I cannot concur in granting this application as to either part, because, if we should do so before the whole case is fairly brought before us, we should be doing very great injustice to Morgan. There were two accounts directed to be taken; one as between Sir Watkin Lewes the mortgagor, and the mortgagees; the other, as between him and Morgan generally. One of those accounts has been taken, and it has been found by the Deputy Remembrancer's report, that the mortgages to Morgan's trustees, and to Wilder, have been satisfied. But the other account still remains to be taken, and we ought not, I think, to grant this application until that shall have been done; for, whenever the Deputy Remembrancer's general report shall be made, I am convinced that there will be found to be considerable sums of money due to the defendant."

[159] "Much obloquy has been thrown on Morgan, but I think that this motion is much more deserving of reprehension: for it is an attempt to take out of his hands the only security which he has for very large sums, which I pledge myself to shew to be due to him."

"This must not be taken as if it were a mere insulated case as between mortgagor and mortgagee, but with a general view to the whole of the dealings between the plaintiff and the defendant. It appears, that money was borrowed by the former of the latter from time to time, till it amounted to 2400l. That, it is said, must be the subject of the general account. It is however quite clear on the evidence on which the report proceeded, that that was the sum advanced, or within a trifle. The other money said to have been advanced by the trustees, has been struck out certainly, not as not being due, but only as not being due on the mortgage account, and therefore it has been referred to the general account. It seems that Sir Watkin Lewes, being distressed for money, gets 8000l. from Morgan, who includes in the advance the bond for 2400l. (His Lordship then stated the circumstances of the manner in which the 8000l. was made up.) Morgan gave him accountable receipts for the whole sum. 4000l. more was afterwards borrowed of Wilder, for which also Morgan gave his accountable receipt. All such money Sir Watkin secures to the lender on his settled estates by a term of years, as he had power under his marriage settlement to do. Then has that 12,000l. [160] been applied to Sir Watkin's use by Morgan? Sir

Watkin has admitted it, and that a balance was due to Morgan on the settlement of accounts in his own hand-writing : and he was certainly not that credulous and ignorant man to submit to imposition. He was a barrister, an alderman of the city of London ; and has been in parliament. Would such a person have settled an account, and have given a note for the balance, unless he was conscious that it was all correct, and that he really owed such balance ? By that account the defendant makes himself debtor for 13,000*l.*, from which he discharges himself by accounts of money paid to the plaintiff and to other persons on his behalf, as per receipts, which vouchers on that settlement of the accounts were all delivered up. That account is signed. One of the items is the payment of Dr. Kent's mortgage, for 5000*l.* : and that was expressly one of the objects to which the money to be raised by the creation of the term of five hundred years, was to have been applied. Now, it is alone a sufficient objection to the present motion, that the effect of it would be to deprive the defendant of his equitable right to stand in the place of the mortgagee, on his paying off the mortgage debt ; for that will be the consequence of our obliging him to give up the possession of the estates."

"In the whole of the settled accounts there were only three or four small bills for business done objected to (and those in part only) by the plaintiff. All the other items he has ticked off as being satisfied of their accuracy ; and having made [161] some small deductions from the bills in his own hand-writing, he signs the accounts. It is quite clear therefore, that Morgan has accounted for every farthing of the money advanced to him for Sir Watkin Lewes on the mortgages : but beyond that, he has further demands which are waiting the result of the general report. Where then has Sir Watkin been imposed on ? That the payments charged against him by Morgan, as made by him on behalf of Sir Watkin were made, is actually self-evident, and so the Deputy Remembrancer has reported." [His Lordship then adverted to the various proceedings in this cause, and particularly as to the several reports (noticing that the defendant, in consequence of having acted as the attorney for the plaintiff, was not permitted to prove that the consideration money for the bonds had been advanced by him, by the mere production of the securities alone) and having commented on the object and effect of the several orders made from time to time by the Court,] he continued, "On the separate mortgage account, the money found to have been actually advanced by the trustees to the mortgagor, had been reduced to the sum of 4209*l.* 7*s.* 1*d.*, and the Court directed that the Deputy Remembrancer should compute interest on that sum, and on the 4000*l.* advanced on mortgage by Wilder ; and that he should take an account of the rents and profits of the estates in mortgage and not in mortgage, received by the defendant, or the mortgagees ; and also of money received by them for timber cut down on the estates, and that such money so received should be set [162] off against the principal and interest of the mortgage money. In that way nothing was to be allowed to the defendant, on account of his disbursements, as having made himself accountable by his receipts for money advanced to him as agent of Sir Watkin, on mortgage of Sir Watkin's estates. The money, however, has been in fact advanced by Morgan, according to the tenor of his accountable receipts ; yet the sums (as reduced by the last separate report of the Deputy Remembrancer) found to have been actually advanced on the mortgages, were paid off in September 1804 ; and therefore it is that this application is now made to the Court. The consequence is, that on the coming in of the general report, there will be found to be a debt due from the plaintiff to the defendant, of more than 8000*l.* for which, if this motion is granted, he will have no sort of security, except the personal responsibility of Sir Watkin Lewes, which, as he has only a life interest in the estates, cannot be considered as worth much at his time of life. Therefore I cannot but think, that to compel the defendant to give up the only security which he has in his hands, on the faith of which he parted with his money, is much too strong a measure, without first having before us the general report, which alone can enable us to know how the accounts stand between them. As to the payment into Court, of the sum of 4993*l.* that will be no sort of adequate security, for, as I have already stated, there will be a much larger debt found to be due to Morgan. Take the 2400*l.* and 1390*l.* only, and forty years interest, it is clear to demonstration, [163] that there is more than 10,000*l.* now due from Sir Watkin Lewes to Morgan, and it would be a manifest injustice to deprive him of his securities on the present motion. Had the House of Lords said, that the estates should be given up on payment of the money due to Morgan, it would have

been a different matter. But it does not follow that because the House of Lords have directed that an account should be taken of the money received by the defendant, or the mortgagees, and that the amount should be set off against the principal and interest due on the mortgages, they have therefore ordered that on the payment of such principal and interest, the estates should be delivered up. And I cannot draw any such inference, even from their Lordships' judgment, as I understand it to have been delivered on the appeal."

"Then, if in point of fact there shall ultimately be found to be a considerable sum due from Sir Watkin Lewes to John Morgan, on the general account directed to be taken, the House of Lords have not declared that he shall not avail himself of the security which he now holds for securing to himself the payments of the amount. The House expressly profess to proceed upon the principle of the case of *Vaughan v. Lord* (5 Ves. 48). I think that case was properly decided: but the attorney there, notwithstanding his demand was reduced, was not deprived of his security. The estates were not discharged from their liability."

[164] "Why also should not these estates continue to be security for the general balance of the accounts. There is, in fact, a mortgage for the 2400*l.* existing against the estates still: and what law is there, or what principle of justice or equity that operates to prevent an attorney from taking a mortgage for securing to himself any demand which he may have against his client? There is no case, as yet, decided in a Court of Equity, authorizing such a proceeding as this. The case of *Vaughan and Lloyd*, as far as it is in point, is an authority the other way."

"Then let the estates be delivered up, but let them be charged with securing what may be found due to the defendant on the general report: and we cannot but see by the papers already before us, that there will necessarily be found to be a considerable sum of money due to him, and we should be doing him a manifest and irreparable injury by depriving him of his only security."

GARROW, Baron. "I feel myself, on the present occasion, in the most painful situation in which a judge can be placed, in being called upon to deliver my opinion, on a case wherein my learned brothers are not agreed, and that, on an application made to the Court, soon after my taking a seat on the bench—a case which has for its object the expediting a suit that has been so long delayed by litigation as to have become reproachful to the administration of justice, and an opprobrium to this Court. It is one on which we ought to sit [165] day by day, till we have rid ourselves of it, by conclusively determining all the questions between the parties." [His Lordship having descanted with much force and feeling on the situation to which the plaintiff, who had set out in life with the fairest prospects, had been reduced by the consequences of this cause, which had (besides the pecuniary embarrassments resulting to him from it more immediately) thrust him from the honorable situation which he once held in society.] "It has been argued (continued his Lordship) and with very considerable ability, against the opinion I hold: and we are told at the bar that what we are about to do will be an act of injustice. However painful my duty is rendered therefore, it is matter of great relief to find myself concurring with a judge of the high character and attainments of the learned Baron, who first delivered his opinion." [His Lordship having pronounced a high eulogium on the talents and integrity of Mr. Baron Graham, added, that he never heard a judgment delivered, which contributed so much to his entire satisfaction, or which excited so completely his unmingled approbation.]

"I concur entirely (continued his Lordship) with that learned judge in the opinion, that the estates ought to be delivered up, and if there could be any doubt about the opinion given by him also on the latter part of the application, it is that it does not go far enough. I think that the money ought to be paid over at once to the plaintiff, that it might thus become a fund which may here-[166]—after be applied in procuring for himself redress and justice, and may no longer be the means of perverting the due course of right between the parties. Perhaps, however, it will be best to adopt, as more moderate, the middle course suggested by my Brother Graham, that the money be ordered to be brought into Court, to await the final event of this cause."

"This is not, as has been suggested at the bar, a case resting on the capacity or incapacity of the plaintiff, to take care of his own personal interests. My opinion proceeds on the defendant's own shewing, as to the conduct which he has pursued, which is, as it has been called with admirable felicity, an effort at the most candid imposition. It is the case of a man distressed by the effects of an election contest,

applying to a solicitor, who uses that opportunity of getting him completely into his power." [His Lordship then adverted to such of the circumstances, already detailed, as apply to this part of the case.] "This cause presents the extraordinary spectacle of an estate, which has itself paid off the mortgage on it, leaving a balance still in the hands of the man who has been appointed receiver of the rents and profits; and of which he yet keeps possession, under pretence of other debts due to him! If this were a common case between mortgagor and mortgagee, there could be very little doubt about it; but the peculiar situation of these parties, and the connection which subsisted between them, puts it out of all question." [His Lordship [167] then took a cursory view of some of the main facts—the reports—and the judgments of the House of Lords, from all of which he drew the inference, that the chief object of the present protracted enquiry had been, to ascertain how far the estates were affected by the transactions, in order that as soon as they should be found to be disencumbered, possession might be restored to the plaintiff.] And he concluded by saying, "Our opinions will most probably be reviewed elsewhere, and I am desirous that mine should be fully canvassed. Justice must ultimately be done. And I trust, that the result of this cause will be a lesson, teaching attorneys, that where their conduct has been such as to require investigation, Courts of Equity are open to the client of whose situation they have taken advantage; and that persons, in the predicament of the plaintiff, should be more cautious how they deliver themselves up to their legal advisers without the intervention of a third person, whose interposition might protect them from the evil consequences of misapplied confidence."

Ordered—That the possession of the estates should be delivered up, and the money to be paid into Court, to abide the event of the suit.

[168] BAX v. JONES, ESQ. AND OTHERS*. 25th November 1817.—In the notice required to be given to persons within the 24 Geo. II. c. 44, of actions intended to be brought against them, it is not necessary to name all the parties meant to be included in the action, or to express whether the action is intended to be joint or several.

This was an action of trespass brought by an individual against the defendants, who were a magistrate of the city and county of Canterbury, and certain constables, for an assault and false imprisonment.

The cause came on to be tried at the last summer assizes for the county of Kent, before Lord Ellenborough, where the same objection was taken to the form of the notice given to the defendants, as required by the statute, as was made in the case of *Agar v. Morgan and Others* (ante, vol. ii. p. 126), and on that point his Lordship non-suited the plaintiff.

Cause being now shewn against a rule obtained for setting that nonsuit aside, and granting a new trial, the case above alluded to was cited and much discussed on both sides.

RICHARDS, Chief Baron. I am not aware that the Court requires in its construction of the statute, that the parties against whom an action of this sort is brought, should have a more particular notice † than has been given them on the present [169] occasion, and if it be not required by the statute, we ought not to insist on it. The case which has been cited was one which underwent much discussion, and was well considered by this Court, as it was at that time constituted, and therefore I am clearly of opinion, that this rule must be made absolute.

GRAHAM, Baron. I am of the same opinion, and I ground myself implicitly, on the case cited.

WOOD, Baron, concurred.

GARROW, Baron, of the same opinion.—I think the case which has been cited is binding on the Court. I remember also a similar objection so disposed of in a case in the King's Bench, of *Ferguson v. Sir William Addington*. The former decision of this

* This case is reported here, because it gave rise to a review by the Court of a former opinion delivered on the same point, which it in all respects confirmed.

† That notice was also addressed to and served on each of the parties, and was thus worded:—You having, &c. I as agent, &c. give you notice according, &c. that I shall, at the expiration, &c. cause a writ, &c. to be issued, &c.

Court in the case of *Aguir v. Morgan*, seems to be so founded in good sense, that were this question one of first impression, I should have thought that it must have come to the same result.

Per Curiam. Rule absolute, with costs.

[170] WARING v. JERVIS. Tuesday, 25th November 1817.—In proceeding against bail on the return of ca. sa. in this Court, by subpœna, the bail have only four days after the return of the writ, in which to render their principal.—Where the writ was returnable on the last day of term, and the bail had been unable to render the defendant, from the dangerous state of his health, within the four days, the Court refused on their application, after the expiration of the four days, to allow them to render the principal on that ground, in consideration of the shortness of the time allowed by that particular mode of proceeding, as abridging the usual time allowed in the other Courts, and even in this Court, by its ordinary process of quo minus.—Quere, if the application had been made before the expiration of the four days notice.

Comyn had obtained a rule nisi, for staying proceedings on the bail bond in this cause, on payment of costs, the defendant having surrendered.

Jones, D. F. and Manning, shewed cause on the facts stated in the affidavits filed in support of the motion, which were as follows:—That the bail entered into the recognizance on the 28th of January: that they were served with the subpœna on the 23d June, which was returnable on the 25th; that the defendant, for two months previous, and subsequent to that day, until the 1st of August, had been in so ill a state of health, that he could not have travelled to London, for the purpose of rendering himself, without endangering his life: and that as soon as he was able to travel he came to London, where, in consequence of the journey, he was confined to his bed for several weeks; that as soon as he was able to leave his bed, he was surrendered to the Fleet in discharge of his bail, which was on the 21st of October.

Jones and Manning contended, that the motion could not be granted consistently with the practice of the Courts, which has been long recognized in such cases, and strictly adhered to; and he cited the cases of *Rawlinson v. Gunston* (6 T. R. 284), *Wynn v. Petty* (4 East, 102), and *Winstanley v. Guit* [171]-skel (16 East, 389), in the last of which the Court recognized the distinctions between an excuse arising out of a moral and out of a legal impossibility, and said, that in the former case the rule, though a strict one, proceeded on reasons of sound policy; and as to the rule of four days only being allowed the bail to surrender the principal in cases of proceeding by subpœna in this Court, they cited the case of *Rulfe and Another v. Chatham* (Wightw. 79), and they submitted, that on the expiration of the four days, the bail having become fixed, it was too late to make such an application as the present to the Court, on the ground of the hardship of the case.

Comyn, in support of the rule, relied on the case of *Mannin v. Partridge* (14 East, 599), where the Court of King's Bench held, that a bankrupt principal having obtained his certificate after the return of the capias ad satisfaciendum, but before the time allowed the bail by the indulgence of the Court for rendering the principal had expired, entitled the bail to be relieved. He submitted, that as in strictness the bail were fixed on the return of the capias ad satisfaciendum, and as the whole of the present practice of allowing the bail a given time after the return of the process against them, emanated entirely from indulgence to the bail, the Court might extend it as matter of favour as far as, under any circumstances, they might think fit and reasonable; the argument therefore of the bail having been fixed, was not an answer to an [172] application made wholly to the indulgence of the Court:—And it could only be on that principle, that the Court allowed the circumstance of the principal being incapable, from ill health, of being brought up out of custody to be rendered, to operate in discharge of the bail.

He then adverted to the nature of the proceeding by subpœna, which he submitted was a process, the disobedience of which brought the party into contempt, and therefore he observed it was a case more particularly within the clemency of the Court, who might permit the contempt to be purged; and he pressed the consideration of the strictness of the proceeding as contrary to the spirit of convenience and accommodation, on which the original practice of requiring the bail to render their principal

before the return of the *ca. sa.* had been relaxed, as contrary to the practice of the other Courts, and even of this Court, in the common case of proceeding by means of its ordinary process of *quo minus*.

The Court (enquiring why the application had not been made before, and being informed that as the subpoena had been served only two days before the expiration of the term, the motion could not have been made before) said, that the bail should have applied before the return of the *capias ad satisfaciendum*, which they might have done, and they must have been aware that the time allowed for the render would expire before the motion could be made in term, if they waited till the ser-[173]-vice of process: for that it was the duty of the bail to watch the proceedings against their principal, if they would protect themselves from the consequences of their engagement.—Therefore they

Discharged the rule; but without costs.

THE KING v. BURN. Wednesday (26th November, 11th November), 1817.—Where a bill of exchange—which had been returned by the holder, indorsed by him generally (who had received it from the payee endorsed by him also generally) to the drawers, with other bills and money in consideration of another draft for the whole amount, and which bill was then remitted by them (the drawers) to a bill-broker, under cover in a letter addressed to one of the firm of a banking-house, (who were the drawees, but who had not accepted) accompanied with orders to the broker by the same letter to get the bill discounted, and to pay over the proceeds to the banking-house;—had been seized by a sheriff in possession of the banking house, &c. under an extent, whose officers received it from the postman, at the time of the arrival of the letter in which it was inclosed.—*Quere.* Whether under such circumstances the banking-house had such a property absolute or qualified in the bill as would support an issue, that such second indorser was indebted to the banking-house in the amount of the bill?—*Note.*—The Court granted a new trial on an objection taken to a verdict (specially) found for the crown, under such circumstances, that the facts did not support the affirmative of such an issue, expressing themselves desirous of having before them a fuller state of facts, but giving no opinion on the point of law.

Hullock, Serjt. moved for a rule to shew cause why the verdict—which had been found for the crown in this case, on the trial of an issue joined on a traverse to an extent against Bruce and Co. which alledged that Burn was indebted to them in the amount of a certain bill of exchange seized under the extent—should not be entered for the defendant; or why there should not be a new trial on the ground of that verdict being against evidence and law.

The questions (he observed) would be in effect, whether a party, for whose use and benefit the proceeds of a bill of exchange was destined, could [174] sue on such bill on its coming to his hands by an accident in the first instance; and whether a bill of exchange returned by a second indorsee, indorsed by him generally into the hands of the drawer for a new distinct consideration before it became payable, might be re issued by the drawer so as to make such indorsee liable on his indorsement to a holder with knowledge of the circumstances.

The bill in question (which was for 400*l.* and dated on the 1st July) had been drawn by Cooke and Co. bankers at Sunderland, on Bruce and Co. bankers in London, (but had not been accepted by them,) payable at forty days in favour of Herring, and by him it was indorsed generally to the defendant Burn in satisfaction of a debt, and by Burn to Cooke and Co. in exchange for a draft for 1080*l.* the amount of that bill and others.

It was in evidence that Cooke and Co. instead of cancelling the bill (as it was submitted they ought to have done) remitted it on the 1st of July (but not indorsed by them) to the house of Bruce and Co. their bankers in London—that it was the custom of their house so to remit bills, for the purpose of being written off—but that this bill had not been remitted direct in the usual manner, but sent under cover to Alexander, a bill broker in the city, through the medium of Simpson, one of the partners in the house of Bruce and Co. who was in parliament (in order to save the postage), for the purpose of being discounted by the agency of Alexander, who was directed by the letter in-[175] closed to Simpson, and addressed to him (Alexander),

which was not sealed, to pay the proceeds, as soon as the bill should be discounted, to Bruce and Co. on account of Cooke and Co. -At that time the sheriff was in possession of the shop and all the property of Bruce and Co. under an extent against them, and on the arrival of the parcel containing the letter and bill the sheriff's officer opened it and detained the enclosure.

On these facts it was contended that the issue on the record was not sustained by the crown -that the defendant Burn was indebted to Bruce and Co. on that bill of exchange—because it had never come regularly into their hands, and was not therefore legally their property : and therefore that under these circumstances the bill could not be recovered on by any of the parties against Burn : for that the bill by being returned to the original drawer, under such circumstances, became extinct and *functus officio*, and could not be re-issued by the drawer so as to affect the party who had endorsed it to him, either while in the hands of the drawer or of third persons who had knowledge of the circumstances.

It was submitted, that if the letter, instead of being sent through Simpson, had been addressed directly to Alexander, Bruce and Co. would have had no right to the bill, or any legal means whereby they might have got it from Alexander—that if Bruce and Co. had not at that time failed, and had, on the receipt of the letter, taken out the bill, they could certainly not have sued the [176] defendant on it, or have made use of it in any way, and trover might have been maintained against them for the recovery of it—and that if Cooke and Co. had thought proper to counter-order the payment of the proceeds to Bruce and Co. at any time before they were paid over, they might have done so.

[It was suggested by the Court, that if Bruce and Co. had been the holders of the bill they might have sued on it, and that, while the order to pay the proceeds to them was in force, Alexander would be a holder for the use of Bruce and Co.]

But *quæcumq. viâ data* Bruce and Co. could have no property in the bill ; for the utmost they would be entitled to by the order of Cooke and Co. would be to sue Alexander for money had and received as soon as he should have got the bill discounted if the proceeds were not then paid over to them.

He cited the case of *Beck v. Robley* (II. Bl. 89, in notis), wherein it was held, that a bill coming back to the drawer ceased to be a bill, and that the drawer could not maintain an action on it as indorsee—otherwise, as Lord Mansfield said, “the payee, having endorsed it, would also be liable to the drawer for which there is no colour.” Now, if Burn was liable on this re-issued bill, Herring would also necessarily be liable, which the case decides cannot be permitted.

[177] It was insisted therefore that no action could be maintained against the defendant Burn under any circumstances on this bill by these parties, for it was not the case of a bill getting into the hands of a holder for valuable consideration without notice. Here too Bruce and Co. were privy to all the facts, and particularly knew that the bill came from Cooke and Co. the drawers, and that it had been indorsed by Burn to them. If Bruce and Co. had brought an action on the bill they must have shewn that they became possessed of it for valuable consideration, and without knowledge of the particular circumstances attending its negociation, and they must therefore have been nonsuited on this bill, because they could not have done so. He submitted therefore that the verdict which had been obtained was not supported, and must be set aside. The Court having granted the rule—

Wednesday, 26th November—Richards, Chief Baron, now read his report : from which, besides the circumstances stated to the Court on moving for the rule, it appeared that the bill was sent from Sunderland on the 2d of July, and arrived in London in due course of post on the 4th, on which day the bank of Cooke and Co. stopped payment—that the bill in question, which had been paid back to Cooke and Co. by Burn with other bills, had been passed by them in their books to Burn's account, and they gave him another bill for 1080*l* being the amount of all the bills paid in with the bill in question. That bill was not paid because the bank of Cooke and [178] Co. had in the mean time stopped payment—Burn was at the same time indebted to Cooke and Co. to a larger amount than that sum. The jury were of opinion (which they stated specially) that all the money arising from the discount was to have been paid to Bruce and Co. and therefore they found a verdict for the crown.

The Attorney-General, Dauncey, and Nolan now shewed cause. They submitted

that one of the questions which had been left to the jury was, whether the money to be obtained by the discounting of the bill was intended by Cooke and Co. to be paid to Bruce and Co., and they had found that the bill was not sent up for the acceptance of Bruce and Co. in order to be of greater value in the hands of the holder, but as a remittance whenever it should be made productive, either by being discounted, or by being paid by any of the parties liable on it, in discharge of the debt of Cooke and Co. to them as far as it would go, and it might therefore be considered as if it had been drawn on and was to be accepted by any other person. It was proved to be the course of dealing between the houses, that Cooke and Co. were in the habit of sending up bills to Bruce and Co., and that such bills as the bank would discount were selected by Bruce and Co. who handed over the rest to Alexander to get them discounted on their account. They contended therefore that the bill in question must be taken to have been, according to that course, sent up in effect to Bruce and Co. through Simpson in the [179] usual way, either to keep or get it discounted as they thought proper. It was not transmitted to Alexander to get it accepted by Bruce and Co., or to return it if not accepted; but as an already available instrument in statu quo, the produce of which was to be paid to and applied entirely for the sole benefit of Bruce and Co. Not having been accepted by Bruce and Co. it was in the nature of a promissory note made by Cooke and Co. who with the indorsers would be liable on it to Bruce and Co. unless there were any thing in their character of drawers to preclude them from a right of suing on it at law.

[It was admitted that no question was intended to be raised on that point.]

Whatever was to have been done with the bill it was to be done for the benefit of Bruce and Co. and it was not attempted to be proved that any of the parties were ignorant of that, and Alexander might at any time, consistently with his authority, have given Bruce and Co. the bill itself in the first instance instead of getting it discounted, and therewith the right to sue any of the parties upon it, for it was within his instructions to do so: or if he had received the money on it it must have been for the use of Bruce and Co., and they might have maintained an action against him for money had and received.

[The Court turned the attention of the bar to the consideration of the legal effect of the transaction [180] put thus—that the bill had been sent direct to Alexander with orders to pay the produce to Bruce and Co., and that that had been followed by a subsequent countermand by Cooke and Co. of the destination of the produce—and they enquired whether it would have been considered to be the property of Bruce and Co. in the interval, and whether their getting the bill by any means in the mean while could alter the rights of the parties?]

To which it was answered, that though the order to pay over the produce might be countermanded before payment, yet, after payment, such countermand, and in the mean time, the possibility of such a countermand could have no effect; but they admitted that if Bruce and Co. had in this instance acquired possession of the bill without having any interest in it, the crown would have had no more right to seize it, than if it had been still in the hands of the postman who brought the letter; but here (they urged) the main ground on which the crown relied was, the fact of the bill having been remitted solely for the benefit of Bruce and Co., and whatever might have been the effect of a countermand after it had got to the hands of Alexander, and before the produce of its having been discounted had been paid over it was enough at present to say, that there was in fact no such countermand. Burn, by his indorsement of the bill, gives the holder, whoever he might be, a right to recover the value against all or any of the persons liable, provided it comes to such holder's hands before the bill becomes due, and while it is [181] current as here. That qualification of the proposition it is which distinguishes the present case from those wherein the bill had expired before it was re-issued, as was the case in *Beck v. Robley*. There can be no objection in point of law to a holder of a bill of exchange or promissory note indorsing it back to the drawer or maker for value, and however unusual that may be in course of business, that consideration does not affect the legal validity of such a transaction.

Then there is no evidence, in the report, of the precise circumstances under which the bill got into the hands of Bruce and Co. or the sheriff: nor do Cooke and Co. complain of what has been done. There is not, in short, any one circumstance to contravene the *prima facie* title of the holders to the property in the bill: whereas it was proved on the other hand that Burn had received the value of the bill in con-

sideration of his indorsement, by which he made the bill negociable in the hands of the indorsee, and he was in fact largely indebted to Cooke and Co. at the time beyond the amount of the bill, who no doubt might have recovered on it against him by virtue of that indorsement.

Hullock and Richardson, in support of the rule, insisted that there was no difference in point of law between the present case and that of *Beck and Robley*, and they denied that Cooke and Co. might have recovered against Burn on the bill, but contended that they must necessarily be non-suited if they had brought an action the next day, and [182] that their indorsee with knowledge could not be in a better situation than they themselves.

It is quite clear the object of Cooke and Co. was to use the same bill twice over. If they had brought an action against Herring on his indorsement, Burn having given value for it (as he would have been held to have done in the eye of the law) would have been considered as a satisfaction quoad Herring. They admitted that if Cooke and Co. had indorsed to a bonâ fide holder without notice he might have recovered, but contended that Bruce and Co. were not such a bonâ fide holder, for they must have known that Cooke and Co. could only have issued the bill for the purpose of fraud. As to the difference said to exist in the cases where the bill is over due, the only effect of that is to preclude the necessity of proving that the bill has not been in the hands of the drawer, and cannot render a prior indorser liable anew whose liability has been once extinguished. Burn's indorsement could not be revived so as to render him liable to either the drawer or indorsee. Hodgson, in the case cited, was in the same situation as Herring here, and clearly the crown would not be entitled to sue the original payee on his indorsement.

Bruce and Co. had not in fact, nor were they meant to have any interest in the bill at all, nor were they to know any thing of it till it had been discounted, and in the mean time it remained the absolute property of Cooke and Co. The fallacy [183] of the argument and of the verdict lies in assuming the bill and the produce of it to be one and the same thing, and that the person for whose benefit the produce was directed to be applied was therefore entitled to be considered as having an interest in the bill itself, and not only so, but to stand in the situation of an indorsee, because by accident the bill afterwards gets into his hands whereby he becomes literally, merely, but not legally the holder; but that is not in law the consequence of such a possession so obtained. As to Cooke and Co. not complaining, the reason is quite obvious, for they had intended to commit a gross fraud in re-issuing the bill. For these reasons they submitted that the affirmative of the issue on this record that Burn was indebted to Bruce and Co. could not be maintained.

The Attorney-General, in reply, admitted, that if Bruce and Co. had had no property in, or right to the bill in any way, the issue was not proved; but he insisted that they had such a qualified right to the bill as would have entitled them to have recovered on it against Burn. He denied the proposition that if Cooke and Co. could not recover against Bruce as the indorser, therefore no other holder could, for there are many cases where an endorser remains still liable to others, notwithstanding his indorsement is extinct as between him and the drawer. But here the bill was never delivered up as satisfied, it was delivered to Cooke and Co. in consideration that they [184] would lend Burn money on the credit of his indorsement, which they did, for Burn was at that time considerably indebted to them beyond the amount of the bill, or why does he indorse it? He must have indorsed it for the sole purpose of giving it currency, otherwise it would have been unnecessary; when it came therefore into the hands of Bruce and Co. accompanied by the order to pay them the proceeds, why might not they have immediately appropriated the bill if they had chosen to do so, or might not Alexander have given the bill, and with it the right to sue the indorsers? It was giving them a right either to do so, or to have sent it to Alexander. Cooke and Co. did not indorse it it is true, but that was because it would not have added to the value of the bill, for they were liable as drawers, and therefore it was not necessary. Burn's indorsement rendered him liable to any holder as much as if he had delivered him the bill, and Cooke and Co. as bankers might have been his agents for the purpose of negotiating his indorsement, and that destroys the general argument, that if Cooke and Co. the drawers, could not themselves recover against Burn, their transferees under any circumstances could not. That is a much stronger circumstance of distinction of this case from that of *Beck v. Robley* than that of the bill being over due.

Suppose Burn had carried the bill to Bruce and Co. for acceptance, and they had refused to accept it, but had advanced him the money on [185] his indorsement of it, what would there have been in such a transaction to object to on their parts, or to have prevented them from enforcing the bill against Burn when it became due. Non-acceptance is not a default in the drawee but the drawer, and under such circumstances Bruce and Co. would have been bonâ fide holders of the bill, and might have recovered on it against Burn as much as if it had been drawn on strangers. Any right of countermand which Cooke and Co. might have had while the bill remained in the possession of Alexander would have ceased on his having delivered over the proceeds or the bill itself, and therefore the bill getting into their hands after having been remitted for their benefit would have the same effect as if it had been sent up by Cooke and Co. to them. Then it must be considered that it is Burn who complains, whereas he is clearly liable to some one on the bill, and his paying it to Bruce and Co. would have so far lessened his debt to Cooke and Co. The sending the bill to Alexander was in fact merely done to indulge the commercial pride of the banking-house of Bruce and Co. who would not like to appear in a transaction of the sort as bill-brokers, or receive any paper which the bank would not discount; and there can be no doubt, under all the circumstances of this case, that the bill was intended to be and in effect was remitted to Bruce and Co., and therefore the transaction gave them such a property in it as to entitle them to recover the amount from the defendant Burn, and if so the crown is entitled to this verdict.

[186] RICHARDS, Chief Baron, (having consulted with the rest of the Court). We think that as it appears probable that there may be many other circumstances in this case, in point of fact, which have not been brought before the Court or the jury, and which it would be very material to know before we can undertake to decide this important question, there ought, on that account, to be a new trial—without saying more, therefore, we make the

Rule absolute*.

[187] STRITCH v. HUGHES. 27th November 1817.—A defendant is not entitled in this Court to judgment, as in case of a nonsuit, if the plaintiff, (having given notice of trial for the next term, after that in which issue is joined,) do not proceed accordingly, but countermand his notice. —Rule to shew cause, therefore, discharged on a peremptory undertaking.

Littledale shewed cause against a rule obtained by Jones on the 25th of June last, for judgment, as in case of a nonsuit, for not proceeding to trial. Notice of that motion had been served on the 20th of June, the day of the Sittings for Middlesex being the 23d. The Court had granted the rule, on the ground that the plaintiff ought to have proceeded to trial pursuant to his notice. The venue was laid in Middlesex. The declaration was delivered in Hilary Term, with notice to plead in eight days. The defendant pleaded accordingly, and issue was joined in Easter Vacation, and notice of trial was given for Trinity Term, and countermanded on the 11th June. It was contended, that the plaintiff was bound to proceed to trial pursuant to his notice, and was not entitled to countermand it, after the proceedings which had been had, submitting the practice to be, that a plaintiff having given notice of trial for the term after that in which issue is joined, is bound to proceed to trial accordingly. And he cited *Munt v. Tremanondo* (4 T. R. 557), and *Harman v. Gilbert* (2 Tidd, Pr. 822).

On the other hand it was objected, that the notice of the present motion having been served [188] on the 20th, and the Sittings not being before the 23d, the defendant was premature. And on the point of the plaintiff being entitled to countermand the notice of trial given, the cases of *Ducosa v. Lodstone* (2 H. Bl. 558), and *Baker v. Newman* (1 ib. 123), were cited to shew that by the practice of the Court of Common Pleas, the application for judgment, &c. cannot be made before the 3d Term.

* The issue was tried a second time, but the question was not brought before the Court again.

The Court, recognizing the practice of the Common Pleas (Tidd's Practice, 822, 3, 6th edit.),

Discharged the rule, on a peremptory undertaking, and without Costs.

The end of Michaelmas Term.

[189] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER. SITTINGS AFTER MICHAELMAS TERM, 58 GEO. III. GRAY'S INN HALL.

REX IN AID OF OLDACRE v. TIDMARSH *. Wednesday, 17th December 1817. —A sheriff has no right to levy costs or poundage, or any incidental expences, under an extent, on a simple contract debt; neither has he, or the attorney for the prosecutor of the extent, a right to receive any such costs, &c. under a compromise, in consideration of staying proceedings, from the defendant, under duress of a seizure.—If more than the precise debt be received by them under such circumstances, they will be ordered to restore it, and to pay the costs of an application to the Court, for the purpose of obtaining the order: and an assignee of a bankrupt defendant, may apply.—Such a motion may be made after an application to set aside the extent altogether, which has failed.

Owen, Sir William, during the last term, obtained a rule, calling on the sheriff of Warwickshire to shew cause why the costs and poundage, and expences received by him, in addition to the debt, under this extent, should not be refunded to the assignee of the defendant.

The rule was obtained on the application of the sole assignee of the defendant, under a commission of bankrupt issued against him 6th February 1816, founded upon an act committed 26th January then last, as stated by the affidavit of the applicant, read on moving the rule, which also stated, that the debt due to the prosecutor of the extent was 111l. 7s. 6d. (on a promissory note) and that the sheriff had levied 159l. 18s. 2d in discharge of the debt, sheriff's poundage, and all other incidental expences, when it was prayed that the sum of 48l. 10s. 8d. might be restored to the applicant, for the benefit of the general creditors of the bankrupt.

In opposition to the rule the prosecutor of the extent filed an affidavit, stating that he had been informed by his attorney, and believed, that the sheriff's poundage, and other incidental expences, were not levied by the sheriff, under the writ of extent, on the estate and effects of the defendant, but were paid by agreement and compromise between the attorney acting for the defendant, and the attorney for the prosecutor of the extent; and in order to stay the proceedings under the writ, which were stayed accordingly. The affidavit also stated, that the defendant's then attorney was also the solicitor concerned in the prosecution of the commission of bankrupt.

[191] The attorney at Birmingham, who was employed in enforcing the extent there, made an affidavit to the same effect: adding, that he had in pursuance of the terms of the compromise (the sheriff having then seized the defendant's effects) delivered an account of the debt and costs, amounting to 136l. 11s. 8d., and that he had received that sum, by the payment of certain persons, auctioneers in Birmingham, in full satisfaction: and that the demand of the sheriff for poundage, &c. had been previously paid by the same persons to the under-sheriff, in fulfilment of the aforesaid voluntary compromise.

Dauncey now shewed cause. He adverted to a former rule nisi obtained in this extent (last Easter term) to set aside the proceeding altogether, on the ground of irregularity, which had been discharged with costs; and inferred, that the present application was merely an attempt to effect the same object by another mode. In the

* Although there could not now (since the 53 Geo. III.) be an extent obtained, in aid of a party in the situation of the prosecutor of this extent; yet as the principle of this case is applicable to every case of extent, whether in aid or in chief, the present decision may yet controul similar abuses of the proceeding, still practicable, though in a more restricted degree.

case of *The King v. Van Fort**, he said, this Court had recognized the distinction between a similar compromise of a case of this sort, and a payment of costs and poundage under a levy: and he sub-[192]-mitted, that there was nothing in the case of a proceeding by extent, which should preclude a party from the advantages given him in all ordinary proceedings: but he principally relied on the fact that all which had been done, and was now complained of had been the result of a voluntary compromise, founded on proposals made by the solicitor for the defendant, who was also the solicitor conducting the commission: and contended, that if the sheriff was not entitled to levy the costs, and that if his having done so would have afforded good ground for the present application, there could still be no reason why by agreement and compromise, for the purpose of avoiding the carrying the process into effect in favour of the defendant, a party might not fairly make terms of reimbursement of his costs incurred.

Sir William Owen, in support of the rule, having called the attention of the Court to the stat. 3 Geo. I. c. 15, s. 13, and to the case of *The King v. Edwards* (ante, vol. ii. p. 448), and addressed himself to the point of a seizure having been in fact made by the sheriff, was stopped by the Court.

RICHARDS, Chief Baron. The only thing which struck the Court at all during this argument, was the mention of the former application, and the case of *The King v. Van Fort*. The application alluded to was, that the proceeding might be set aside altogether, on a ground which could not be supported. The case cited, was a [193] motion made on the authority of *The King v. Webb*. It afterwards appeared there that some of the bills were in part due, so that the Court had been misled.

As to the right of a party to costs in a case of this sort, our decision in the report of *The King v. Edwards* puts that question out of all doubt. [His Lordship read that case.] There is certainly no distinction which can affect this application, between a levy of the debt, &c. and a seizure of the defendant's goods. There was, in fact, a levy made in the eye of the law [stating the facts]. Under such circumstances this Court is bound to protect the debtor, and will treat the transaction as having proceeded from his mistake of the extent of his liability. The conduct of the other parties has been such, as ought to be checked, and this rule must therefore be made absolute.

GRAHAM, Baron. The former application was essentially different from the present, and then this motion was suggested by one of the Court. The case of *The King v. Van Fort* having been now brought to our recollection, has no resemblance to this case; there is, therefore, no authority against this application.

In point of fact, the defendant was under the duress of this process by the seizure, as much as if the sum had been levied, and we must not permit imposition to be effected by means of terror. [194] This sort of compromise, therefore, as it is called, must not be allowed to affect persons in the situation of this defendant, for the sake of public justice.

WOOD, Baron. I am of the same opinion. It is acknowledged on all hands, that this money should not have been levied: and I cannot admit the excuse of its being taken under a compromise, for if it were so, the defendant has mistaken his rights. In *The King v. Van Fort* the motion was, that the sum not due should be refunded. I was of opinion, I remember, then that the poundage ought to be returned: but that rule was discharged, on the ground of its having been obtained on a false suggestion.

GARROW, Baron, of the same opinion.

Per curiam. Rule absolute, with Costs.

[195] THE ATTORNEY GENERAL v. KING AND OTHERS. Saturday, 22d December 1817.—Where a brewer is liable to the penalties imposed by the 51 Geo. III. c. 87, for receiving and taking into possession the articles prohibited by that

* That case, in point of fact, decided nothing: or, at most, nothing more than that a party, misrepresenting a fact to the Court, will not be allowed his application, which might have been entertained if that fact were as stated, and therefore it has not been reported. Peake had moved to set aside an extent, because bills had been given for the debt, which had not become due: but it turned out that that was not the fact, (some of them being payable) when, of course, the rule was discharged.

statute to be received into possession by brewers, it is no defence to an information founded thereon, that such brewer, besides his trade of brewer, exercised another trade (ex. gr. a distiller), in which the use of such articles be lawful and necessary, and the article was found on his distillery premises.—An information on such a statute, charging a “receiving and taking into possession,” is not maintainable, where it is proved that the act of receiving was antecedent to the statute, although the possession has continued ever since.—A record of condemnation of goods seized, for an act of forfeiture created by one statute, is not evidence on a charge of an offence against the same party, with respect to the same goods, created by another statute.—Quere, whether such a record is conclusive evidence in any case, of all the facts stated therein, so as to affect a defendant collaterally, in any other proceeding against him, for penalties for the act of forfeiture?

The information in this case consisted of two counts. The first, founded on the 51 Geo. III. c. 87,* charged that the defendants, being brewers of beer, did, after the 26th June 1811, and before, &c. to wit, on the 13th March 1817, receive and take into their custody and possession a large quantity (to wit, &c.) of grains of paradise, contrary, &c.; and which said grains of paradise was afterwards, to wit, on the day and year last aforesaid, found in the custody and possession of the said defendants, whereby, &c.—The second count charged them with receiving, &c. on the same day and year, a large quantity of a certain preparation of other grains of paradise, [196] and which was also then found in their possession, whereby, &c.

On the trial before the Lord Chief Baron, at the sittings after last Trinity Term, the legal objections being taken, which are the subject-matter of the present motion, a verdict was given for the Crown for the penalty (200l.) with liberty to move for a new trial.

8th November.—Owen, Sir William, now moved for a rule to shew cause why the verdict should not be set aside and entered for the defendants; or why there should not be a new trial, on the following points:—

1st. That the defendants being rectifiers and distillers, and dealers in British compounds and spirits, the possession of the subject-matter of the information by them, in those characters, was lawful, as it was necessary to them in their trade of distillers, and was recognized to be so in the 26 Geo. III. c. 73, (among other articles), as an ingredient in the making of British spirits. The question, therefore, on that part of the case would be, whether the defendants, although brewers, might not be lawfully possessed of the article in question as rectifiers; or whether they were liable to the penalties, although they were also rectifiers, by reason of their trade of brewers: which, it was submitted, would be, in effect, whether the two trades could be carried on by the same person at the same time. On that point it was argued, that [197] the legislature had not so intended, or it would have been so expressed in the act, as was the case in the 48th Geo. III. c. 60, with respect to tanners and leather-cutters; or otherwise very many persons, now carrying on the two trades together, which was very common, would be innocently liable for very heavy penalties, by construction of a penal statute, which ought to be construed strictly.

Adverting to the evidence it was submitted, that the circumstances under which the cask had been brought on the premises, and left there openly for so long a time, negated all suspicion of fraud.

The other point (they observed) was one which arose out of the accidental circumstances of this particular case. The act, on which the information was founded, passed in June 1811, and the information accordingly charged, that after that time the defendants had received and taken into their custody and possession (not charging

* Which enacts, “That no maker or makers of any such liquor as aforesaid, nor any brewer or brewers of beer, shall receive or take into his, her, or their custody or possession, any (grains of paradise, &c., &c.); and if any such maker or makers, or brewer or brewers, shall receive into his, her, or their custody or possession, any, &c. the same shall be forfeited, together with the casks, &c. containing the same; and all such, &c., &c. shall and may be seized by any officer or officers of excise: and such maker or makers, or brewer or brewers, in whose custody or possession any such, &c. shall be found, shall forfeit and lose the sum of 200l.”

them with receiving and having) these grains of paradise; whereas the evidence was, that the defendants had succeeded to the possession of the article, being already on the premises on the death of Mr. King, their predecessor, in January 1811, antecedently to the passing of the act; nor does the averment in the information, that the grains of paradise were found in the defendants' possession, aid the Court, because it refers to the thing before alleged to have been received, and taken into their possession. A rule being granted,

[198] The Chief Baron now read his report of the evidence: from which it appeared to have been proved at the trial, that the defendants were considerable brewers, and were also rectifiers and brandy-dealers at Plymouth; that they had two sets of premises, about one hundred and fifty yards apart, one used as a brew-house, the other as a rectifying-house, and that in the latter there was found by the officers of the excise a cask of grains of paradise: that that cask was brought on the premises, and placed where it was found, two or three years before the passing of the act, by Mr. Richard King, a relation of the defendants, who died in January 1811, when the defendants succeeded him in the business, and became possessed of the premises and property, and, amongst the latter, to the cask of grains of paradise in question, which had remained in the same place ever since, till seized by the officers of the excise.

The record of condemnation of the cask, and contents, had been also put in and read.

The Lord Chief Baron, on this evidence, directed the Jury to find a verdict for the Crown, giving the defendants leave to move for a new trial.

The Attorney General, Dauncey, Clarke, and Walton, now shewed cause,—having observed, that this statute was passed with the object of remedying the statute of Anne, (which prohibited the [199] using of such articles by brewers, and which it was found impracticable to detect), by enacting that no person using that trade should have such articles in his possession,—they insisted that the act had not restricted the prohibition of the possession of such drugs to persons being merely brewers only, but was general in its terms, and must be so construed. All, therefore, which it was necessary to prove in such an information as the present, would be, that the defendants were brewers (no matter what other trade they might use besides), and had in their custody or possession this prohibited article.

(Graham, Baron. Otherwise he might carry on, together with his trade of brewer, the business of selling these drugs, known by the name of brewer's chemist.)

If this statute be penal, it is also, in favorem salutis, for the protection of the health of the subject, by preventing the use of noxious ingredients in making the necessary article of beer, and should therefore be construed largely.

The ingredients in question, they observed, are so powerful a stimulant, that they are used only in small quantities at a time, which renders them easily removed from place to place, and their illegal use therefore difficult of detection. If (as has been put) it be a necessary consequence of enforcing this law, that the two trades cannot be carried on together, that is no reason why it [200] should remain inoperative on the statute-book: and if they be legally incompatible, that is tantamount to a virtual enactment, that they shall not be carried on together. The fact of the defendants being also rectifiers, therefore, they contended, was no defence to this information.

As to the other point, arising on the objection taken to the information, charging the defendants with receiving, and taking into possession these drugs, they submitted that the count would be sufficient for the purposes of this proceeding, if the latter part of it stood alone, for it was only necessary to shew that the drug was found in the defendants' possession, after the passing of the act, to render them liable to the penalty. The 16th section of the statute is composed of two parts: the first part of the section prohibits the receiving into possession; the other imposes the penalty on the article being found in possession. But even if that be not so, and it should be necessary to shew an actual receiving into possession, they insisted that, in point of law, every continuance of an illegal possession of prohibited articles is a new receiving; and that the subsequent part of the clause, which authorizes the seizure of the prohibited articles, on a mere finding in the possession of any brewer, shews that it was so considered by the legislature, who accordingly framed the statute with that view. Were it otherwise, the thing might be kept in possession for all time, on pretence of having received it before the passing of the act. They illustrated [201] their position on that point, by the construction put by the Courts on the statute William and

Mary, giving a settlement to persons taking a tenement, which had been held not to be confined to the mere act of taking the tenement, but had been extended to the possession.

They then urged, that if any thing more were wanting to complete the case on that part of it, the record of condemnation *¹, which had been put in and read on the trial, was conclusive evidence of all the facts which it purports to record, and estops the defendant from now denying those facts, which he had refused to contest on the occasion of that proceeding; and they submitted that a judgment by default—in nature of which such a proceeding undefended (they observed) might be considered—was as conclusive as if obtained on the [202] merits, because it is an admission of every thing so not denied. In support of these propositions, they cited the MSS. cases in the margin *², and also those of *Geyer v. Aguilar* (7 T. R. 696), and *Scott v. Shearman* (2 Bl. 979); in the first of which [203] Lord Kenyon said, that Lord Mansfield had, after having entertained doubts on the point of whe-[204]ther, in an

*¹ Whereby the goods were stated to have been condemned, for “being materials and ingredients other than malt and hops, found in the custody and possession of Phillis King, John King, and Richard King (the defendants), to be mixed, compounded, fabricated, manufactured, and prepared into a liquor, to imitate and resemble, and to be mixed with and used, as beer brewed and made from malt and hops.”

That proceeding was founded on the 42 Geo. III. c. 38, s. 20, which enacts, that “No person shall mix, compound, fabricate, manufacture or prepare, or cause, &c. (inter cetera,) grains of paradise, &c. &c. or any other material or ingredient whatever, (except malt and hops,) any liquor to imitate or resemble, or to be mixed with, or used as beer or ale brewed from malt and hops: and that all such liquor so mixed, &c. and all the prohibited articles in the custody or possession of such person or persons, together with every copper, &c. shall be forfeited, and may be seized by any officers of excise.”

*² *The King v. Matthews.* MS.—Trinity Sittings, 1797.

This was a *seire facias* on a bond, conditioned that a certain boat should not be employed in smuggling.

It was proved on the trial, on the part of the Crown, that a boat called the “Ranger,” belonging to the defendant, was seized by a custom-house officer, for importing spirits without payment of duties.

The record of condemnation of the boat was then put in and read, which it was insisted on, by the Solicitor General, was conclusive evidence of the defendant's having forfeited the bond, by the smuggled spirits being seized in a boat called the “Ranger,” and that that was his boat; when, notwithstanding Mr. Rous strenuously opposed it, the Lord Chief Baron held the record of condemnation *cum causa* of the boat, conclusive evidence of the defendant's having broken the condition of his bond.

The Attorney General v. Wakefield. MS.—Sittings after Michaelmas, 1797.

This was an information against the defendant, who was a paper-maker, for removing paper before it had been charged, and an account taken of it by the officer.

Dallas proposed calling a witness, to prove that the condemned brown paper was “sheathed paper,” and which was exempt from duty, with a view to exonerate the defendant from the penalty sought by the fifth count of the information, for sending paper from the mill, before the officers had taken an account of it, which penalty could not apply to any paper not liable to duty.

The Lord Chief Baron, however, refused, to let the witness be examined; and ruled, that the record of condemnation was conclusive evidence of the seized paper being liable to duty, and that it had been sent out from the defendant's mill before the officer had taken an account of it, as was stated in the record of condemnation.

The Attorney General v. Reynolds. MS.—Sittings after Hilary, 1804.

This was an information against calico-printers, for eighteen penalties of 20l. each. The goods were differently described in the different counts of the information.

The defendants were charged, by the first count, with beginning to print eighteen pieces of stuff, wholly made of cotton-wool wove in Great Britain, the same, or either of them, not being dyed throughout of one colour only, &c. before the same had been

action brought against an officer of the customs or excise, a condemnation of the goods seized by judgment of the Court of Exchequer, was conclusive in favour of the defendant, had [205] ultimately acquiesced in that opinion; and, in the latter case, it was held, after much discussion and deliberation, that a record of condemnation of goods seized was conclusive in personam, and precluded the owner from giving evidence, that the goods were not actually seizable; and many cases and authorities are brought together, in the report of *Scott v. Shearman*, in favour of that position.

Both on the facts, therefore, and the law of this case, they contended, that the Crown was entitled to the verdict which had been recorded.

The Common Serjeant, and Owen Sir William, in support of the rule, insisted preliminarily, that in all cases of proceedings on penal statutes, there could be no construction inferred against the subject, where the offence was not express, and that every penal charge must be taken strictly secundum allegata et probata. They then, on the first point, submitted, that as the act, making it unlawful for a brewer to receive and possess the drug in question, had not in words declared that a brewer should not also exercise the trade of a distiller, the defendant was therefore not within the statute, a brewer using, &c. for he was also a distiller, and in that latter trade, and on premises entered and used in that trade, and lying apart from his brewery premises, he kept the drug: it was not, therefore, in his possession as a brewer but as a distiller.

[206] In all the acts of parliament, which were intended by the legislature to have the effect of prohibiting the union of trades, which being exercised by the same person, might facilitate practices which the particular statute was meant to suppress, the carrying on such trades concurrently was expressly and in terms prohibited, as in the case of a tanner and leather-cutter, butcher, &c. (c): that, therefore, was sufficient

measured and frame marked, and which were found in defendant's possession, contrary to 25 Geo. III. c. 72, s. 9.

The eighteen pieces of stuffs which the defendants were charged with having so printed before they were frame-worked, had been condemned for the following cause of forfeiture, viz. for being calico, linen, and stuff printed, painted, and dyed in Great Britain, by John Reynolds and Charles Reynolds, being printers, painters, stainers, and dyers of calicoes, linens, and stuffs, before the same, or any or either of them, had been measured and marked at both ends thereof, by the officer of excise, with a frame-mark, denoting the measure thereof.

Without the previous examination of any witness, the Solicitor General called for the record of condemnation; which being read by the clerk in court, the Solicitor General said, that it was conclusive evidence as to the first count of the information, and that he did not wish to carry the case further.

Dauncey said, that he did not mean to controvert the effect of the record, as far as it went, but strenuously insisted that it was no evidence at all, to attach the pecuniary penalty on the defendants.

The Solicitor General and Dampier, in answer, cited the above cases of *The King v. Matthews*, and *The Attorney General v. Wakefield*.

And, in the course of a very full and long discussion, the Lord Chief Baron observed, that the fact of the pieces not having been stamped was proved by the record, which could not be controverted; and that in cases where any fact was averred, it was conclusive evidence of that fact: and as the record asserted, that the defendants had begun to print before they had frame marked, his Lordship would not hear any thing against that fact, where the record was produced.

Dauncey and Hughes then attempted to shew, that the description of the goods in the record of condemnation, did not agree with the description of any goods which defendants were, in the penal information, charged with printing before they were frame-marked.

To that it was answered by Dampier, that having shewn that eighteen pieces of linen were seized, the information calling them eighteen pieces of linen was sufficient. His Lordship held, that the record of condemnation meant the same goods, which were called in the penalty linens and stuffs, and therefore overruled the second objection: on which the Solicitor General took a verdict on the first count for the eighteen penalties, of 20l. each, amounting to 360l.

(c) Stat. 1 Jac. 1, c. 22, s. 4 and 6.

to shew, that express enactments were held necessary, in all such cases, to abridge the natural liberty of the subject, in the choice and exercise of whatever trades he might be disposed to adopt jointly, and at one and the same time.

That general question, therefore, in all its bearings, and with all its consequences, having been brought fully before the Court,

They then adverted to the fact (as it affected this particular case) of the defendants having had the article in their possession before the passing of the act; and they put it to the Court, whether a brewer having a very large quantity of this material in his possession innocently, before the passing of this act of parliament, on a general speculation of a rise in the market, would have been obliged to sell the whole eo instanti that the bill passed into a law, even though at that moment the price should have fallen so considerably, as that to be obliged to dispose of the commodity would be his [207] ruin? And they pressed the hardship of that supposed case. They then contended, that a case of receiving before the passing of the act, could not be brought within the words of the statute; and that the article being found in the brewer's possession, was neither a constructive receiving, nor was it a distinct integral offence, created by the statute, independent of the act of receiving. In the present information the count related throughout to the first antecedent, the receiving, and having charged the defendants with so "receiving," &c. it concluded by stating, "and which said quantity, &c. was afterwards found," &c. obviously applying to the grains of paradise so received, i.e. before the statute. There could be no splitting the counts so as to take advantage of any such alternative, as it had been contended the laying of the charge afforded. The act itself says nothing of a retainer of what has been previously received; and therefore, according to the constitutional and legal rules of construing penal statutes, it cannot be extended to this case. The words of the act are, "who shall receive and take into"—not and "have in—possession" (obviously applying to an original taking,) whereas there is no proof in this case of either the one or the other.

[Graham, Baron, suggested, that a possession in one county of goods stolen in another, was a felonious taking in the former.]

But this (they repeated) was a case of construction of the express words of a penal statute, [208] which operated in restriction of trade, making an act previously innocent in all respects, an offence against a revenue law. As to the 8 & 9 William and Mary, they submitted that the object of that statute rendered it quite distinguishable from the present. That was an act, giving the subject a benefit, and therefore to be construed liberally, so as to extend, rather than restrain its effect. On that point also they submitted that this rule should be made absolute.

Then, applying themselves to the question of the defendants being concluded by the effect of the record of condemnation, they denied that that was the effect of it in law: for such a proceeding, they submitted, was alio intuitu. Besides, the subject-matter might be of so trifling importance, as not to be worth contest: and if that could be shewn to be the fact, on what principle, they demanded, was a record of the condemnation of the article condemned, to be considered as conclusive and unanswerable evidence of the act incurring the forfeiture. In practice, the record of condemnation does not state the cause of forfeiture, and the condemnation itself may have been the result of other conduct, than that with which the defendants are charged by this information. They admitted that the record of condemnation was conclusive, as to the fact of condemnation, so as to obviate any question as to the goods having been forfeited, and having been legally seized, or as to the right of the Crown to the property seized: but, beyond that, they contended that it [209] was not conclusive, and particularly that it could not be considered evidence of any act which amounted to an offence, or subjected the owner to penalties in an information on another statute, making the act of forfeiture also highly penal; and that it would be hard in itself, and mischievous in its effects, if it were so held. In *Geyer v. Aguilar* (they observed), that all that Lord Kenyon had said was, that where there has been a proceeding in the Exchequer, and a judgment in rem, as long as the judgment remains in force it is obligatory on the parties, who have civil rights depending on the same question. In *Scott v. Shearman* also, the question arose on a civil suit, and even there Mr. J. Blackstone at first entertained great doubt: but, as far as that case goes, the point might be admitted, without prejudice to the present question, where the proceeding is not of a civil nature, but charges an act made an offence under a penal statute.

They also submitted, that the record of condemnation could not be received as evidence in this case, for another reason, because that condemnation had been founded on a different statute, (the 42 Geo. III. c. 38), and which is not confined to brewers; whereas this proceeding was instituted on an entirely different statute, the 51 Geo. III. c. 87, and which related to a totally different offence.

On the whole, therefore, they submitted that the rule should be made absolute.

The Attorney General, in reply, contended, that the original act of taking was not the sub-[210]-stance of the offence; the offence was, in effect, the illegal possession, and the time of acquiring such possession was not a necessary ingredient in that offence, otherwise the act might be easily evaded: as if a man, who is not at the time a brewer, gets possession of the prohibited article to-day, as he lawfully may, and afterwards he chooses to become a brewer, according to the construction now contended for, he would not be amenable to this wholesome law. There is a clause in the act, limiting the brewer's liability to be sued for the penalties to three years; now it may be possible, that although the article may have been received by the brewer illegally originally, yet if it be not found in his possession till after the three years, he may safely keep it for any time. In both those cases he might violate the law with impunity, unless, taking the whole of this count together, the proof of the allegation would bring him within the statute. It is, in short, on the meaning and object of the act, that this whole question should turn.

On the other point, arising from the fact of the union of the two trades in the person of the defendant, he submitted that it was of the highest importance that that should be well understood; and contended, that all that was to be enquired of in such cases, was merely whether the defendant was of the trade enjoined from using the prohibited article; and if he were, his being of another trade not so enjoined, was beside the question: otherwise another and much wider door for evading this, and all other such statutes, was open at [211] once, even to the consequence of rendering them altogether nugatory.

As to the question of the conclusive testimony furnished by the record of condemnation, he admitted that that record did not state that the defendants were brewers: but submitted, that its shewing that the articles had been forfeited and condemned, sufficiently squared with the provisions of this statute, and the averments of the present information; to which, if the defendant's being a distiller were a sufficient defence, it would have also been an answer to the seizure, proving, conclusively, a conversion of the article from their premises and business, as rectifiers, to be used in their trade of brewers: and that as it could not have been subject to seizure for any other offence, the record was positive, and could not be controverted.

[Wood, Baron, observed, that this condemnation proceeded on the 42d of the King: his Lordship read the words of the record, and of the act, to shew that the proceeding was founded on that statute; and expressed himself desirous that he might be understood as giving his opinion, that no immaterial allegation, contained in such a record—such as the names of the parties in whose possession the goods were found, which had, in this case, been introduced under a scilicet; and which loose allegations, his Lordship observed, should not be introduced into a record of condemnation,—ought to be admitted in evidence on its authority.]

[212] It was then submitted, that the present was not a criminal, but a civil proceeding, like the usual action by a common informer for penalties; that the proceeding by information was the only mode in which the Crown could sue the subject on statutes of this description: and that, therefore, no argument could be founded, as had been attempted, on any such supposed distinction.

For these reasons, he contended, the rule ought to be discharged.

Cur. adv. vult.

Before the Court proceeded to give judgment, Sir William Owen took an opportunity of mentioning, as an authority in favour of the defendants, *Cole's case* (2 East's P. C. 767), who was indicted for "receiving and having" in his possession naval stores. The Jury found him guilty, but said that they did not find that he received the stores after the 28th day of July 1800, but only that he had them in his possession after that day. Judgment was respited, to take the opinion of the Judges: when there being a difference of opinion between them, as to whether the statute ought not to be construed in the disjunctive, the prisoner was in consequence ultimately recommended to mercy.

22d December. —RICHARDS, Chief Baron, now delivered the judgment of the Court (Mr. Baron Garrow abstaining from giving any opinion, having been [213] Attorney General at the time when the information was filed).

[After stating the pleadings,—the object of the information (which, his Lordship considered as involving a question of great importance to all common brewers, and particularly to those who united with that trade the business of a distiller),—and the facts.] The act—51 Geo. III.—(continued his Lordship) is directed simply against brewers having this article in their possession. At the same it is clear, that rectifiers of spirits may lawfully possess the ingredient, (26 Geo. III.) c. 73. One objection made for the defendant was, that being a rectifier as well as brewer, he was entitled to have these grains of paradise in his possession, as a rectifier, without rendering himself liable to the penalties of the act, for possessing them in his character of brewer. On that part of the case there is no doubt in the minds of the Court. We are clearly of opinion, that he would be equally liable to the penalties laid in the information, to have been incurred by him for that offence, for the act makes no exception in favour of brewers who are also, at the same time, rectifiers, and the defendant is not the less a brewer, because he happens also to be a distiller. The statute is general, and applies to all brewers, under any circumstances. The consequence must certainly be, that the two trades cannot be carried on together: and if that was one of the objects of the statute, it might perhaps have been more candid to have declared it, which would have obviated all doubt: but be that as it [214] may, the effect is obvious. So far, therefore, we have had no difficulty.

Another question was made, on the record of condemnation of the article itself having been given in evidence, on the trial, by the Attorney General, as conclusive of the facts recorded in that document. Without entering into any opinion as to what would be the effect of such a piece of evidence, where it might be offered in a proper case, it is sufficient for the present to say, that we are of opinion that that record does not apply in this instance, because it was founded upon another statute, and did not proceed on the ground of any of the offences created by this act of parliament, and therefore it is altogether out of the present question.

We must therefore take it, that on the trial of this information the cask containing the drug, was proved in the common way to have been found in the possession of the defendant; and it was contended, in the argument for the Crown, that that was sufficient evidence to satisfy me, and the Jury, of the fact of a receiving and taking into possession, within the meaning of the act of parliament. Possession is, undoubtedly, *prima facie* evidence of a receipt and taking. So far, therefore, the case was made out; but then the defendant, in answer to that, proved, satisfactorily, that he had received the cask into his possession a very considerable time before the act of parliament had passed. In fact, it had been left on the premises by the defendant's [215] predecessor in the business, where it had remained openly, ever since, unused.—(Here his Lordship adverted to the evidence of those facts.) There was, therefore, no fraud imputed, and the original possession was an innocent one. Then the question is, whether that being proved, there was before the Court, on the whole case, evidence to shew, that the defendant had received and taken these grains of paradise into his possession after the act had passed, so as to bring him within the penal clause. In common parlance, every reception imports a delivery: and, if so, the defendant cannot be brought within the meaning of this law, as having received the article into his possession, unless a delivery could also be proved after the passing of the act. Here, on the contrary, it was originally delivered to his predecessor, and not to him; and we are then called on to say, whether his possession, after the act passed, is not a receipt of the thing after the act. It certainly seems to me to be impossible, so to separate the acts of receipt and delivery, or to admit the idea of a receipt, as unconnected with that of a delivery. The root of the word is *recipio*, which has an active signification. It is most probable too, that in framing the statute the legislature had in contemplation the primary act of receiving, at the time of delivery. Certainly the thing which was delivered to a man yesterday, cannot be said to be received into possession by him to-day. Sir William Owen, who argued this point with great ability, has also furnished us with an authority (*Cole's case*) from East's Crown Law, which is in point. [216] Then this is a penal statute, and must be construed strictly. Therefore as the word "received" cannot import any thing but a receiving, at the time of delivery; and as this article was received in that sense of the word before the passing

of this act, the defendant cannot be considered as liable to the penalty imposed by it on the offence with which he is charged, because the act took place before the passing of the law. The receiving the article, therefore, being a positive act, the mere possession of it cannot be considered as a new act of receiving committed by the defendant, amounting to the offence charged against this statute.

The rule must therefore be made absolute, as to the first part.

[Garrow, Baron, after the judgment had been pronounced, expressed his entire concurrence in the result, and the reasons given by the Lord Chief Baron.]

Per Curiam. Rule absolute: as to the Verdict being entered for the Defendant.

[217] THE KING v. CAPPER AND OTHERS. IN THE MATTER OF BOWLER, ATTAINTED OF FELONY. Demurrer.—23d December 1817.—Construction of royal grants.—Grant of a liberty in a certain manor to A. who grants the manor, with, &c. to the crown. The crown grants the manor again to B. with all, &c. liberties, &c. in, &c. in as full and ample manner as A. had it—such re-grant passes nothing, but what is expressly mentioned in words, as the subject-matter of such grant, notwithstanding the words of reference to the former grant, which do not extend the operation of the later beyond the precise terms of the patent.—A grant of a liberty in a manor of goods and chattels of tenants in such manor, attainted of felony, is confined to the goods, &c. of felons being locally situate within the manor, and does not pass goods, &c. lying out of it. Semble, that if the words were “in, of, or upon,” it could not be so extended.—If the words “Ex certa scientiâ, speciali gratiâ, et mero motu,” reduce a royal grant to the rules of construction to which the grants of private persons are subject, doubted.—Stock, and money in the funds, are not goods and chattels, and do not pass by a grant of bona et catalla felonum—Stock has no locality, except for purposes of probate and administration.—Stock is a chose in action.

[See *Colonial Bank v. Whinney*, 1885-86, 30 Ch. D. 283; 11 App. Cas. 426.]

The several important questions which arose on this demurrer, were founded on certain facts, which are fully detailed in the proceedings on the record—the construction of two royal grants—and the pleadings: the substance and material parts of which are given in a note to the corresponding part of the case.

[It has become necessary to set these out more fully than usual, in consequence of the Lord Chief Baron having gone most minutely into the terms and tenor of the grants, and the pleadings (which will, besides, be found to be very special, and of considerable novelty), in the course of the industrious and elaborate judgment pronounced by his Lordship in delivering the opinion of the Court on this case, which seems to have principally proceeded on a diligent attention to the language and object of the letters patent, aided by the averments introduced in the pleadings.]

[218] An inquisition had been issued, on a commission to enquire of what lands, &c. Thomas Bowler (a felon) was seised, &c. at the time when, &c.

The defendants, who claimed the goods and chattels of felons convict and attainted within the manor of Harrow, pleaded to the inquisition their title to the beneficial interest in the manor and its appendant franchises, -to which the Attorney General replied. The defendant demurred to the replication. Joinder by the Attorney General. (See the pleadings, p. 237-8 9-10.)

By the commission, which was issued 26th of January, 53 Geo. III. addressed to certain commissioners therein named, reciting, that at the General Quarter Sessions of the Peace for the county of Middlesex, held on the 29th of June, 52 Geo. III. it was presented, that Thomas Bowler, late of the parish of Harrow (Middlesex), yeoman, on the 30th May, in the same year, with, &c. &c. did shoot at one William Burroughs, &c. &c.: that on the 1st July (following), at the gaol delivery of Newgate, holden, &c. the said Thomas Bowler was charged with and convicted of the said felony in the said indictment specified, and adjudged to be hanged: by reason whereof all his lands, &c. escheated, and all his goods, chattels, debts, credits, specialities, and sums of money, which he or any person had for his use, at the time of his conviction and attainer, became forfeited to the Crown: -the said commissioners, or any three or more of them, were therefore empowered to en [219] quire of what lordships, manors, lands, tenements, and hereditaments, and of what annual value, and what estates therein, the said Thomas

Bowler, or any other or others was or were seized to his use, on the said 30th of May, (the day on which *the said felonies were committed*), or ever afterwards, &c., &c.; and who hath since taken the mesne profits, &c. and in whose possession, &c. the same then were: and of what *lord or lords, and by what service or services, and by what tenure or tenures the same* were holden: and whether the same, or any and which of them, had escheated and devolved, and come to his Majesty; and also what and what sort of leases, or grants of lands, tenements, or hereditaments, and what *and what sort of annuities or annual rents, and what and what sort of goods and chattels*, and of what value, and *what and what sort of debts, credits, specialties, and sums of money*, the said Thomas Bowler, or any other or others for his use, had on the aforesaid 1st of July, in the 52d year of his Majesty's reign aforesaid, on which day the said Thomas Bowler was *convicted and attainted* as aforesaid, or at any time since; and of all other articles, matters, and circumstances, concerning the premises aforesaid, or any of them whatsoever: and the said lordships, &c., &c. so as aforesaid, to be found to enter upon, and seize into his Majesty's hands.

On that commission an inquisition was taken, 13th February following, whereby it was found that Bowler was, on the 30th May (the day on [220] which he committed the said felonies), seized to him and his heirs, in fee simple, of certain freehold messuages and premises in the parish of Harrow, and of certain other premises, mortgaged in fee, all of which were holden by him of his Majesty in free and common socage, in right of his royal crown, but not subject to any services or rent in respect thereof except fealty, and had devolved to his Majesty as an escheat, in right of his prerogative royal.

And it was also found that he (Bowler) was on the 1st day of July, and at the time when he was convicted, and received judgment, &c. *possessed of certain leasehold property, and residues of terms of years therein, of considerable value, partly situate in the parish and manor of Harrow, and partly elsewhere.*

And it was found that he was also possessed of and entitled unto the sum of 4500*l.* capital or joint stock 3 *per cent.* Consolidated Annuities, transferable at the Bank of England: and also of and in the sum of 2000*l.* capital or joint stock 4 *per cent.* Annuities, transferable at the Bank of England: which said sums of 4500*l.* 3 *per cent.* Consolidated Annuities, and 2000*l.* 4 *per cent.* Consolidated Annuities, were then standing in the name of the Accountant General of the High Court of Chancery, in the books of the Governor and Company of the Bank of England, on the credit of a matter, entitled "Thomas Bowler, a lunatic:" and that the said Accountant General [221] had also received the sum of 157*l.* dividends thereon; and that he was, on the said first day of July last, possessed, as of his own proper goods and chattels, of and in the several goods and chattels mentioned in the schedule thereunto annexed, which they found to be of the value of 1159*l.* 18*s.* then mostly in the possession of Eliz. Heydon, of Apperton, and that there were certain debts due to him.

All which said tenements the jury found to have become escheated; and all which said residues of terms of years, annuities, goods, chattels, and sums of money, of which the said Thomas Bowler was so possessed, the jurors found to have become forfeited to his Majesty: and all which the said commissioners returned, that they had, in obedience, &c. seized into the hands of his Majesty.

On the 5th of May (East Term, 53 Geo. III.), the defendants entered their claim (the legal estate being in them*), and pleaded as follows:—

"And now, nevertheless, to wit, on the 5th day of May, in this same term, come here Francis Capper, and Elizabeth his wife, and James Pierson, by Hutton Wood, their clerk in court, and claim all the aforesaid *residues of terms of years, annuities, goods and chattels, and sums of money*, of the aforesaid Thomas Bowler, late convicted and attainted of felony by the said commissioners, &c. into the hands of his said Majesty, taken and seized as aforesaid, being goods and chat-[222]-tels, and property of felons convicted and attainted, belonging and appertaining to them the said (claimants) defendants, (and having craved oyer of the premises, which, &c. and day having been given, from time to time, till fifteen days from the day of Easter, 54 Geo. III.): at that day they appeared, and complained that they were grievously vexed and disquieted under colour of the premises; and that the aforesaid residues of terms of years, &c., &c. of the said Bowler, late convicted, &c. were taken and seized by the said commissioners

* Lord Northwick was lord of the manor.

into the hands of his said Majesty, by colour of the aforesaid commission : and that the less justly, and that they, the said defendants, were withheld from the possession thereof by the aforesaid commissioners, and that also the less justly ; and thereupon the said defendants, for plea and title to the aforesaid residues of terms of years, annuities, goods and chattels, and sums of money, in the aforesaid inquisition, and the schedule thereunto annexed contained, said that there was a certain record had and noted before the Barons of this Exchequer, at Westminster, in the memoranda of the same Exchequer (to wit), amongst the records of the term of St. Hilary, in the 17th and 18th years of the reign of his late Majesty King Charles II. upon the roll on the Treasurer's Remembrancer's side, in these words, &c. &c.* (setting it out).

* EXTRACTS FROM THE RECORD.

Middlesex.—The claim of Joseph Herne, Esq. Thomas Davis, Esq. and Edward Palmer, Esq. and Alice his wife, proprietaries of the manor of Harrow, otherwise Sudbury, otherwise Harrow upon the Hill, to hold to them, and the heirs and assigns of the said Edward Palmer, and Alice his wife, &c. &c. (enumerating the various subject-matters of the grant, in the words of the letters patent) ; all and singular which liberties, &c. they, by their attorney, claimed to belong to them, and the heirs and assigns of the said Edward Palmer, and Alice his wife : because they said, that in the first year of the late King Edward the 4th, the then Archbishop of Canterbury was seised in his demesne as of fee, in right of his archbishopric of and in the afore said manor, &c. with, &c. : and being so thereof seised, the same Edward, &c. by his letters patent, &c. bearing date at Westminster, the 15th day of April, in the second year of his reign, after reciting various former grants of his progenitors and successors, and confirmations, and extensions thereof, all of which he himself confirmed. And reciting, that the said Edward the 4th being moreover willing to shew to the said archbishop more abundant grace in that behalf, &c. &c. did grant and confirm, and by the same letters patent did, for him and his heirs, as much as in him laid, declare, grant and confirm, that the aforesaid then archbishop, and his successors, and all their men and tenants, as well entire tenants as not entire tenants, residents and non residents, and all other residents in, of, or upon the lands, lordships, possessions and fees of the aforesaid then archbishop, and his successors, although they should be tenants of the same king or his heirs, or of any other persons whomsoever, should be quit throughout his whole kingdom of England, of all toll in every market, and in all fairs, and in all passages of bridges, rivers, ways, and the sea, throughout his whole kingdom of England, and all the lands of the same king, wherein he might give them liberty ; and that all the goods, chattels, and merchandizes of the aforesaid archbishop, and his successors, and of all their men and tenants, as well, &c. in, of, or upon the lands, lordships, possessions, and fees aforesaid, although they should be tenants of the same king, or his heirs, or of any other persons whomsoever, should likewise, throughout the whole kingdom of England, be quit of all manner of pamage, passage, lastage, stallage, carriage, passage, terrage, trevage, pontage, cheminage, anchorage and wharfage, and of suits to be made to shires and hundreds, and lasts of hundreds, to the same king and his heirs belonging ; and also that they should have the goods and chattels of such tenants, residents and non residents, and of other residents whomsoever, felons convicted, attainted or outlawed, or of any others whomsoever, condemned to die, as well at the suit of the king, as at the suit of the king and others, or at the suit of any others whomsoever ; and also the goods and chattels of such tenants, residents and non residents, and of other residents whomsoever, convicted and attainted, or outlawed for any contempt, trespasses, debts, accounts, or any other offences whatsoever, or for any other occasion or cause whatsoever, as well at the suit of the king, or his heirs, as at the suit of the king and others, or at the suit of a party ; and all the goods and chattels forfeited of all the men and tenants of the aforesaid archbishop, and his successors, as well entire tenants, residents and non-residents, and other residents whomsoever, in, of, or upon the lands, lordships, possessions, and fees of the aforesaid archbishop, and his successors, although they should be tenants of the lord the king, or his heirs, or of any other persons whomsoever, and of any felons of themselves whomsoever, and of all other felons, fugitives, or outlaws, so that if either of their men and tenants, as well entire tenants as not entire tenants, residents and non-residents, and other residents whomsoever, in, of, or upon the lands, lordships, possessions and fees of the aforesaid archbishop, and his

[223] And the said defendants further said, that the estate, title, interest, claim, and demand of the [224] said Joseph Herne, Thomas Davies, Edward Palmer, and Alice his wife, of and in the manor, [225] fines, issues, amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits, com-[226]-modities, and heredit-

successors, for any felony whatsoever, ought to lose his life or member, or should fly, and would not abide judgment, or should be outlawed, or should commit any trespass, forfeiture, or thing whatsoever, whereby he ought to lose his chattels and lands in any court whatsoever, where justice ought to be done on him, whether it should be before the king himself, or, &c. &c. : and also, that the aforesaid archbishop, and his successors for ever, should have the deadlands, treasure trove, wreck of the sea, and all the goods and chattels, called stolen goods, found or to be found with any person whomsoever, *in, of, or upon the lands, lordships, possessions, and fees aforesaid*, and by the same person, before any judge whatsoever avowed. And that it should be lawful to them, their ministers and servants, without any impediment of the said lord the king, or his heirs, and all other the officers and ministers aforesaid, and also of the sheriffs, escheators, coroners, mayors, bailiffs, and other ministers whomsoever of the said lord the king, and his heirs, *to put themselves in possession of the goods and chattels aforesaid whatsoever*, in all and singular the cases aforesaid, and other cases whatsoever, when the officers, bailiffs, or ministers of the said lord the king, or his heirs, might not, or ought not to seize the goods and chattels aforesaid, into the hands of the same lord the king, or into the hands of his heirs, if they should belong, or might belong, to the said king, or his heirs : and the same goods and chattels to the use and profit of the aforesaid archbishop, and his successors, to receive and have for ever, although the same goods and chattels shall have been first seized by the same king, or by the officers and ministers of him, and his heirs, on the occasions aforesaid, or either of them ; and that the aforesaid archbishop, and his successors, should have, for ever, the returns of the writs of the said lord the king, and of the precepts whatsoever of the same king, and his heirs, &c. &c. except in default of the said archbishop, or his successors, or their ministers, in the lands, lordships, possessions, and fees abovesaid. And moreover, that the aforesaid archbishop, and his successors, for ever, should have all *manner of fines* for trespasses, oppressions, extortions, deceits, conspiracies, concealments, regratings, forestallings, maintenances, ambidexters, falsities, and other misprisions and occasions whatsoever, and all fines for licence of agreement, *and all amerciaments, ransoms, issues forfeited, and all fines adjudged and to be adjudged : and all forfeitures*, as well by writs of attaint, or writs of "decies tantum," or "premunire facias," adjudged or to be adjudged, as by all other writs and mandates whatsoever, of all their men and tenants, as well entire tenants as not entire tenants, residents and non-residents, and other residents whatsoever, *in, of, or upon the lands, lordships, possessions and fees aforesaid*, as well before the said lord the king, and his heirs, as before, &c. &c. And also the escapes of felons of and in the lands, lordships, possessions, and fees aforesaid, and all other things which to the said late king, or his heirs, might *or ought to belong* *, as well of the said escapes of felons, as of murderers and felons, of all their men and tenants, as well entire tenants, &c. and of all other the ministers of the said late king, and his heirs aforesaid : and also all manner of fines and ransoms for any cause whatsoever arising, and the amerciaments whatsoever which then passed, or thereafter should pass, in demand of any town and hundred, *in, of, or upon the lands, lordships, possessions, and fees aforesaid*, although they should be tenants of the said late king, or his heirs, or any other persons whomsoever, in the court of the said late king, and his heirs, &c. &c. : where the aforesaid men, and their tenants, as well entire tenants, &c. &c. *in, of, or upon the lands, lordships, possessions, and fees of the aforesaid archbishop, and his successors*, although they should be tenants of the said king, or his heirs, or of any other persons whomsoever, should make ransom, or happen to be amerced, forfeit, issues, or to be condemned in escapes of felons, murders, or felonies : and which fines, amerciaments, ransoms, issues, escapes of felons, murders, and felonies, ought to have belonged to the said king, or his heirs, if the same had not been granted to the archbishop aforesaid, and his successors. And that the said archbishop, and his successors, should have, receive, levy, and collect by themselves, and their ministers, in form aforesaid, all such fines and ransoms, issues and amerciaments, and all the

* N.B.—As to the money in the funds.

aments aforesaid, by good and sufficient conveyances and assurances in the law, [227] came to and vested in them, the said defendants, in right of the said Elizabeth and Frances, before [228] the 30th day of May, in the fifty-second year of his said present Majesty, the day on which the said [229] felonies were committed, and that

forfeitures, things and profits aforesaid whatsoever, without the impeachment of the said lord the king, or his heirs, or his or their ministers whomsoever, although the same men and their tenants, as well entire tenants as not entire tenants, residents and non residents, and all other resiants, were tenants of the said king, or his heirs, or of any other persons whomsoever: although also the pledges or manueptors of the said men, and their tenants, as well entire tenants, &c. or either of them, should hold of the said lord the king, or his heirs, or of any other person or persons *elsewhere*, or that they, or either of them, were not or was *not resident or non-resident, in, of, or upon the lands, lordships, possessions, and fees aforesaid*.

Moreover the same king granted for him, and his heirs, that the aforesaid archbishop, and his successors, for ever, might make two constables, or more, at his or their pleasure, in any hundreds whatsoever of the same archbishop, and his successors, as often as and when to the aforesaid archbishop, and his successors, and every of them, it should seem necessary and fitting: and that as well the aforesaid constables, so made, and every of them, should have power to execute and exercise all things, which to the office of constable *in* the aforesaid lands, hundreds, and *in* the aforesaid lordships, possessions, and fees, within the hundreds aforesaid, pertain to be done, as often as and when it should be needful and necessary: so that no coroner of the said king, or constable of the said king, should enter the hundreds aforesaid, or either of them, to do or exercise any thing there, which to the office of constable belonged, in anywise howsoever; and if any such constable of the said king, or his heirs, should enter the hundreds, to do any thing which to the office of the hundreds aforesaid belonged, and should exercise and use his office there, that every thing done by such constables, or either of them, in that behalf, should be void, and held for nothing.

And further, of his more full grace, he granted for him and his heirs, to the same archbishop and his successors, for ever, that no sheriff, bailiff, or other minister of the said king, or his heirs, or of any others whomsoever, should attach or take any such man and tenant, as well entire, &c. *in, of, or upon the lands, lordships, possessions, and fees aforesaid, or without*, although they should be tenants of the said late king, or his heirs, or of any other persons whomsoever, by writ, precept, or any other warrant or cause whatsoever, within the county or counties where they should be resident: provided that execution of such writs, precepts, or other warrants whatsoever, *might duly be made within the lands, lordships, possessions, and fees aforesaid*, by the same archbishop and his successors, or their ministers, although such sheriff, bailiff, or other ministers, should find any such men their tenants, as well entire tenants as not entire tenants, residents and non-residents, and other resiants, *without* the lands, lordships, possessions, and fees aforesaid, within the county or counties where they were so resident, and it had been commanded to the same archbishop, and his successors, or their ministers, to make execution thereof, if it were not in default of the same archbishop, and his successors, or their ministers. And that the aforesaid archbishop, and his successors, as well in the presence of the said king and his heirs, as in his and their absence, by themselves and their ministers, in all the lands, lordships, possessions, and fees aforesaid, should make and have the assay, amendment, and assize of bread, wine, and beer, and all other victuals whatsoever, and of measures and weights, and other things which to the office of clerk of the market of the household of the said king, and his heirs, might belong, with the punishment thereof, and to do and exercise whatsoever should pertain to the same, as often as, and when it should be needful and necessary, as fully as the same clerk of the market of the household of the said lord the king, and his heirs, might or ought to do, in the presence of the said late king, or his heirs, and in his and their absence: and that they should have the amerciaments, fines, and other profits thereof, arising or to be received and levied by them, and their ministers, without the impeachment of the said king, or his heirs, or of the ministers whomsoever of him, and his heirs, so that the aforesaid clerk of the market of the household of the said king, or his heirs, should not enter the lands, lordships, possessions, and fees aforesaid, to do or exercise any thing there which to his office might, in anywise howsoever, belong. *And the same*

it appears, by a certain record had and noted before the Barons of [230] this Court, in the common business of this Court, amongst the records of Trinity Term, in the fifty-[231]-fourth year of the reign of his said present Majesty, upon the roll on the Treasurer's Remem-[232]-brancer's side, that they, the said Francis Capper, and

king granted to the said archbishop, and his successors, that those his aforesaid letters to them thereof generally made, should be of the same force, virtue, and effect, as if all other the things above specified had been more especially, lawfully, and particularly expressed and specified in the same letters; and that they should be read, understood, adjudged, and determined on the part of the same archbishop, and his successors, against the said king and his heirs, as better it might be known and understood notwithstanding any omission, defect, negligence, repugnance, and contrariety in the same or any act, ordinance, statute, or restriction to the contrary passed: or although, in the same letters patent, no express mention was made of the true yearly value of the liberties, franchises, acquittances, and immunities therein contained, or of any lands and tenements, or grants of liberties or acquittances to the said archbishop, and his successors, or to any of his predecessors, by the same king, or any of his progenitors, theretofore made notwithstanding. Wherefore the same king willed and firmly commanded for him, and his heirs, that the aforesaid archbishop, and his successors, archbishops of the place aforesaid, for ever, should have all the liberties, franchises, and acquittances aforesaid, and the same and every of them should thereafter fully enjoy and use as aforesaid, without fine or fee, to the use of the said king, therefore in anywise howsoever to be made or paid, as by the aforesaid letters patent exemplified, &c. more fully appears: and by virtue of which letters patent by the aforesaid late King Edward the 4th, made to the aforesaid Thomas, then archbishop of Canterbury (the same archbishop then being seised of the aforesaid manor of Harrow, otherwise, &c. in the said county of Middlesex, and of the several other letters patent aforesaid, the same archbishop was also seised of the aforesaid liberties, privileges, franchises, and immunities, of, in, and upon the aforesaid manor of Harrow, as of fee and right, and he and his successors, archbishops of Canterbury, had held and enjoyed all and singular the liberties, privileges, immunities, and pre-eminences, in and by the aforesaid letters patent granted, in and upon the aforesaid manor of Harrow, from the time of making of the aforesaid letters patent, to and until the 12th day of November, in the 37th year of the reign of the late King Henry the 8th: at which day Thomas, then archbishop of Canterbury, primate, &c. by his deed, bearing date the same 12th day of November, for certain causes and considerations, him the said archbishop thereunto moving, gave, granted, and confirmed to the aforesaid Henry the 8th (amongst others) the aforesaid manor of Harrow, with its rights, members, and appurtenances; and also all and singular messuages, grange, &c. &c. (general words), to have, hold, and enjoy the manor aforesaid, with the appurtenances, to the aforesaid Lord King Henry the 8th, his heirs and successors, for ever, to the proper use and behoof of the same lord the king, his heirs and successors, for ever, as by the aforesaid deed, enrolled in the Court of Augmentation of the Revenues of the Crown appears. (It then recites the confirmation by the Dean and Chapter.) By virtue of which charter and confirmation, the aforesaid late King Henry the 8th was seised of the aforesaid manor of Harrow, with the appurtenances in his demesne, as of fee, in right of his crown of England; and being so thereof seised, by his letters patent under the great seal of England, bearing date at Hampton Court, the 5th day of January (an. Reg. 37), as well in consideration of the good, true, faithful, and acceptable services to him, thentofore frequently bestowed and rendered by his well-beloved and faithful counsellor, Sir Edward North, then knight and chancellor of his Court of Augmentation of the Revenues of his Crown, as for the sum of 7337l. 6s. 8d. of lawful money of England, to the proper hands of the same king well and truly paid; and for the sum of 500 marks, by the same Edward, by the appointment and consent of the said lord the king, to the then Reverend Father in Christ, Thomas, by divine permission then archbishop of Canterbury, primate of all England, and metropolitan, in hand, well and truly likewise paid, of his special grace, and of his certain knowledge and mere motion, by the same letters patent, gave and granted to the aforesaid Sir Edward North, and the Lady Alice his wife (amongst others), all that his manor of Harrow, with all its rights, members, and appurtenances, late parcel of the lands, possessions, revenues, and hereditaments of the said archbishopric of Canterbury; and also free warren, free chase, and free conduct of deer, and wild beasts; and all

Elizabeth his wife in right of the said Eli [233] zabeth and Frances Pierson, on the said 30th day of May, in the fifty-second year of the reign of his said present Majesty, the day on which the said felonies were committed, and long before, and from thenceforth down to and on the said 1st day of July, in the fifty-second year of the reign of his

and singular messuages, mills, tofts, cottages, houses, edifices, lands, tenements, meadows, feedings, pastures, woods, underwoods, rents, reversions, services, courts leet, and views of frank-pledge, *and other rights, franchises, liberties, privileges, profits, commodities, possessions, hereditaments, and emoluments whatsoever, with all and singular their rights and appurtenances in Harrow, to the said archbishop of Canterbury, or to the said archbishopric of Canterbury formerly belonging and appertaining, or as being parcel of the lands, tenements, possessions, and revenues of the same archbishopric of Canterbury thenceforth had acknowledged, accepted, used, or reputed, and which the same late king held to him, and his heirs and successors, for ever, of the gift and grant of the said archbishop: to have, hold, and enjoy the said manor (amongst others), and other the premises, with the appurtenances, to the aforesaid Sir Edward North, Knt. and the Lady Alice his wife, and the heirs and assigns of the said Edward, for ever, to the only proper use and behoof of the said Edward, and the Lady Alice his wife, and the heirs and assigns of the said Edward, for ever: To hold of the same lord the king, his heirs and successors in chief, by the service of the twentieth part of a knight's fee, and rendering therefore yearly to the same late King Henry, his heirs and successors, of and for the aforesaid manor of Harrow, otherwise Sudbury, otherwise Harrow upon the Hill, and for Seymour Park, 11l. 1s. 6½d. at the Court of Augmentation of the Revenue of the Crown of the same lord the king, payable at the feast of St. Michael the archangel, every year, for all rents, services, and demands whatsoever for the same, to the said king, his heirs and successors, in anywise howsoever to be rendered, paid, or done. And further, the same lord the king, of his certain knowledge and mere motion, did, for him, his heirs and successors, by the aforesaid letters patent, grant to the aforesaid Sir Edward North Knt. and the Lady Alice his wife, and the heirs and assigns of the said Edward, that the same Edward, and Lady Alice his wife, and the heirs and assigns of the said Edward, should have, hold, and enjoy, and might and should be able to have, hold, and enjoy, within the aforesaid manor, messuages, lands, tenements, and all and singular other the premises, and *within every part thereof, view of frankpledge and leet, and all things which to view of frankpledge and leet belong, free warrens, and all things which to free warren belong; and also goods and chattels waived, estrays, assay and assize of bread, wine and beer, and goods and chattels of felons and fugitives, and felons of themselves, and otherwise howsoever condemned, or put in exigent; and also so many, such, the same, the like, and such sort of courts leet, views of frankpledge, and all things which to court leet and view of frankpledge belong, or thereafter might or ought to belong, feasts, markets, tolls, customs, fairs, gersummes, fines, amerciements, assize and assay of bread, wine and beer, free warrens, and all things which to free warren belong, goods and chattels waived, goods and chattels of felons and fugitives, felons of themselves, and others outlawed, or otherwise howsoever condemned or convicted, deadlands, estrays, and other rights, jurisdictions, privileges, franchises, liberties, emoluments, commodities, profits, and hereditaments whatsoever, as and which the said Thomas, late Archbishop of Canterbury, or either or any of his predecessors, archbishops of Canterbury, in right of the archbishopric of Canterbury, or any other, or others the said premises, or any part thereof, thenceforth having, possessing, or being seized thereof, ever had, held, and enjoyed, in the manor and premises aforesaid, by reason or pretext of any charter of gift, grant, or confirmation, or of any letters patent by the said king, or either of his progenitors, to the aforesaid archbishop or to either of his predecessors, made, granted, or confirmed, or by reason of any lawful prescription, use, or custom, by the said archbishop, or any of his predecessors, thenceforth had or enjoyed. Then the defendants on that record derived title by mesne conveyances, from the persons claiming under the original grantee, alleging that they were thereby still possessed thereof, for the residue of the said term of sixty years, by right of accretion: and that so thereof being possessed, and the aforesaid Edward Palmer, and Alice his wife, so as aforesaid being seized of the reversion of the manor aforesaid, with the appurtenances, and of the liberties, privileges, and franchises aforesaid, within the said manor, and by their attorney aforesaid -prayed, that by the grace of the Court, all and singular the aforesaid fines, issues, and amerciements, forfeitures, penalties,**

said Majesty, on which day the said Thomas Bowler was convicted and attainted of the felonies aforesaid, and from thenceforth, down to and in the said Trinity Term, in the fifty-fourth year, &c. claimed to be, and were seised of the manor of Harrow, otherwise, &c. with the appurtenances in their demesne, as of fee, and also claimed to be, and were seised, as of fee and right, of and in the aforesaid fines, issues, amerciaments, forfeitures, penalties, *liberties, franchises*, pre-eminences, profits, commodities, and hereditaments: and upon the confession of Sir William Garrow, Knt. his Majesty's Attorney General, it was considered by the Barons of this Exchequer, that the aforesaid *fines, issues, amerciaments, forfeitures, penalties, franchises, pre-eminences, profits, commodities, and hereditaments*, should be adjudged unto the said Francis Capper, and Elizabeth his wife, in right of the [234] said Elizabeth, and the said Frances Pierson, according to their said claim, as by the said last-mentioned record, now remaining in this Court as aforesaid, may more fully appear.

And the said defendants further said, that they, the said Francis Capper, and Elizabeth his wife, in right of the said Elizabeth and Frances Pierson, had, ever since the said Trinity Term, in the fifty-fourth year, &c. and the allowance of their said claim, been and still were seised of the aforesaid manor of Harrow, &c. with the appurtenances in their demesne, as of fee, and of the fines, issues, amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits, commodities, and hereditaments aforesaid, as of fee and right.

And the defendants further said, that the said Thomas Bowler, on the said 30th day of May, in the fifty-second year of, &c. being the day on which the said felonies were committed, and since, until, and at the time of his conviction and attainder, as before and hereinafter mentioned, was a tenant of the said manor of Harrow, and also a resident within the said manor, and the precincts of the same to wit, at Westminster, in the county of Middlesex. And the defendants further said, that they, the said Francis Capper, and Elizabeth his wife, in right of the said Elizabeth: and the said Frances Pierson being so seised of the said manor of Harrow, &c. with the appurtenances, and of the *fines, issues, amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, pro-*[235]*fits, commodities, and hereditaments aforesaid*, and the said Thomas Bowler being so a tenant of the said manor, and resident within the same manor, and the precincts of the same, the said Thomas Bowler, of the aforesaid felonies by him committed and perpetrated, according to the law and custom of this realm, was lawfully convicted and attainted, as by the aforesaid record thereof appears.

And the defendants further said, that the said Thomas Bowler, on the said 1st day of July, in the fifty-second year, &c. being the day on which he was convicted and attainted as aforesaid, was possessed of and entitled unto all and singular the aforesaid *residues of terms of years, annuities, goods and chattels, and sums of money aforesaid, in the aforesaid inquisition, and the schedule thereto annexed contained, in his own right, and of his own proper goods and chattels, and property: and that the said lands, situate at Apperton aforesaid, wherein the said Thomas Bowler was possessed of the residue of a term for twenty-one years, as in the said inquisition mentioned, were and are situate within the said manor of Harrow, otherwise Sudbury, otherwise Harrow upon the Hill: and that the said indentures of lease of the said several terms for years in the said inquisition mentioned, were, on the said 1st day of July, within the said manor, and the precincts thereof: and further, that all the said goods and chattels in the said schedule specified, were, on the day and year last aforesaid,*

liberties, franchises, pre-eminences, profits, commodities, and hereditaments whatsoever by them, in form aforesaid, claimed within the said manor of Harrow, otherwise Harrow upon the Hill otherwise Sudbury, with the appurtenances, and the members of the same manor, according to the tenor of their aforesaid charter, they might be allowed to have, use, enjoy, and exercise *within* the manor aforesaid; and day being given till, &c. when the then Attorney General confessed their claim, and the premises being seen by the Barons mature deliberation between them had, it was considered that the aforesaid Joseph Herne, Thomas Davies, Edward Palmer, Esq. and Alice his wife, had, *within* the manor of Harrow, all and singular the aforesaid *fines, issues, amerciaments, forfeitures, penalties, liberties, franchises, pre-eminences, profits, commodities, and hereditaments whatsoever, by them in form aforesaid claimed, according to the tenor of the charters aforesaid, to be used, enjoyed, and exercised, within the manor aforesaid, by pretext of the premises. Saving always the right of the lord the king, if, &c. prout patet, &c.*

within *the said manor*, [236] *and the precincts thereof*, to wit, at Westminster aforesaid, in the county aforesaid.

And the said Francis Capper, and Elizabeth his wife, in right of the said Elizabeth and Frances Pierson, all the aforesaid *residues and terms of years, annuities, goods and chattels*, and sums of money, in the aforesaid inquisition, and the schedule thereunto annexed contained, by virtue of the premises, claimed to belong to them, and that they have, and of right ought to have and enjoy the same.—*Parati verificare*.

Wherefore they humbly hoped, that his said present Majesty would not hinder or molest them therein any further, of or in the premises; and they demanded judgment, that the hands of his said present Majesty, from his possession of the aforesaid residues of terms of years, annuities, goods and chattels, and sums of money, which were of the said Thomas Bowler, late convicted and attainted of felony, and in the hands of the said (commissioners), so as aforesaid remaining, might be amoved: and that the said (commissioners), of the aforesaid residues of terms of years, annuities, goods and chattels, and sums of money, which were of the said Thomas Bowler at the time of the said conviction and attainder, and every part and parcel thereof, against his said present Majesty, his heirs and successors, and every of them, might be exonerated and quieted, by reason of the premises; and that the now sheriff, and all others who may hereafter be sheriffs of the said county of Middlesex, might not be charged therewith; and [237] that all the aforesaid residues of terms of years, annuities, goods and chattels, and sums of money, which were of the said Thomas Bowler, late attainted of felony at the time of his said conviction and attainder, so taken and seised into the hands of his said Majesty as aforesaid, or elsewhere, within the realm of England, to the aforesaid Francis Capper, and Elizabeth his wife, in right of the said Elizabeth and Frances Pierson, by virtue of the premises, may be given and delivered, &c.

Replication. Sir Samuel Shepherd, Knt. Attorney General of our said Lord the King, who prosecutes for our said Lord the King in this behalf, having heard the said claim of the said plaintiffs read:—as to so much thereof as relates to the said lands at Apperton aforesaid, wherein the said Thomas Bowler was possessed of the said residue of a term of twenty-one years, and to the said goods and chattels in the aforesaid inquisition, and schedule thereto annexed contained:—

Saith, that he cannot deny but that the said last-mentioned lands are situate within the said manor of Harrow, otherwise Sudbury, otherwise Harrow on the Hill; *and that the said goods and chattels are within the said manor*, and the precincts thereof, in manner and form, as the said Francis Capper, and Elizabeth his wife, and Frances Pierson, have above alledged and pleaded. And the said Attorney General doth not deny, but *confesseth the claim of the said defendants to the* [238] *said last-mentioned lands, and the said goods and chattels; and as to the residue of the said claim*, the said Attorney General, on behalf of his said Majesty, protesting that the said claim, in manner and form as the same is above made and pleaded, and the matters therein contained, are insufficient in law to amove the hands of his said Majesty from his possession of the said residues of the said terms of years, and the lands comprised therein (except the said lands at Apperton) annuities, and sums of money therein mentioned; and that the said Attorney General, on behalf of his said Majesty, has no occasion, nor is he bound by the law of the land to answer thereto. Nevertheless the said Attorney General, on behalf of his said Majesty, saith, that the lands comprised in the said residues of the said terms of years, (except the said lands at Apperton) and the said annuities and sums of money, *were not, nor are any or either of them, situate within the said manor of Harrow, otherwise Sudbury, otherwise Harrow on the Hill*, but were and are *out of the said manor*. And the said Attorney General, on behalf of his said Majesty, further saith, that in the said first year of the reign of the said King Edward IV. formerly King of England, and at the time of the making of the said letters patent of the same late King, *the then Archbishop of Canterbury was seised in his demesne as of fee, in right of his said archbishopric, as well of and in the said manor, as of and in divers other lordships and manors, in divers parts of England, wherein were divers men and tenants of the arch* [239] *bishop, as well resident as non-resident, and the said archbishop, and his successors, archbishops of Canterbury, and the said Thomas, archbishop of Canterbury, in the said claim mentioned, continually from the making of the said letters patent of the said King Edward IV. until and at the time of the making of the said deed by the said Thomas, archbishop of Canterbury, bearing date the 12th day of November, in the thirty-seventh year of the reign of the late King Henry VIII.*

were seised in their demesne as of fee, in right of the said archbishopric, as well of and in the said manor of Harrow, otherwise Sudbury, otherwise Harrow on the Hill, as of and in the same other lordships and manors, wherein, during all the time aforesaid, were divers men and tenants of the same archbishops, as well resident as non-resident, and also of and in the several liberties, privileges, and franchises, granted by the said letters patent of the said late King Edward IV.: and that the said Thomas, archbishop of Canterbury, and his successors, archbishops of Canterbury, from the time of the making of the said deed, continually have been, and the now Lord Archbishop of Canterbury still is seised in their and his demesne, as of fee, in right of the said archbishopric, of and in divers of the other lordships and manors, wherein there were and are divers men and tenants of the same archbishops, as well resident as non-resident, to wit, at Westminster, in the county of Middlesex: and this the said Attorney General, on behalf of his said Majesty, is ready to verify. Wherefore he prays [240] judgment, and that the said lands comprised in the said residues of the said terms of years (except the said lands at Apperton), and the said annuities and sums of money, may remain in the hands of our said lord the king.

Demurrer—and Joinder.

Parke, for the demurrer, submitted, that the real questions would be, 1st, whether the leasehold property of Bowler, situate *without* the manor, passed by the operation of the two grants taken together: and, 2dly, whether the stock and *money in the funds*, the property of the felon, passed by those grants, or either of them.

On the first question he contended, that it having been admitted on the record that the defendants were entitled to the tenant's goods and chattels within the manor, it was admitted, that a royal franchise passed by the letters patent to the grantee: for unless a liberty had been granted, they would have had no right to any thing.

[It was admitted that the leasehold property would pass under the words of the grant.]

He then insisted that the terms of the grants were general, large, and unconfined, and there was nothing expressed in them by which their construction could be so limited as the crown were obliged to contend it must be:—that there could be no doubt that by the first grant of Edward IV. to the [241] archbishop every thing personal which the tenant attained had, wherever situate locally, passed to the grantee. On that point he submitted there was to be found an authority which was precisely applicable and went to establish the whole proposition: and that was *Lord Lumley's case* (a):—a case decided with more than ordinary solemnity: being said to have been resolved by all the judges of England. The king (in that case) granted to the Earl of Arundel and his heirs “*ex gratiâ speciali certâ scientiâ & mero motu omnia bona & catalla felonum & felon' de se attinet' de proditiõne, de felonîâ, utlagatorum in exigendo positor', hominum suorum, integre tenentium, & non integre tenentium, residendum, & non residendum de et in omnibus maneriis & hereditamentis dicti comitis.*” The earl was seised in fee of the hundred of Paling, in the county of Sussex. B. held a tenancy in fee within the said hundred of the said earl, as of his person. B. was attainted of treason, committed by him in the county of Hereford, and had a lease for years, and goods within the said hundred of Paling, and elsewhere, *where the earl had not any hereditament*: Resolved by *all the judges of England*, that the Lord Lumley, who has the estate of the Earl of Arundel, shall by force of the said patent have the said tenancy, lease, and goods.

The case then proceeds:—“The word ‘*de*’ shall be construed and relate to any tenure of the per-[242]-son, or of any manor of the earl: the word ‘*in*’ relates to goods: the word ‘*de*’ to tenancies which are held of the earl be the tenants resident or non-resident. This is a good precedent to construe *beneficium principis, quod decet esse mansurum*. The words in a patent *ex certâ scientiâ speciali gratiâ & mero motu*, make the case of the king like the case of the grant of one subject to another: if the king be not evidently deceived.”

That case goes the whole length of the proposition for which the defendants contend, and if it be an authority at all, is directly in point, at least as to the grant of Edward IV.

Then the question will be, whether that grant is not embodied, and the whole substance of it incorporated in the grant of Henry VIII. to Sir Edward North. The

latter grant adopts the former in the fullest and most ample terms, and by express and most comprehensive reference to it grants all the privileges, *liberties*, franchises, &c. &c. which the archbishop had. Now the cases are numerous which establish that words of express reference to a former charter, person, or thing, will pass the franchises which had been appendant to the subject-matter before its re-union to the crown. This is the case of a *liberty*—a *royal franchise*—and therefore passes by words of reference. In *Whistler's case* (10 Rep. 65 (*b*)) it was held (citing *Darcy's case*), that “if a [243] man has a manor to which an advowson is appendant, and franchise to have forfeitures and other franchises within the manor, and afterwards the manor comes to the king by forfeiture of war, and afterwards the king gives the manor to hold with the franchises which were always regardant to the said manor as such a one held, he shall have the franchises: and there Sir William Herle said, that it shall be a new grant: for the franchises (which lay in point of charter) were come to the crown.” And in the same case it is said to be observable thereon, “that if a manor, in which the owner have franchises which lie in point of charter, as forfeitures for treason, and other royal franchises, come to the king's hands, and he grants it again with the forfeitures of treason and other franchises which were regardant or appertaining to the said manor, as such a one held, all the franchises should pass, and that the words ‘regardant or appertaining to the manor’ shall be taken in that sense, although according to the strict propriety of the words such franchises could not be appertaining to the manor.” And the reason given is, that such construction as will make the true intention of the king expressed in his charter take effect is for the king's honor, and stands with the rules of law: and therefore this word “appertaining” shall in such case in the king's grant be taken out of the proper signification. The case then proceeds thus:—2. “It is to be observed, that in the same case such franchises as *be in point of charter* shall pass as *by a new grant*; à fortiori, franchises appendant or appertaining to a manor, [244] as advowsons, &c. (which always continue in esse, and are never extinct in the crown) shall pass. It is said in *Plow. Com.* in *Fogassa's case*, 12 b., if the king at this day grants over certain lands which have come to his hands before, and further grants to the grantee *tales libertates, privilegia, jurisdictiones, &c.* that he had who was last seised of the lands, where the king knows not the certainty of the liberties and privileges, yet the grant is good enough, and the patentee may enquire what liberties and privileges the other had before; and forasmuch as this incertainty may be reduced to a certainty by enquiry or circumstance, the grant is good” (citing 9 Rep. f. 24 b.). That case is noticed for the same point in *Viner (c)*, where also under the same title (pl. 1) it is said (citing *Br. Abr. tit. Extinguishment*, pl. 32, and *ib. Incidents*, pl. 12 *), if the king purchases a manor to which franchises real (*royal*), are regardant, and after gives the manor *simul cum libertat' ad illud spectant'* and does not say *simul cum libertat' ad illud spectant' at the [245] time that the manor was in the hands of the feoffor* of the king, the franchises do not pass by this general grant, because the franchises of common right were annexed to the crown. But (it is also said, pl. 2), otherwise it had been if special mention had been made “as is aforesaid” in the charter: and several other cases to that effect are noticed in the same book. The authorities therefore establish that point incontrovertibly: and the whole case is strengthened by the rule with respect to royal grants recognized in the books, that where the king grants by the words “*ex certâ scientia & mero motu*,” such patents shall be taken more strongly against the king, and in favor of the patentee. (*Vin. Abr. tit. Prerog. (E. c.) 3*), where many authorities are cited in support of that position. These patents grant by those words: and therefore *ex vi termini*, many objections which might otherwise have been raised on the distinction to be taken

(c) *Abr. tit. Prerog. of the King (I. b.)*, pl. 7 (L. b., pl. 1.

* “Thorpe dit, si le roy purchas maner a q' franchises royaux sont regardats & puis done le manor simul cu libertat ad illud spectant. nul libertes passa, car p le purchas les franchises de como droyt fuit annex' al coron', 'coti sil doe le maner cum libertat' ad illud spectant t'epore quo maneriu fuit in manibus le feoffor' car ils fueront extincts devant, ut videtur & p ceux parolx ils passa eoe appendants per luy. 13 As. p. 10.”

“Incidents & appendants, pl. 12.

“Franches que fuer extinct p purchase le roy pass' p novel grant come append.”

between the grants of the crown and those of the subject are entirely put out of this discussion.

Then (adverting more particularly to the terms of the grants, and observing that besides the very general nature of those terms, there were many things granted which were merely personal—as to have fines, amerciaments, &c. of their tenants, that they should be exempt from tolls throughout England, &c. &c.—which could not be confined to locality)—it was insisted, that, on the whole, it was impossible to contend that the grantees were not entitled to the goods and chattels of at-[246]-tainted tenants of the manor, *wherever they might be found*, as well *without the manor, as within*.

On the 2d question—whether the money in the funds and stock belonging to the tenant passed by the grant—it was submitted, that the grantee was entitled to that species of property also under the words “*bona & catalla felonum*,” used in a grant of a *liberty*. It was urged, that as there could be no doubt that the crown would be entitled to such species of property, and that the grant of a *liberty* was a transfer of a complete right of sovereignty, such property must be held to have passed by this grant. In Com. Dig. tit. Waife, C. it is said, that “by grant of the *goods fugitivor’ & felon’*, the grantee shall have the *debts and specialities* of fugitives, &c. as well as other goods, though there are no special words.” In 2 Rol. Abr. 195 (E.), pl. 1, is the position, that—if the king grant certain *liberties*, and among other things *omnia bona & catalla felonum de se*, within such a place, it shall pass obligations, specialties, and debts, due to the felon; for though in other cases it would not, in the grant of a *liberty* it will. There can be no doubt that the stock would have belonged to the crown; and if a particular grant had been made, which, after reciting Bowler’s conviction, had granted all his goods and chattels, his stock or money in the funds would have passed. Such property is in fact an annuity, and it is personal, and declared to be so by the 41st Geo. III. c. 3, s. 17. It is transferrable by assignment. Annuities were known to the common law. (Com. Dig. [247] tit Annuity.) And although funded property was certainly not known when these grants were made, yet the language of the grants is prospective: the words are “of all things which to the said late king, or his heirs, *might or ought to belong*.” Promissory notes, which are choses in action, and also of comparatively modern introduction, would have belonged to the crown; and therefore they would pass to the grantee.

Richardson, for the crown, contended, that the defendants were not entitled to the goods and chattels of the felon not situated within the manor. If the grant of Edward IV. even to the archbishop could be construed so largely, it would be productive of the utmost mischief and inconvenience if it were not altogether impracticable. It would induce a continual clashing of claims between different lords, grantees of similar franchises in different manors, and between the archbishop himself and his alienee of any of his lordships, before the act restraining ecclesiastical persons from disposing of their possessions; and it would be impossible to say where one of the numerous manors of the archbishop had been granted away by him, and a tenant of that manor had been attainted, being possessed of leasehold property both in the manor granted, and in others still belonging to the archbishop, whether the property in the manor not granted belonged to the archbishop or his grantee: and he submitted that on that ground alone it could hardly be conceived that the king had granted the franchise in so large [248] a manner as the defendants construe it. Such a grant in those days would have occasioned a constant warfare between the different lords, if it were so to be construed, and in more modern times unceasing litigation as the present claim sufficiently proves; and therefore it ought to be most satisfactorily shewn to be the unavoidable construction of it before the Court would so extend it: whereas the construction put on it by the crown was at once reasonable and practicable.

He then adverted to the various passages of the grant, which gave authority to the ministers and servants of the archbishop to put themselves in possession of the goods and chattels, &c., &c. (Vide the grant, ante, in italics passim) as shewing that the franchise was intended to be confined to the possessions of the archbishop, where alone his ministers and servants could have had jurisdiction.

He admitted that *Lord Lumley’s case* was a strong authority, as far as it went; but he submitted, that there did not appear to have been any opposition made to the claim of Lord Lumley, and that it was decided without argument: and that there was also to be noticed a distinction in that case, the tenant holding the tenancy in fee of the earl “as of his person.”

He then insisted, that whatever might be the construction of the first grant, it was quite clear that the goods of felons without the manor did [249] not pass to the grantee by the re-grant of Henry VIII., contending that there must be express words to revive a liberty, which has become reunited to the crown, by a re-grant to a subject of the possessions to which it had been annexed: and for that he cited Com. Dig. tit. Grant, G. 7, where it is said that "words too general are not sufficient in the king's grant: as if bona felon', &c. which lie in grant and not in prescription, are reunited to the crown or extinguished, and afterwards the king grants the manor cum tot tal' libertat' privileg', &c. qual' A. nuper abbas habuit, who claimed the same privileges by charter, the grantee shall not have bona felon' by such general words." To the same point is *The Bishop of Coventry's case*, 2 Rol. 193, l. 40, and *Lord Lovelace's case*, Sir W. Jones' Rep. In itin. Windsor, 270, and in itin. de Waltham, 349. The rule is clear that the crown is not bound by general words, or words of reference, and that in all cases of royal grant express words are necessary to confer or revive a franchise.

[Graham, Baron, mentioned *The Marquis of Downshire's case*, recently determined in this Court, as having so decided.]

If it should be said that there are express words in this grant, it should be observed that there is also an express limitation of them, confining the subject-matter to the manor of Harrow. The words "*within the manor of Harrow*" govern and qualify every one of the several objects of [250] the grant, and the grant itself commences and concludes with those words. The Court is therefore relieved from the necessity of construing the grant in a manner so inconvenient and incongruous as the construction attempted to be put on it by the defendants would be, if indeed they could so construe it on the general tenor of the grant independently of the presence of those words.

He submitted therefore finally, that the defendants construction was not the true and legal one, as applied to either of the grants: but that as applied to the grant of Henry VIII. the very terms of the letters patent exclude the possibility of such a construction, and are conclusive against it.

As to the question of the stock, he contended, that the general words of the letters patent were not sufficient to pass money in the funds, of whatever nature such sort of property might be deemed to be: and he submitted that it certainly was not personal property. Cases have established that the debts of a felon do not pass by general words: and particularly *The King v. Sutton* (1 Wms. Saund. 275); *The Mayor of Southampton v. Richards* (1 Sid. 142); *Ford and Sheldon's case* (12 Rep. 162); *The Queen v. The Archbishop of Canterbury* (1 Leon. 202), which last was a case where the question was, whether a right to a presentment on an avoidance passed by a grant of goods and chattels of felons themselves: and it seemed to be the prevailing opinion (for the case was not deter [251] mined) that a title to present being a special chattel, did not pass by the general words "goods and chattels." He also cited an *Anonymous case* in Owen (Ow. Rep. 155); *Lord Northampton v. St. John* (2 Leon. 56); and an *Anonymous case* in Ventr. (1 Vent. 32). Then advertng to the case cited for the defendant from 2 Rol. Abr. 195, he objected that that was not in point of fact a decision: the report states merely that "so the judges seemed to incline," and eventually they recommended a trial, the result of which is not known.

But it was chiefly urged, that in all events, as the money in the funds, be it annuity or what it may, was not locally situate within the manor of Harrow, it therefore did not pass. It has no locality: it is bona notabilia, and requires prerogative administration. It is difficult to define what species of property stock is. It was certainly made personal by act of parliament (41 Geo. III. c. 3) for purposes of enjoyment: but the intrinsic nature of the property was not nor could be altered by that statute: and in construing a grant of the date of these letters patent, that act of parliament can not certainly be called in aid to extend its effect, by including a species of property not in existence at that time. In the case of *Hildman v. Hildman* (9 Ves. 117), the Master of the Rolls held, that stock was merely a right to receive a perpetual annuity, and that it was neither a chattel nor had any resemblance to a personal chattel. On the whole [252] therefore he submitted, that that species of property did not pass by the grant of goods and chattels of felons, or that if it did, as it was confined to goods, &c. within the manor of Harrow, stock being not in fact locally situate any where, and

certainly not within the manor, clearly did not pass by the words of the second grant.

Parke, in reply, submitted that whatever might be the inconvenience arising from any number of sub-grants made by the original grantee, no question of that sort occurred in the present case, and therefore no argument could be founded on it now. He insisted that the cases cited for the defendants were in point, and had not been answered: and as to the cases brought forward for the crown, he relied on the distinction before taken of the present being a grant of a *liberty*.

He repeated that the money in the funds passed to the defendant under the words "goods and chattels," and submitted that the case from *Siderfin*, of *The Mayor of Southampton v. Richards*, on which *The King v. Sutton* seemed to have been founded, had in fact decided nothing, nor had there been any decision in the case from *Leonard*, of *The Queen v. The Archbishop of Canterbury*. The present was therefore a case of first impression, and depended materially on the nature of such property, and whether it was capable of being included and granted under the words "goods" and "chattels."

Cur. adv. vult.

[253] RICHARDS, Lord Chief Baron, now delivered judgment.

[Having stated the facts and the pleadings elaborately and succinctly from the record: and having observed, that—it being admitted by the confession of the Attorney General in his replication, that the defendants were entitled to the residues of terms, goods, and chattels, situate and being locally *within* the manor of Harrow, of such of the tenants of the manor as should be attainted of felony—the sole question would be, whether they were also entitled to the residues of terms, and goods and chattels of such tenants, situate and being locally *without* the manor.] That question, said his Lordship, will depend wholly on the legal construction of the two grants by which the franchise is said to have been conferred.

The first is a grant of Edward IV. of certain privileges therein enumerated to the then archbishop, to be enjoyed by him and his tenants *in, of, or upon* the lands, lordships, possessions, and fees of the said archbishop.

[His Lordship, having read verbatim the granting part of those letters patent, as far as the conclusion of what relates to the franchise of having the goods and chattels of felons, observed:—]

There is nothing said of the manor of Harrow by name in that grant, as distinguished from the other possessions of the archbishop, and it appears [254] from the record (on which I shall presently observe) that the archbishops of that day possessed many other manors besides this of Harrow in different parts of England. The grant is a very general one, and is worded in a very general way, and certainly in its terms it is very indefinite and confused, and most inconvenient of construction.

In the 37th of Henry VIII. the then archbishop granted this manor of Harrow to king Henry VIII. and there is no doubt that by that grant the king became seised of the manor *de jure coronæ*, as amply as if it had never been granted at all to a subject.

The king then (in the same year) granted it to Sir Edward North, and it will be extremely material in deciding this case to attend particularly to the precise terms of this last grant.

[His Lordship read the words, as in the note, p. 230-1, to the habendum.] He granted therefore, as we see, all this manor of Harrow, with all and singular its rights and appurtenances in Harrow *expressly and emphatically*, to the said archbishop of Canterbury formerly belonging. Nothing is here, as yet, said about the goods of felons, and whatever is given is stated to be *in* Harrow. Then the grant thus proceeds: "And further the same lord the king of *his certain knowledge and mere motion* did grant to the aforesaid Sir Edward North and the Lady Alice his wife, that they should have, hold, [255] and enjoy, *within* the aforesaid manor, messuages, &c. and all and singular other the premises, and *within* every part thereof, view of frankpledge and leet, and all things which to view of frankpledge and leet belong, free warrens, &c. &c.: and goods and chattels of felons and fugitives, and felons of themselves, outlawed or otherwise, and others howsoever condemned, or convicted, deodands, estrays, and other rights, jurisdictions, privileges, franchises, liberties, &c. as or which the said Thomas, late archbishop of Canterbury, or either or any of his predecessors, in right of the archbishopric, ever had, held, and enjoyed in *the manor and premises aforesaid*, by reason or pretext of any charter of gift, &c." That is the language of this second grant to Sir Edward North. The defendants in their plea deduce their title from that

grantee. Now the first question is, whether under that second grant the leasehold property of tenants of the manor, *not locally situate within the manor*, passed from the crown to the grantee; for the Attorney General has very properly confessed the defendant's claim, *as to those parts which are locally situate within the manor*.

Now I very much question whether the leasehold premises of the tenants of the archbishop, situate *out of* the manor, would have passed even by the terms of the first grant of Edward IV. to the archbishop, large and extensive as they are said to be; yet certainly, as applied to this question, those letters patent are very difficult of inter-[256]-pretation. But a fact is put on the record by the replication of the Attorney General, which will much assist us in ascertaining the true construction of these instruments. It is, that "the archbishops of Canterbury before and at the time of making the letters patent of Edward IV. and from thence till the time of the grant from the then archbishop to King Henry VIII. *were seised in their demesne as of fee, in right of the archbishopric, as well of and in the said manor of Harrow, as of and in divers other lordships and manors in divers parts of England, wherein were divers men and tenants of the archbishops, as well residents as non-residents,*" and that fact may serve to account for the otherwise apparently extraordinary terms of the grant, on which the defendants put so extensive a construction; and under which they insist that every thing which belonged to every tenant of the manor, in any place, and wherever situate, became forfeited on attainer, to the archbishop. Now certainly that would be a most inconvenient construction, and would be productive of much mischief if it were to be supposed that the king should make such a grant to any person who was possessed of other manors, without confining it to the possessions of the grantee; for each of those manors might be aliened to other different persons as the manor of Harrow was to the king, and in that case each individual alienee would have claims so incompatible as to render the grant altogether absurd in effect, and impracticable of enjoyment, if it were necessarily to be construed as the defend-[257]ants contend, *reddendo singula singulis*, whereas there might be somewhat more of consistency in such a grant, if taken to be personally confined to the proprietor of many manors, giving him such a right commensurate in extent with his other possessions. In any other point of view the construction now attempted to be set up would so abound with inconveniences and inconsistencies, that unless we should be absolutely driven to adopt it, it ought to be at once rejected.

In such a case therefore the onus is on the defendants. Now they profess to sustain that onus by an authority, which they insist is decisively in their favor. I have been favored with a copy of the record, but I think I may fairly state it from the book in which it is reported: that is *Lord Lumley's case*.

[His Lordship read the case.]

Now it does not strike me that that case is exactly in point here, even as applicable to the first grant, so as to establish the defendants' position; for the words, and the form of the grant in *Lord Lumley's case*, are not precisely the same as in these letters patent*. But with respect to its being [258] conclusive or applicable to that proposition as to the second grant, I think it is quite clear that it has no application whatever to that, and therefore we need not discuss its bearing on the first letters patent.

There can be no doubt that Henry VIII. took the manor as fully as the king had it before the original grants. The cases are numerous which establish that; but I shall content myself with only stating one or two. In the case of *The Abbot of Strata Marcella* (9 Rep. 25 b.) it is said, "when the king grants any privileges, liberties, franchises, &c. which were such in his own hands as parcel of the flowers of the crown, as *bona & catalla felonum*, &c. within such possessions: if they come again to the king, they are merged in the crown, and he has them again in *jure coronæ*." That position is maintained in Comyn's Digest (tit. Franchises, G. 1), where authorities are collected

* It may be useful to make one short observation, as to the distinction in the language. In the case cited, the words are "*de & in*." In this grant the words are "*in, of, or, upon*," the one making the more comprehensive and *personal* preposition "*de*" the leading term, and uniting it with the more limited and *local* one "*in*" by conjunction (purporting addition) — the other giving the commanding position to "*in*," and employing the disjunctive, making "*of*" rather synonymous with "*upon*," than distinct from "*in*" and "*upon*," as if intended to be used merely to explain, and not to add to the leading term.

which establish that franchises appendant to a manor, or other possessions become extinct by their re-union to the crown, and the king is then again seised of them in jure coronæ.

That being so, the rule is, that where liberties are extinct, they cannot be created de novo by [259] general words. There are one or two strong decisions to that effect in Viner; and I have looked into the cases themselves, and find them perfectly correct. The first is in tit. "Prerogative of the King," (A. c.) "The dean and chapter of P. being seised of certain manors, to which the king annexed by grant that they should be discharged of purveyors. They surrendered the manors to the king. The king afterwards granted them to others, with the same liberties and privileges as the dean and chapter had. In that case, in as much as the ancient liberties were extinct, by being sunk into the crown, such general grant did not create de novo the liberties which the dean and chapter had before." In another case, in the same book, tit. Prerogative (A. c.) 2, "The Bishop of Coventry had a liberty de catallis felonum within his manor of B. and the manor having come to the king by attainder, he granted it over with tota tales tantas & quales libertates, as the bishop or his predecessors had: yet it was held, that the grantee should not have by that grant the said liberties which the bishop had: for when they are once extinct, words of revivor will not be sufficient; but there ought to be words of grant: and such general grant will not be sufficient." In *Lord Paytel's case* also (n) it was held, that general words are not sufficient in the king's grant. Thus, where a grant was of bona & catalla felonum in a particular forest by H. VI. to J. S. Afterwards, by a private statute, [260] all liberties granted by him were resumed. The forest came to the king by attainder, and it was again granted over with all the liberties which J. S. had therein with a non obstante aliquo statuto; yet it was held, that the grantee should not have bona felonum by such general words: and there are many other cases to the same effect. I will only add that of *The King v. Sutton* (1 Saund. 273), where, on a grant of bona & catalla felonum, it was held, that the goods and chattels of felons of themselves do not pass.

[His Lordship again adverted particularly to the terms of the grant of Henry VIII.] It is admitted that by this grant the goods and chattels of felons, situated within the manor, passed; but the defendants claim all the tenant's goods, &c. wherever situate. Now that, as I have said, would be a most inconvenient grant if it were to be so construed; but I consider that it is impossible to give so extensive a construction to that grant, even if it were not a grant of the crown, but of a private individual; for by the grant of a private person, of the goods and chattels of felons within a place, the goods and chattels of felons out of that place would clearly not pass. I, however, by no means intend to admit, by so saying, that the grants of the crown are to be construed as those of private persons are: for they are not governed by the same principles. It has been urged, that the words ex mero motu & certâ scientiâ (p), reduce a royal grant to the [261] same standard of construction as the grant of a subject, and bring it within the principle that it is to be taken strongly against the grantor, and certainly those words are here. I am however not of that opinion, and although cases to that effect may be found, yet they will not bear minute investigation, when the principles on which they proceed are examined. Then, when it is contended that the words of reference to the former grant carry it further, the cases, which I have already adverted to, furnish the answer to that proposition.

Thus the defendants having no claim on principle, and there being many authorities against them, we are to enquire if there be any case which favors the doctrine on which they rely. I consider the only authority cited for them which even appears to incline towards it, (*Lord Lumley's case*), as by no means in point, or applicable; for the words in that grant are bona (&c.) tentium (&c.) de & in omnibus maneriis, &c. dicti comitis, so that that grant is extended expressly to tenants holding of the manor, as well as tenants within the manor; whereas in this second grant there is a total absence of *de*, and a constant presence of the preposition *in*. The words within the manor are on each occasion repeated as if with care, at the commencement, throughout, and at the end. That case being therefore out of the way, there is no authority for the arguments which have been used on behalf of the

(n) Cited in *Lord Darcie's case*, Cro. Eliz. 513.

(p) Vide *Sawyer v. East, Lane, Rep.* 111.

defendants' [262] claim, and there must accordingly be judgment for the crown on that part of the case.

The next question is as to the stock and the dividends. Now it is certainly not easy to define precisely the meaning of "stock." It is not an ancient subject of property, nor known to the common law. It is however a hereditament. It is an annuity, and treated as such by act of parliament, and it is made personal estate by statute. But whatever it may be after our decision on the other part of the case, the only question regarding it now, is where such estate is to be considered as locally situate. It does not lie within the manor of Harrow clearly, nor is there any precise defined locality ascribable to it. For some purposes however it has a locality, as certain specialties have. One of those purposes is that of probate and administration, for giving effect to which it is supposed to lie within the archbishopric of Canterbury. Now Harrow is not within that archbishopric. It cannot therefore in any sense be said to lie within the manor of Harrow, even if it have a fixed locality; and if it have not, *cadit questio*, for nothing is granted that is not within the manor of Harrow.

The case of *Willman v. Willman* (9 Ves. 177), which was decided by the then Master of the Rolls, whose accuracy we all well know, is applicable to this [263] point. The question there was, whether stock which a wife had become entitled to as next of kin to an intestate in the life-time of her husband, part of which she had transferred with his consent, belonged to her after his death. She had received the dividends whilst he was living. The Master of the Rolls was of opinion that it did belong to her by survivorship. We know that a chair or a horse would not, but that a debt or a legacy would. On that occasion his Honor said, "The interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption—a mere right therefore: the circumstance that government is the debtor (so that he considered it a debt) can make no difference—a mere demand of the dividends as they become due having no resemblance to a chattel moveable, or coined money, capable of possession, and manual apprehension." Thus he seems to have thought, and I apprehend correctly; that such a chattel as is capable of reduction into possession by a husband, so as to give it to him, must be such as may be possessed by manual occupation. And on that ground he decided, that a transfer of stock to the wife, was not a reducing into possession by the husband, so as to destroy its legal incident of surviving to the wife.

Then it has been held, that the words *bona & catalla* in a royal grant will not pass the debts of a felon. The authorities for that are *Ford and Sheldon's case* (12 Co. 1, 2), and *The King v. Sutton* (1 Saund. 273). In [264] the first of those cases it is laid down that a grant of such things extends only to goods in possession, and not to things in action. Now stock cannot be called a thing in possession: it is a thing in action.

There is also another case which is very strong on the same point, because it goes to shew that the words "goods and chattels" will not carry a debt as being a chose in action even in a will, where there are not other words plainly importing an intention that they should pass: for I by no means say that it would not pass choses in action in a will in any case. We are now however upon the construction of legal instruments which require great care, notwithstanding any liberality which the words *certa scientiâ & mero motu* may be supposed to admit of. The case I allude to is that of *Chapman v. Hart* (1 Ves. sen. 271), which was a bequest of all the testator's goods and chattels in his house, and on board the "Warwick." On that Lord Hardwicke said, "Undoubtedly no goods and chattels in the house can pass but such as were properly in possession, not choses in action, except bank notes, which the Court considers as cash; for those words may certainly extend further than to bare furniture, and if any ready money were in the house (if not an extraordinary sum, and just received) that would pass. In *The Countess of Aylesbury's case*, I was of opinion, that by a devise of all things in a house, money and bank [265] notes passed to the testator's wife, and that the testator meant to consider the notes as cash: but bonds do not pass, not admitting of a locality, except as to the probate of wills, &c. I think there is a difference between a legacy of goods on board a ship, and in a house," and so on. So that Lord Hardwicke was of opinion, that the words "goods and chattels," would not pass choses in action.

There is also a case in Bro. Ch. Ca. of *Moor v. Moor* (1 Br. Ch. Ca. 127), where Lord Thurlow held the same doctrine, and recognized the case of *Chapman v. Hart*. The question was, whether a bond found in a drawer in a house in Suffolk passed

under a bequest of "all my goods and chattels in Suffolk," and whether the word bona would pass bonds and credits: and his Lordship said, "Choses in action have no locality. Bonds have no more locality than other choses in action, otherwise than by drawing the jurisdiction of the ecclesiastical court, and the judgment in that case (*Chapman v. Hart*) must prevail. In this case also it has weight that the house was given to the same person. Removal of goods for a necessary purpose is not an ademption of a specific legacy. But would you follow bonds and judgments in the same manner? It would be too much to argue it in that way. The authority of that case must go so far as to include bonds with other choses in action as to their want of locality."

[266] It is thus settled that a bond, and stock have no locality any more than other choses in action, except for the purpose of probate and administration: and therefore as the words here are bona & catalla felonum they do not pass stock, which I consider is a chose in action, or in the nature of a chose in action. It is not a thing tangible of which you can take corporal possession, and therefore, without having recourse to the distinction founded on the words "in" and "within," as not passing any thing which is locally situate without the manor, stock, as a chose in action, does not pass by this grant as bonum aut catallum, and therefore it is impossible to refuse our judgment to the crown.

I am desirous of repeating such of the reasons which I have given as are founded on the fact stated in the replication, that the archbishop was seised at the time of these various grants of many other manors: for in case of his alienation of any or all of them singly to different persons, as he might have done, the absurdity and impracticability, which would ensue from adopting the construction contended for by the defendants, would be infinite and monstrous. Independently of that however we are of opinion, that judgment should be given for the crown. That is the opinion of the Court, at least with the exception of my brother Garrow, who has abstained, from motives of delicacy^{*1}, from expressing any opinion: but my [267] brothers Graham and Wood concur fully in the judgment which I have delivered. The reasons which I have given are my own, and for those I am alone responsible.

We therefore give judgment for the Crown^{*2}.

*1 Having been Attorney General when the proceeding was instituted.

*2 It appears by the following case, which is in Lane, 90, and the cases there cited arguendo, that the question of the locality of a chose in action of an outlaw on a similar claim, in virtue of a royal franchise, was made in this court in the reign of James.

Bromley's Case. Hil. 8 Jac.

Hutton, Serj. came to the bar, and shewed that one Bromley had before this time made a lease for years, in the county palatine of Durham, of certain coal mines in that county, rendering rent £100 per annum, which rent is arrear for divers years, and that Bromley became outlawed here in the Common Pleas for debt, at the suit of Cullamour, a merchant: and that the king had granted this debt, due upon this lease for years, as forfeited for outlawry unto him. And Hutton, for the bishop, said that it belongs to him, because he had all the goods of men outlawed within his county; and if this debt belongs to the king or bishop, it was the doubt, the party being outlawed in the county of Northumberland, which is out of the county palatine of Durham.

Tanfield, Chief Baron, said that the debt shall follow the person; and he said that in 21 Eliz. *Fire and Jefferies* [268] case, it was a question if debt upon a bond shall be forfeited to him who had such a privilege where the bond is; and he said that in this case it was resolved that he shall have the bond and debt (who had bona utlagatorum) where the bond is: and so it was resolved, as he said, in a case referred out of the realm of Ireland; but here is a debt which accrueth by reason of a real contract of goods in the county palatine, and he who is debtor is the party outlawed, but not in the county palatine of Durham.

And Hutton, Serj. said, that he had the roll of a case in this court in the time of Edw. III. that the bishop of Durham was allowed a debt in a more strong case than this is; for there a creditor was outlawed in London, and his bond was also in London, and the creditor was only an inhabitant within the county palatine, yet the bishop was allowed this debt.

Curia. Put in your claim, and we will allow that which is reasonable, and it was adjourned.

[A question arose in the course of the proceedings in this case, in which department of the office they ought to be carried on, whether on the King's Remembrancer's, or the Treasurer's Remembrancer's, side of the Court; but the present determination rendered the decision of that point of practice unnecessary.]

[269] SITTINGS AFTER TRINITY TERM, 56 GEO. III. GRAY'S INN HALL.

THE ATTORNEY GENERAL v. THE MARQUIS OF DOWNSHIRE. 13th June 1816.—Construction of the grants of the king.—A grant of exemption from forestal duties, does not pass the forestal rights from which those duties spring: therefore a grant of exemption from forestal duties, does not give such a right to the grantee as will give him a claim to an allotment on the inclosure of commonable lands within a forest, in consideration of the forestal rights.—To pass forestal rights there must be express words, indicative of that particular purpose, in the grant. Semble, such rights, properly so called, are not grantable to a subject.—A grant of a manor to A. with particular words of reference to a previous grant to B. as “with all liberties, &c. &c. which B. had”—“in as full and ample manner as B. held and enjoyed, &c. &c.” is not sufficient to pass forestal rights, which had been granted to, and enjoyed by B., without express words.—A decision in *Eyre* against a former grantee, and submitted to by him, if followed by conformable usage, is conclusive on those claiming under him.

In this case the question was, the extent of the forestal rights of the crown within the manor of Easthampstead (Berks), as opposed to the claims of the defendant, the proprietor of the manor, under various grants from the crown, with a view to allotments of the commonable lands in that part of the forest of Windsor about to be inclosed under recent acts of parliament: and it depended entirely on the construction of those grants by the court, with reference to the facts put on the record by the finding of the jury.

On the trial of an issue, directed by those acts, for the purpose of ascertaining the rights of claimants in the usual way, the jury had returned [270] a special verdict *, and on that the case now came on for argument:

27th May.—Shepherd for the crown: and Taunton, W. E. for the defendant

The arguments, and the cases which were cited, are fully stated and considered in the judgment of the court, as now delivered by—

13th June—THOMSON, Lord Chief Baron, (after time taken to deliberate,) as follows †.

This was a suit by the Attorney General, on behalf of his Majesty, on an issue as directed by two acts of parliament of the 53d and 55th of the King for the inclosure of Windsor forest.

Those acts have provided, that certain compensation should be made to the crown, and all other parties interested in the forest, in lieu of the several rights, to which they claimed to be entitled in the forest so about to be inclosed. Those claims were thereupon referred to a trial at law, on a feigned issue, on which the question was, whether his Majesty was, in fact, entitled to the forestal rights and interests claimed to belong to the crown, in and over the parishes and places within the regard of the forest.

* The parts of the special verdict on which the points in this case turned, were read and dwelt upon with much particularity and minuteness by the Lord Chief Baron, in delivering the judgment of the Court: and as his Lordship has so blended, with the passages to which he referred, the comments and observations which occurred to him, as that it would have been necessary almost to repeat the case again in the judgment, the special verdict is not stated here, in the usual course. Indeed, the judgment itself is altogether so complete a detail of the facts of the case, and the documents on which the claim is founded, that it has been thought necessary to state but very little more, for the purpose of introducing the substance of the question, and the nature of the claim.

† His Lordship had previously observed, that the judgment was given *non*, out of the common course, by consent, that it might be entered as of the last Term.

The acts of parliament recite, that the Marquis of Downshire claims to hold the manor freed and exempt from all forestal rights whatsoever; and the marquis, by his plea, says, that the king is *not entitled to any forestal rights or interest in the manor and parish of Easthampstead, for which compensation ought to be made under the act of parliament*. It is, in other words, a question, whether the crown is entitled to forestal rights there: for, if it is entitled to forestal rights, the compensation follows, as a matter of course.

This being the issue which was joined between the Attorney General and the Marquis of Downshire, it came on to be tried at the Summer Assizes for Berks, in 1814. A special verdict was then found, which states,—"That the forest of Windsor is an ancient and royal forest, within the county of Berks, extending over and comprising divers parishes and places, situate and being within the regard thereof; and that the [272] within-named manor and parish of Easthampstead continually, from time immemorial, have been and are within the metes and (except the within-named park) parcel of the within-named forest: and that the within-named park was, up to and until the 2d day of June, in the 12th year of the reign of King Charles I. late king of England, also within the metes and parcel of the said forest." The finding does not stop at the word "metes": and a good deal of argument was urged on the part of the defendant in this case, to shew that the manor of Easthampstead might be within the metes and bounds, and yet not within the forest; that is to say, not within the regard of the forest. The special verdict having found, "that the manor and parish of Easthampstead are within the metes and bounds, and except the park, parcel of the within-named forest, and that the park was, up to the 12th year of Charles I. parcel of the forest:" the jury further state, "that the park of Easthampstead is situate within the within-named manor and parish of Easthampstead, and that the king is not entitled to any forestal right or interest within the said park, but that the same park is exempt from all the laws of the forest, and all the rights of the crown, in respect thereof;" so that, with regard to the park, the jury, by their finding, have expressly negatived the crown's right to any interest whatsoever within the park, and consequently to any compensation whatsoever in respect of that. That part of the case, therefore, the jury have decided upon.

[273] Then the jury further find, (and this is a finding upon this special verdict, extremely material to be attended to :) "that the king and his predecessors, kings and queens of England, have continually, from time immemorial, within the same manor and parish, except in the said park, from the said 2d day of June, in the 12th year of the reign of Charles I. exercised such forestal rights and interests as are claimed by, and to belong to his majesty, in and over the parishes and places within the regard of the said forest:" finding an actual usage by the crown of forestal rights over these lands, in respect of which they are now claimed, notwithstanding any supposed grants that may have existed, to convey the right from the crown.

They further find, "that before and on the 27th of February, in the 20th year of the reign of King Henry III." (and this is the date of the first grant upon which any right which the defendants can claim must arise), "the within-named manor and parish of Easthampstead, and the manor of Hurley, were within the regard of the said forest of Windsor; and that the prior and monks of the church of St. Mary, of Hurley, a cell of the abbey of Westminster, were seised of the within-named manor of Easthampstead, and of the manor of Hurley, with their appurtenances, in their demesne, as of fee, in right of their priory of Hurley; and that they being so seised thereof, certain letters patent were made by King Henry III. under his great seal of England, bearing date at Woodstock, on the said 27th day of February, in [274] the 20th of his reign." Those letters patent are then set out verbatim. They begin by reciting his Majesty's pious and good intentions towards which monastery: and he grants for him, and his heirs for ever, to God, and the church of St. Mary, of Hurley, (which is a cell of the abbey of Westminster,) and to Richard, the prior of Hurley, and the monks there serving God, and their successors, all the lands and donations of lands, men, alms, property, rents, and possessions, and so on, under general words: in short, a confirmation of whatever they then possessed; and it uses a great number of words of Saxon derivation, as "infangenthef" and "utfangenthef," and a great many others, "infang and forfang," &c. &c. &c. and escape from prison, and murder, and robbery, and of money which belongs to murder and robbery, and forestalling, within time and without, and with all causes which are and can be; and granting also,

"that the church of Hurley, and the prior and monks, be quit of all mercies, and that they, and all the men of the tenements which they hold of the same prior, be free from all *scot and geld*." Those terms, it was contended, were properly terms which applied to impositions in the forests; but that is not so, for it means tax and tribute every where, in point of fact, and thus it is true, it may include the forest,—“and all aids of the king's sheriffs, and their ministers, and mercy and fine of county, and hydage, and carucage, and danegeld, and horngeld, and wapentake, and talliage, lastage, and stallage, and sewynge, miskening, mandbrig, burchbrig, shires and hundreds, [275] *swanimotes*, pleas and plaints, assizes, views and summonses: and of the carrying of treasure, and ward and wardpenny and averpenny, and hundred penny and bord-halfpenny, and theirthingpenny: and from all works of castles, parks, walls, vivaries, and bridges, inclosures, and from all carriage, summage, and navage, and the building of royal houses, and all manner of work;” and the king forbids “that the woods of the aforesaid prior and monks shall be, in any manner, taken for the works aforesaid, or any other: and likewise that the corn of them, or of their men, or any of the chattels of them, or of their men, shall be taken for the purveyance of castles: and he wills that they may be freely and sufficiently, without any exaction of chiminage,” (which is a toll for wayfares through the forest,) “or other impediments, take of all their woods to their own proper use, when they will, nor shall they, by reason thereof, be put in forfeiture of waste, or in mercy; and also all lands, purprestures now made, and all the assurts of them, and their men, who are not earls or barons now made, and which thereafter shall be made by royal assent: *and he quits claim to them, for ever, of waste and regard*, and of the view of foresters, and of all other things which to forest or foresters pertain; and that then, and their successors, for [276] ever, and their aforesaid men, of the tenements which they hold of them, be quit of the lawing of dogs.*”

This last sentence certainly does purport to convey to them exemptions (for that is the view in which I see it) from their attendance on these swanimote courts, and from the view of foresters (who are the persons who by the law of the forest are to watch and take notice of the misconduct of the persons within the forest, with regard to that forest,) and of all other things which to forest or foresters pertain, and that they shall be quit of the lawing of dogs—that lawing of dogs being (as we all know) what the foresters were to do, as part of their duty, in respect to the cutting off the claws of dogs within the forest, to prevent their chasing the deer.

Then follows this, which has nothing to do with the forest. —“That the prior and monks and their men, of the tenements which they hold of them, be free and quit of all toll in every market, and in all fairs, and in all passage of bridges, waters, ways, and of the sea throughout our whole kingdom, and throughout all our lands in which we can grant liberties to them, and that all the wares of them and of their men in the aforesaid places, be likewise quit of all toll.” The king then grants, that “they may have view of frankpledge in all their lands and tenements, with plea of unlawful distress, and with fines for licence of agreement” and then he grants and confirms to them—[277] “that if any of their men who are not earls or barons, for his offence ought to lose life, or member, or shall fly and will not abide judgment, or shall have committed any offence for which he ought to lose his chattels, wheresoever justice ought to be done, either in our Court or in any other Court, the same shall be the chattels of the aforesaid prior and monks, and that it shall be lawful to them, without the disturbance of the sheriffs and all our bailiffs and others, to put themselves in possession of the aforesaid chattels, in the aforesaid cases, and in others, where the king's bailiffs, if the same chattels belong to him, may and ought to seize the same into his hands.” Then it grants, “waifs, and estrays, and if any of the tenants of the aforesaid prior and monks shall forfeit their fee which they hold of the aforesaid prior and monks, it shall be lawful to them to put themselves in seisin of the said fee, and the said fee, with the appurtenances, to possess, notwithstanding that the king have been accustomed to possess the fees of fugitives, and persons condemned for a year and a day, and if any of their tenants or men, except earls and barons, be amerced before the king, or the justices, sheriffs, constables, foresters, bailiffs, or other his

* It was contended, in the argument for the defendant (citing Coke, 4 Inst. 306), that the effect of these words was a complete disafforestation; and that where a forest was once disafforested, the forestal rights could not be revived without matter of record, since the Carta de Foresta.

ministers of what condition soever they be, for whatever cause, offence, or forfeiture, the said prior and monks shall have all the mercies, and amerciements, and fines, for the licence of agreement, and their distresses without any contradiction; and if it shall happen in any case, the said mercies and amerciements shall have [278] been collected by the bailiffs of the king, or his heirs, they shall at his Exchequer, by the view of the treasurer for the time being, be restored to the same prior and his successors without diminution;” also he grants and confirms to them, that “if it shall happen, that they shall not have used any of the aforesaid liberties, nevertheless, they may hereafter use the same: and prohibits, any one thereupon to vex or disquiet the aforesaid prior and monks thereof, or to do, or permit to be done to them, any molestation, or injury, or put them in plea of any of their tenements which they hold, except before the king and his heirs, or their justices: also granting that no one shall enter their fees, or may have, or retain their lands, without the consent of the prior for the time being; all which things he grants and confirms to them *in pure and perpetual alms, with all liberties, and free customs* which the royal power can more fully confer on any religious house for the love of God, and for the soul of the Lord the King John, his father, and for the souls of all his ancestors and successors: and he prohibits upon forfeiture, &c. *that any justice, sheriff, constable, forester, or their minister, do intermeddle himself or themselves, in any matter great or small, concerning their lands, rents, possessions, or woods, against this charter, nor forfeit them or their men in any thing inasmuch as we have taken them, and all the property and possessions of them and of their men into our custody and special protection.*”

[279] Then the special verdict finds, that on the 16th day of May, in the 2d of Henry IV. letters patent were made and passed by writ of the privy seal to this effect: —“The king, considering that the church, belfry, and priory houses of Hurley, within the forest of Windsor, which is of the foundation of the progenitors of Mary, the king’s late most dear consort, deceased, and in the king’s patronage, are so weak and ruinous, that for the reparation of the church, belfry, and houses aforesaid, the prior and convent of the aforesaid priory cannot provide:” the king, of his special grace, and by the assent of his council, granted to the same prior and convent “licence to fell, sell, and to their own proper use take competent wood for timber and other wood to the value of one hundred marks of their own wood, within the forest aforesaid, for the reparations of the church, belfry, and houses aforesaid, without the disturbance or impeachment of the king or his ministers whomsoever, saving always the vert for the king’s wild beasts there, by the survey of the foresters and other officers.”

So that here, notwithstanding the supposed grant of Henry III., which is contended to have passed to the convent the right of taking their own wood without any disturbance, we find that in the 2d Hen. IV. there is a licence to take a portion of their own wood only, and that only for a particular purpose, namely, for the repair of the belfry of the church and the priory houses within that priory. That is certainly not consistent with [280] the notion that they had under their grant of Henry III. any such right as that of taking the wood generally: it bears strongly the appearance that at that time of day the grant had not been put in use, so far as the wood was concerned: if it had, there would have been no occasion for this special licence from Henry IV. so many years after to grant to the monastery, this particular right of taking the wood for this special purpose, and it is to take it only for once, it is not that they may take it from time to time, but to take it for once, and for this special purpose.

They then find the dissolution of this, (which is a lesser) monastery by the act of parliament of the 27th of King Henry VIII. by which it is enacted, “that all monasteries and religious houses not possessed of 200l. a year, and every thing belonging to them, shall be dissolved, and that his highness shall have all such monasteries and religious houses which at any time within one year next before the making of that act had been given and granted to his majesty by any abbot, prior, abbess, or prioress, under their convent seals, or that otherwise had been suppressed or dissolved, and all and singular the manors, lands, tenements, rents, services, reversions, tithes, pensions, portions, churches, chapels, and so on, and all other interests and hereditaments to the same belonging to hold to the crown for ever.”

The verdict then states, that ‘by virtue of that act of parliament, King Henry VIII. became and [281] was seised of the within-named manor of Easthampstead, and of the said manor of Hurley, with their appurtenances in his demesne, as of fee in right

of his crown of England, in such manner and form as the said act of parliament passed the same."

There is then set out a grant from King Henry VIII. of the 19th of May, in the 36th year of his reign, in consideration of 400*l.*, to Leonard Chamberlayne, Esq. amongst other things of the "within-named manor of Easthampstead," and the manor of Hurley, with all their rights, members, and appurtenances in the said county of Berks, to the said late priory of Hurley formerly belonging, and being parcel of the possessions thereof, and also amongst other things of all and singular messuages, houses, edifices, mills, waters, fisheries, fishings, glebe lands, meadows, feedings, pastures, commons, knight's fees, escheats, reliefs, rent, reversions, and services, and also woods and underwoods, and other his rights, profits, commodities, emoluments, possessions, and hereditaments whatsoever, with all their appurtenances in the towns, fields, parishes, and hamlets, of Hurley and Easthampstead, in the said county of Berks, and elsewhere soever, to the said manors, or either of them, in any wise howsoever, belonging or appertaining, or as being members or parcels of the same, thencefore had, known, accepted, reputed, occupied, or used as fully and entirely, and in as ample manner and form as the last prior, and the late convent of the said late priory of Hurley, or any of the predecessors of them, in right [282] of the said late priory of Hurley, at any time before the dissolution of the same late priory had, held, or enjoyed or ought to have held or enjoyed the aforesaid manor, lands, tenements, and other the premises, with the appurtenances, or any parcel thereof, and as fully and entirely, and in as ample manner and form as all and singular the same premises came to the hands of him the said Lord Henry VIII. late king of England, by reason of the dissolution of the said late priory, or of any act of parliament, or otherwise, and in his hands then were or ought to be, or to have been, and also such sorts of courts leet, view of frankpledge and free warrens, and all things to view of frankpledge and free warren, belonging, and all chattels, waifs, and estrays, and all other profits, &c. which, &c. and as fully and entirely, in as ample manner and form as the said last prior, as fully and entirely, and in as ample manner and form as the said last prior, and the late convent of the said late priory of Hurley, or any of them, or any or either of the predecessors of them, had, held, or enjoyed, or ought to have had, held, or enjoyed, in the manors aforesaid, and other the premises, by reason or pretext of any prescription, use, or custom thencefore had or used, or by reason or pretext of any grants or confirmations, or of any letters patent by him the said Lord Henry, or any of his progenitors of the said prior, &c. or any of his predecessors in anywise however made or granted, or by any other mode whatsoever: to have and [283] to hold the aforesaid manors, messuages, lands, tenements, courts leet, view of frankpledge, chattels, waifs, estrays, free warren, and all and singular the premises above expressed and specified, with all their appurtenances to the aforesaid Leonard Chamberlayne, his heirs and assigns for ever.

There is not, therefore, in this grant—of the manor, and of what, strictly speaking, belongs to the manor only, as far as I can read and construe the grant—any express mention made of forestal rights, as being intended to be conveyed by this grant. It is a grant of the manor, and of all things belonging to that manor as fully as the priory enjoyed it at the time of the dissolution. It grants (what I did not perceive to be contained in the grant of Henry III.) free warren. I believe it occurs here for the first time. Now a grant of free warren is by no means a grant of forestal rights: for the beasts of the warren are very different from the beasts of the forest: the beasts of free warren are said to be only hares, conies, and the roe, and certainly free warren does not comprehend beasts of the forest, therefore, nothing properly a forestal right, can pass by that: Then the grant runs "To hold and enjoy these manors, messuages, lands, tenements, courts leet, view of frankpledge, chattels, waifs, estrays, free warrens, and all and singular other the premises above expressed and specified, with all their appurtenances to Leonard Chamberlayne, his heirs and assigns, for ever."

[284] The jury find, that "by virtue of these letters patent, the said Leonard Chamberlayne became, and was seised of the within-named manor of Easthampstead and the manor of Hurley, with the appurtenances, and of such of their said liberties, franchises, immunities, and privileges, therein mentioned, as did or might pass the same." In point of fact, the jury have not found what he actually did possess under this grant, but say, that he became seised of what did or might pass by that grant.

They further state, "that the manor of Easthampstead, and the manor of Hurley, with every of their rights, members, liberties, franchises, immunities, privilege, and so on, granted to Chamberlayne, afterwards by divers lawful conveyances became,

and were vested in Richard, Lord Lovelace: and that the said manor of Easthampstead, with every of the rights, members, liberties, franchises, and so on, granted to the said Leonard Chamberlayne, became and was vested in the said Arthur, Marquis of Downshire; and that, at the time of passing the act of the 53d of Geo. III. for inclosing the common lands within the forest of Windsor, he was seised to him and his heirs, of and in the said manor of Easthampstead, with every of its rights, members, and appurtenances, *and of the liberties, franchises, immunities and privileges* thereunto belonging and appertaining, as fully, freely, and entirely, and in as ample manner and form as the said Leonard Chamberlayne was seised thereof, by virtue of the said grant to [285] him thereof made." I have already stated, that it is not found what Leonard Chamberlayne, in point of fact, possessed under that grant.

It is further stated, that "on the 6th day of February, in the 6th year of the reign of King Charles I. the said Richard, Lord Lovelace, being then seised of the said manor of Hurley, with every of its rights, members, *liberties, franchises, immunities, privileges, and appurtenances*, by the said letters patent granted to the said Leonard Chamberlayne, in his demesne, as of fee, *a certain licence* was given under the hand of Henry, Earl of Holland, Chief Justice in Eyre, for the precinct on this side Trent, having full power and authority, by virtue of his office, to grant the same, which is set out in *hæc verba*:" and it states "that the Justice in Eyre had been certified by Sir Richard Harrison, Knt. one of the verderors of his Majesty's forest of Windsor, in the county of Berks:" so that it seems, that at this time, the king was exercising—and, indeed, the special verdict has expressly found, that he had, from time immemorial, except as to the park, since the 12th of Charles I. when the grant was made, exercised—forestal rights. It appears by this document that the verderors, whose duty it was to inspect the timber, and other things on the forest, had certified "that there was a certain coppice of the Right Hon. Richard, Lord Lovelace, commonly called or known by the name of Dodslie's Coppice, containing, by estimation, twenty acres, or thereabouts, lying and being in [286] Hurley, in Fyne's bailiwick, within the forest of Windsor, and county of Berks; and that the same might conveniently be felled, that year, without destruction of the vert or hurt to his Majesty's game;" and the Justice in Eyre says, "I have therefore thought good, for the causes aforesaid, and at the request of the said Lord Lovelace, who is owner of the said coppice, to give licence to the said Lord Lovelace to fell down and inclose the said coppice, so that the same be sufficiently fenced and kept with fences and hedges, according to the assize of the forest, for nine years next coming after the date thereof."

There had also been a licence granted many years before, in Henry IV.'s time, *to the convent*, to fell their own wood, for a particular purpose, which I have already noticed: and then again, so late as the 6th of Charles I. there was this licence granted, in consequence of the approbation of the verderors of the forest, and other officers, to Lord Lovelace, to fell and inclose his coppice for that year, so that the same be sufficiently fenced, and kept with fences and hedges, according to the assize of the forest, for nine years next coming. And that is found by the jury, who state by this verdict, that they further find, that on the 16th day of January, in the 10th year of the reign of King Charles I. one Richard Libb, Esq. being then seised of a certain coppice, situate in the within-named manor and parish of Easthampstead, in the said forest of Windsor, in his demesne, as of fee, a certain other licence was given [287] under the hand of the said Henry, Earl of Holland, Chief Justice in Eyre, of the precinct on this side Trent, having full power and authority, &c. which is just to the same effect as that licence which was granted to Lord Lovelace: and this licence, I take it, was granted, according to the date of it, subsequent to the disallowance of Lord Lovelace's claim, before the Chief Justice in Eyre, which, I apprehend, was in the 8th of Charles I. In the 10th of Charles I. then this further licence is so granted: it is precisely in the same terms as that which had been granted to Lord Lovelace, as the owner in fee. It is, to cut wood in a coppice, within this manor of Easthampstead, of which the Marquis of Downshire is now seised, and with respect to which he claims to exclude the crown from all forestal rights upon that manor.

The jury, with respect to the park, have taken upon themselves, very properly, to decide upon the forestal right: they state that "the late King Charles I. and his predecessors, were, from time immemorial, seised of the within-named park of Easthampstead, in right of his and their royal crowns: and that Charles I. being so seised, did, by letters patent made under his great seal of England, bearing date at

Westminster, on the 2d of June, in the 12th year of his reign, grant for him, his heirs and successors, to William Trumball, Esq. the park of Easthampstead: "not with any general words, which might be of doubtful import how much they carried, and how much they did not; but with certain express words: [288] "to hold and enjoy the same, free and exempt from all the laws of the forest, and all the rights of the crown, in respect thereof, and his heirs and assigns, for ever." So that, with regard to the park, it seems perfectly clear, that by fit and apt words contained in this grant, not only the park passed, but all forestal rights passed; and with regard to the park, it may therefore be said to be disafforested; but then *that is confined to the park, and to the park only*. Then the verdict states, that the same park has since, by divers lawful conveyances, become, and is now vested in the Marquis of Downshire.

These facts having been found by the special verdict, the doubt submitted to the Court by the jury is, whether or not, upon the whole matter found, the king is entitled to any forestal rights or interest within the within-mentioned manor and parish of Easthampstead, out of the said park of Easthampstead, for which a compensation ought to be made under and by virtue of the within-named act of parliament made and passed in the 53d year of the king. That they submit to the judgment of the court; "that if upon the whole matter it shall seem to the Court that the king is entitled to such forestal rights and interest within the within-mentioned manor and parish of Easthampstead, out of the said park of Easthampstead, as are claimed by, and to belong to his majesty in and over the parishes and places within the regard of the said forest, then they say, that the king is entitled to forestal rights and interests within the [289] within-mentioned manor and parish of Easthampstead, out of the said parish of Easthampstead, in manner and form as the Attorney General has within claimed; and if upon the whole matter it should seem to the Court that our lord the king was entitled to forestal rights and interest within the same manor and parish, but that such rights and interest had been diminished by grants, charters, or other means above mentioned, so as that such forestal rights are not so extensive in the said manor and parish as in the other manors and parishes mentioned in the said act of parliament; then they say, that our lord the king is entitled only to such limited rights and interest as it shall seem to the Court that our lord the king is entitled unto: and in such case it was agreed to refer the proportion of his majesty's compensation for such his limited rights therein, to an arbitrator who is mentioned in the special verdict. But if upon the whole matter it shall seem to the Court that our lord the king is not entitled to any forestal rights or interest within the within mentioned manor and parish of Easthampstead, for which compensation ought to be made under and by virtue of the last-mentioned act of parliament: then the jurors say, that our lord the king is not entitled to any forestal rights or interest in the within-named manor and parish of Easthampstead, as the Attorney General for our lord the king has within claimed. This is the substance of the special verdict which has been found, and which raises the questions upon which the Court are now to decide.

[290] It was contended on the part of the crown that there were no forestal rights intended to be passed by this grant of Henry III. to the priory, which has been mentioned—that there was nothing to convey the forestal rights, and that the words of general reference in the subsequent grant of the Crown to Chamberlayne, after the possessions of the monastery had come to the crown, were not sufficient for that purpose,—that there was no allowance of it in Eyre,—and that in the reign of Henry IV. and afterwards licences were granted to cut wood, which would have been unnecessary if they had had forestal rights. That I have stated before and observed on. Then the case of Lord Lovelace himself, who had claimed certain rights, or rather exemptions, within this forest in the 8th of Charles I. was cited and relied on, where certainly all his claims whatever they were, were disallowed. The report of that case is in Sir William Jones, but Sir William Jones certainly has not stated the whole of the claim which was actually then made. It appears by the record from the Tower, that the claim was more extensive than is there stated: in short, that the claim comprehended every thing that was granted by name to the convent, by the grant of Henry III. And he claimed also free warren which was not given by that grant of Henry III. but by the subsequent grant of Henry VIII. It was, in fact, bringing before the Court of Eyre, the whole that he could possibly lay any claim to, under any title whatsoever, and the result of that was, that by the Court in Eyre, that claim was wholly disallowed, [291]

and it does not appear that any subsequent steps were ever after taken to impeach that judgment of the Court in Eyre.

It was contended on the part of the defendant however, that the crown, under the circumstances was not entitled to any forestal rights: or if it was, that they were only of a limited nature. To shew that the king was not entitled to any forestal rights, or that they were limited; it was contended that these grants passed entirely, or in part, all, or some forestal rights. We are, however, of opinion, that they did not; for the grants themselves not being of forestal rights in terms, but only as it seems, to us, of certain exemptions from forestal rights, not of the forestal rights themselves, as passing, or intended to pass, by those grants—exemptions from attending courts and a variety of other minor exemptions, such as from having their dogs lawed, &c.:—but nothing is therein expressed to have been intended to pass, so as to exclude the crown from exercising in right of the crown, as it has exercised in point of fact, the forestal rights which inherently belonged to the crown.

But it was contended, though not very strongly, that, supposing the monastery to have had these forestal rights at the time of the dissolution, and that they came with the property belonging to the monastery, that is to say, with the manor to the hands of the crown, they were well granted by the new grant to Chamberlayne. Now Chamberlayne's grant certainly contains no special men-[292]-tion of any thing like forest rights: it is a grant, as confined to the manor, of the manor, and of all privileges, and every thing which with that manor ought to be enjoyed. Upon the defendant's construction of it a great question would arise, (which, it seems to me, ought to be answered in the negative,) whether the crown could, in this way, convey the forestal rights. But there was no grant in the letters patent, of any right to chase or kill beasts of the forest. The non-usage, since Chamberlayne's grant, explains what was not comprised in it, and the actual finding of the jury upon this subject seems to be, I think, decisive, that the forestal rights have ever been exercised by the crown, notwithstanding those grants, with the exception only of forestal rights within the park, since the deed of the 12th of Charles I.

Upon the law of the question, as to what passed under such general words in a grant from the crown, I think the case of *The Bishop of Coventry and Litchfield*, in 2 Rolle's Abr. 203, is material to be attended to, as it is decisive on that point. It is this:—"If the king grants certain manors, which are within his forest of D. to a bishop and his successors, and grants besides that they shall have the said manor free, and acquit of the said forest, and pleas of the forest, &c.; and after the said manors come into the hands of the king, and he restores them to the bishop,"—I say, *restores* them, for so I translate the word *reddit*, and that I take to be the true meaning of it,—“still the bishop shall [293] not be exempted of the forest for these manors.” In 2 Rolle's Abr. 193, tit. *Prerogative le Roy*, l. 25, under the head, of “What things shall pass by general words,” I find the following case:—"The dean and chapter of J. were seised of divers manors in Essex, in fee, and in the 1st of Edward IV. the king grants to them and their successors, that they shall be discharged of all purveyance of the king in their manors in Essex; and afterwards, by the 27th of Henry VIII. c. 4, it was enacted, that the purveyors of the king might purvey in all for the king's provision, as well within liberties as without, notwithstanding any grant to the contrary; and afterwards, in the 35th of Henry VIII. the dean and chapter surrender their manors to the king, his heirs and successors; and afterwards the king grants the same manors to the ancestors of Lord D'Arey, with *tot tales quantas et hujusmodi libertates*, as the dean or chapter, or any of their predecessors had, any statute notwithstanding. In this case, in as much as the old liberties were extinct by the statute, this general grant shall not create anew the said liberties that the dean and chapter had before." Then follows another case, l. 41, “The bishop of Coventry, among other liberties, had a liberty *de catallis felonum*, within his manor of B. and afterwards this manor came to Henry VIII. by attainder, and this is granted, with *tot tales tantus et quales libertates* the bishop, or his predecessors had: the grantee shall not have by this grant the same liberties [294] which the bishop had, for when they are once extinct, the words of revivor will not be sufficient; but there ought to be words of grant, and such general grant will not be sufficient.” It seems to me, therefore, on these authorities, that there is no ground for contending, that the general words contained in this grant to Chamberlayne, could grant this liberty to him, even provided the convent had had them.

I have already stated, that the convent no where appears to have had granted to them a liberty of chasing and killing beasts of the forest, but only exemptions from certain services, which, as belonging to the forest, they were bound to perform, and certain exemptions from the regard of the officers of the forest, for their defaults.

I was very desirous of finding what kind of remedy there was, provided there had been an improper disallowance of the claims, made before the Chief Justice in Eyre: and I find it appears, in the first place, that if they should refuse to receive the claim, there is an old writ in the Register de libertatibus allocandis, which lies in case of their refusal, and that is mentioned in 4 Inst. 297. And if having received the claim, they give an erroneous judgment upon that claim, a writ of error lies (it is expressly stated) from that judgment to the Court of King's Bench. Now certain it is, that this disallowance of Lord Lovelace's claims has been acquiesced in, from that time down to [295] the present, and there appears to have been no attempt, by a writ of error, or otherwise, to get rid of it, although it is plain he might have so done if he had thought proper.

There was only one point in that case of Lord Lovelace, which the Court took time to consider about, that was, as to the courts leet; but that is totally different from any thing claimed under the idea of forestal rights: that is a grant of what is generally contained in grants to lords of manors; but as to all his other claims, according to that case they were totally disallowed; and he made no attempt whatever to bring into review the decision of the then Court of Eyre. The jury do not find that these grants were ever put in use; on the contrary it is found, by this special verdict, that all forestal rights were exercised by the crown over the manors, except within the park, from the time of granting that park with an exemption from forestal rights, by express name. What ground is there for saying, therefore, the grantees had any such rights given to them, as to exclude the crown from the exercise of its forestal rights. They had indeed certain privileges, in the nature of exemptions: and supposing those exemptions to have been well granted, and put in use, still the king's forestal rights, namely, his chase of venison, and the preservation of the vert, would have remained to the crown, notwithstanding these grants. It is, in respect of the right on the land principally, I should imagine, that the compensation provided for by the act is to be made, but it is on the fo-[296]-restal rights, as far as either party is entitled, that any right in respect of the land depends.

There seems to be no ground for drawing any line between the crown's being generally entitled to forestal rights, or only to some partial rights: I mean, on any of the facts of this case: so that the second matter referred to the Court seems not necessarily to arise; for if we are satisfied, from the facts disclosed, that the king still has his forestal rights, I think we are bound to say, that the first finding in the matter referred to us, by the verdict, is right, and that the king is entitled to all his forestal rights on this place, (with the exception of the park,) taking it in the words in which the jury have referred the question on the matter to us.

It seems to me, for the reasons I have given, (and those I am alone answerable for,) though the whole Court concurs in the conclusion, that the king is entitled to the forestal rights in the way the special verdict has submitted them to us: and therefore the entry, I take it, should be, that "it appears to the Court that our said lord the king is entitled to such forestal rights and interest within the within-mentioned manor and parish of Easthampstead, out of the said park of Easthampstead, (for that is the question referred to us by the special verdict,) as are claimed by, and to belong to his majesty, in and over the parishes and places within the regard of the said forest." I have [297] already stated, that it appears very plainly that this manor was clearly once within the regard of the forest, it being so stated and so found by the verdict, — and that the "king is entitled to such forestal rights and interest, in manner and form as the Attorney General hath within claimed."

CORAM RICHARDS, LD. CH. BARON.

CUFF v. BROWN AND OTHERS. 12th January 1818. — If an apprentice after serving two years of his time, and without any misconduct on the part of the master, runs away of his own accord, and enlists as a soldier, and afterwards is willing to return, but the master will not receive him again, the master is not compellable

to return any part of the apprentice fee.—Nor will the court restrain the holder of a promissory note given for the amount from proceeding to recover it at law, by injunction, under such circumstances.

[Distinguished, *Ex parte Pankerd*, 1819, 3 B. & Ald. 258. See *Whincup v. Hughes*, 1871, L. R. 6 C. P. 84.]

The case, as it appeared by the pleading, was as follows:—In the beginning of October 1812, the plaintiff entered into an agreement with the defendant Brown and Samuel Cary, of Bristol, who were then in partnership as conveyancers, attornies, and solicitors, to place William Cuff the younger, the plaintiff's son, with them as an apprentice, in the business of conveyancer for eight years, and to article him at the end of the first three years as an articulated clerk in their business of attornies and solicitors, and they were to receive the sum of 100l.; the payment of which was to be secured by a promissory note for 99l. 19s. payable at the end of three years. The note was drawn and delivered to Brown, and an indenture dated the 29th October 1812, was accordingly prepared and executed between Cuff the elder and Cuff the younger of the first part, and the defendant Brown and Cary of the other part. It [298] witnessed that Brown and Cary, in consideration of 100l. paid, or reserved to be paid by the promissory note of the said William Cuff the elder, and also in consideration of the services to be done and performed in and about their business, as after mentioned, covenanted to receive and take the said William Cuff the younger to be their clerk and apprentice, in the profession of conveyancing for the term of eight years, and to teach and instruct him in the business of a conveyancer. And there was a covenant by Cuff the elder, that his son should diligently, faithfully, and to the best of his skill, power, and ability, serve them the said Brown and Cary as their clerk and apprentice, in their profession of a conveyancer for eight years, and not absent or withdraw himself during his stipulated office hours from their service without their leave. And there was also a covenant by Brown and Cary, that they or either of them would at any time before the expiration of the first three years of the said term, upon the request of the said Cuff the son, but at the costs and charges of Cuff the elder, or Cuff the son, in respect of the stamp duties, and all other expences, but without any further or other premium or fee, accept and take the said Cuff the son to be their clerk, in their practice, profession, or employment of an attorney or solicitor.

Brown and Cary dissolved partnership in September 1813; and Cuff the son was, by consent of all parties, continued with Brown alone to serve the remainder of his time.

[299] In 1814 Cuff the son ran away and enlisted as a soldier; and, after he had been absent some time, his father applied to the defendant Brown to take him back again, which Brown at first was inclined to do; but afterwards, in consequence of hearing of some other misconduct of the young man, Brown refused to take him again.

The defendant Hurd was agent to Brown, and Brown indorsed the promissory note for 99l. 19s. to Hurd, in part payment of money due from Brown to Hurd; and Hurd brought an action and recovered judgment against the plaintiff for the amount of the note.

Cuff the elder therefore filed his bill against Brown and Hurd, stating the circumstances, and also charging that the indenture of the 29th October 1812, as prepared, was a fraud on the plaintiff, inasmuch as the agreement was that the consideration money was to be paid expressly upon the condition, that Cuff the son should be articulated as an attorney; and the bill charged that the defendant Hurd never gave any consideration for the note, but that it was put into his hands with a full knowledge of all the circumstances, and for the mere purpose of his bringing an action against the plaintiff; and the bill prayed that the note might be cancelled; and that, in case by the terms of the indenture or otherwise, the note was payable by the plaintiff, that the indenture might at all events be declared fraudulent and void, and might be delivered up to be cancelled; and it [300] also prayed for an injunction to restrain the defendant Hurd from suing out execution.

The defendants by their answer negatived the fraud, and insisted that the indenture was conformable to the agreement, which was that the 99l. 19s. was to be paid at all events after the execution of the indenture; and the defendant Hurd denied any knowledge of the circumstances charged by the plaintiff, and that he brought the action as the agent of Brown, but said that he had received it in payment of a debt due to him from Brown.

There were no witnesses examined on either side.

Dauncey and Wray, for the plaintiff, contended, that the indenture was not in conformity with the agreement; for that the premium was not intended to be paid, unless in the event of Cuff the son being articed as an attorney to the defendant Brown; and that as Brown refused to take Cuff the son back again, the plaintiff was entitled in equity to have the premium returned, or at least a proportionate part; and that Hurd, whom they alleged to be the mere agent of Brown, for the purpose of bringing the action, ought to be restrained from taking any advantage of the judgment obtained: and they cited *Therman v. Abell* (2 Vern. 64).

Martin and Roots, for the defendant Brown, insisted that the indenture was conformable to the [301] agreement; that the premium was payable in the first instance upon the execution of the indenture, and did not depend upon the contingency of his being articed as a clerk to Brown and Cary, in their business of attornies—that Brown had done all that was required of him; and that the contract was broken and put an end to by the act of Cuff the son—that this case was distinguishable from the case of *Therman v. Abell*, because in that case the master himself had put away the apprentice; but here the apprentice had run away—and that there was no case made out to warrant the interference of the Court: and they cited *Argles v. Heaseman* (1 Atk. 518), to shew that the Court would not take upon itself jurisdiction in such a case.

Agar and Duckworth, for the defendant Hurd, were stopped by

The Lord Chief Baron, who said, There is no evidence to charge the defendant Hurd, who is a bona fide holder for a valuable consideration, with any improper conduct; nor any case made out against him; and therefore as against him the bill must be dismissed with costs.

With respect to the question of jurisdiction, the Court has jurisdiction in this case, as it was necessary for the parties to come here to discuss the question as between the defendants Brown and Hurd, although the question between the other parties might have been tried at law. The pre-[302]mium of 100l. is a consideration applying to, and extending over, the whole term of eight years. I am told the deed is not according to the agreement; but when I see the deed executed I must have that made out most clearly: and indeed, as it appears to me, I see no contradiction between them. The point is this:—The youth having remained as a clerk two years runs away of his own accord, and enlists as a soldier: he may or may not come back: he chuses however to come back, and then he asks for a return of the premium. It does not appear that there was any misconduct on the part of the master; it is not fair therefore that the young man should demand a return of the consideration money, because he chuses to run away. There is another circumstance to be considered—he may stay with his master for four years, and then run away when his services are become more valuable; and is the master to lose the benefit of that service? It is stated that at one time the master was willing to take him back, but that makes no difference, for there is no contract to bind the master; and it was at the master's option to take him back or not. It makes no difference the money not being paid at the time; for if the money was due on the note, it must be paid, if you can apply it, as the consideration for the indenture being executed. The master performed his contract until it was put an end to by the apprentice, and he is therefore entitled to retain the money arising from the note, as much as if the premium had been paid in money. The bill therefore must be dismissed against the defendant Brown without costs.

[303] CORAM RICHARDS, LD. CH. BARON.

FAREBROTHER v. PRATTENT AND ATCHESON. Saturday, 17th January 1818.—A plaintiff in an interpleading bill having done all in his power to bring the parties before the Court, may obtain a decree, although one of the defendants have not answered, and is not present at the hearing, if he (having appeared to the process,) has been duly brought into contempt for want of answer.

The plaintiff (an auctioneer) sold the defendant Prattent an estate, belonging to Atcheson, by public auction, on which the purchaser paid him a sum of money, by way of deposit, but the defendants did not conclude the purchase, in consequence of disputes about the title.

Both of them had claimed the deposit-money from the plaintiff, and Prattent brought an action at law to recover it. The plaintiff filed this bill for an interpleader and an injunction, and he paid the deposit-money into Court, minus the auction duty, which he had paid to the excise.

Both the defendants appeared; but Aitcheson afterwards absconded, and never put in an answer. The plaintiff having proved him to be in contempt*, obtained an order, that as to him the bill should be taken pro confesso.

The cause came on for hearing in the course of the last Term, as between the plaintiff and the defendant Prattent; but the other defendant, who had not answered, did not then appear; when

[304] Rose, for the defendant Prattent, raised the objection, that even if this were properly a case of interpleader, (which he submitted it was not,) it could not be sustained till all the parties called on to interplead were brought before the Court, and were present at the hearing.

In *Stevenson v. Anderson* (2 Ves. & Bea. 407) the Lord Chancellor said, that it rests upon the plaintiff to bring all the parties into the field who are to contend together, whether, they were within or without the jurisdiction; and in *Jones v. Gilham* (Cooper's Ch. Rep. 219) it was held to be the course of practice, that the plaintiff should set down the cause for hearing. It is therefore incumbent on him, in the first instance, to put the cause in a state to be heard, whatever protection the Court may afterwards think fit to extend to him, by injunction or otherwise, with respect to the subject-matters of the prayer of his bill.

The Lord Chief Baron enquired, if any precedent was in the recollection of any of the bar who were present, of an interpleader decreed, where one of the defendants had not answered, and did not appear at the hearing: Roupell having mentioned the case of *Hodges v. Smith* (1 Cox, 357).

The cause was then ordered to stand over, to afford counsel an opportunity to furnish themselves with whatever precedents and authorities there might be to be found on that point.

[305] The counsel for the plaintiff now admitted, that he had not met with any case more in point than that of *Hodges v. Smith*: which, however, (he submitted) was, in principle, an authority for going into the case, and making a decree in the absence of one of several defendants: having stated his merits,

The Lord Chief Baron determined (having observed that there was no doubt that the present was a proper case of interpleader) that the Court might make a decree in favour of a plaintiff, in the absence of a defendant, who was in contempt for want of answer, provided the plaintiff had used all necessary diligence. Here the absent defendant (having appeared) is still, in the eye of the law, before the Court, although not present at the hearing. Therefore there must be a

Decree for the plaintiff: with Costs, to be taxed, and paid out of the fund in Court.

[306] TAYLOR v. BAKER, STRONG, METCALFE, AND ANOTHER. Saturday, 17th January 1818.—If a purchaser have been informed, before payment of the purchase-money, that there is any previous incumbrance against the vendor, which would be a lien on the land, it is such sufficient notice as to put him on enquiry; and if the lien turn out to be not of a precisely similar nature,—(as if he have been told that A. had a judgment, who, in fact, had a mortgage)—it is yet, to a certain extent, legal notice, and the Court will set aside conveyances made after such notice in prejudice of the prior incumbrancer.—Where a sale or mortgage is a fraud on a prior incumbrancer, the Court will give costs against the vendee or mortgagee, on setting aside the deeds.

[Followed, *Harvey v. Tebbutt*, 1820, 1 Jac. & W. 199, 202.]

The plaintiff filed this bill in the character of a prior incumbrancer, with notice, praying, to be let in to redeem a previous mortgage subsequently assigned to the defendant Baker; and that a posterior fraudulent sale to him might be set aside; and for an injunction of a pending action of ejectment.

* He was also outlawed.

The bill stated, that the plaintiff had advanced the defendant Strong 300l. on the security of certain freehold and copyhold property, at that time subject to a previous mortgage for 250l. by a term of one thousand years in the freehold, and a defeazible surrender of the copyhold,—that in consideration thereof Strong executed to the plaintiff a lease and release (30th and 31st October 1814) in fee of the freehold, and covenanted to surrender the copyhold, (the plaintiff being then and afterwards in possession, as lessee to Strong,) and that the deeds were afterwards enrolled in the manor court.

Soon after Baker (who was a relation of Strong) applied to him for a security on the premises so mortgaged, for certain money, which Baker claimed to be owing from Strong to him; and Strong, after some delay, at length (having first mentioned the mortgage to plaintiff, as a reason why he could not do so,) agreed to sell to [307] Baker the property for a nominal consideration of 500l.: with a condition, that he might be at liberty to re-purchase, on payment of that sum, with costs and interest; and, on 7th November 1814, he signed an agreement to that effect, but no money passed. In January 1815, the plaintiff's attorney apprised Metcalfe, the defendant Baker's attorney, of the mortgage to plaintiff, and shewed him the deeds, and gave notice to the first mortgagee not to allow Baker to redeem. Strong, on the 19th January, executed a similar security to Baker, to that which he had given the plaintiff; and on the 13th, the first mortgagee, notwithstanding the notice, executed an assignment (dated 3d January) of his term to Metcalfe, (Baker's attorney,) in trust, to attend, &c.: and, on the 23d, Strong surrendered the copyholds to Baker, who was then admitted. Baker then brought an ejectment, on the demise of Metcalfe.

Baker, by his answer, denied being acquainted with Strong's affairs, or with the plaintiff's mortgage,—the claim by him of any debt,—and the alleged agreement; but he stated, that he had some time before become answerable for Strong to the amount of 250l.: and that Strong wishing to pay it, and wanting further pecuniary assistance, agreed with him (Baker) to sell, &c. for 500l.; and that, at the time of the treaty, Strong said, he had given a judgment, or warrant of attorney, to the plaintiff, for money borrowed of him, but that he had then no knowledge of the mort-[308]-gage; and he (and Metcalfe and Strong) admitted the other material facts charged in the bill, and that no money passed at the time of executing the deeds; but Baker stated, that he afterwards paid the whole to Strong's creditors, on his account.

Damney and Treslove, for the plaintiff, submitted that the questions were, whether Baker had had such notice, as that he ought to have ascertained what incumbrances there were on the property, or be bound by the prior charge: and whether he had had such notice in time. To support the affirmative of both those propositions, they cited, as to the first, *Allen v. Anthony* (1 Mer. 282), *Danicks v. Davison* (16 Ves. 249. 17 ib. 433), and the cases there cited; and, on the second, *Fourville v. Nash* (3 P. Wms. 307), *Story v. Lord Windsor* (2 Atk. 630), *Maunderell v. Maunderell* (10 Ves. 246-271), *More v. Mayhew* (1 Ch. Ca. 34), and *Wray v. Wigg* (1 Atk. 384); and they contended, that under the dishonest circumstances of this case, the plaintiff was entitled to a decree, with costs.

Martin, Wetherell, and Wakefield, for the defendants, contended, that under the circumstances Baker had not sufficient notice, the plaintiff's possession being no more than that of any other tenant; and that if it should be considered that he had had notice, it was received too late, and that [309] he was not prevented by it from securing to himself a debt, previously due from Strong, or from purchasing the equity of redemption which Strong possessed, and acquiring, by redeeming the first mortgage, the legal estate. This being an equity of redemption only which had been purchased, distinguishes the present from the cases cited, the subject matters of which were legal estates. All that was done by Baker in this case, amounted merely to a redemption of a first mortgage by a third mortgagee, without notice of the second, which, in equity, may be, and is constantly done.

As to costs, they submitted that this being the case of a mortgagee, the defendants would be entitled to their costs, whatever might be the result of this cause.

RICHARDS, Lord Chief Baron*, (having stated all the circumstances of the case

* The Reporter was not present when this judgment was delivered, but he has been favored with a short and accurate note of it, which may be safely relied on.

with much particularity, both at the commencement, and in the other corresponding part of the judgment,) observed: When Strong mortgaged the premises to the plaintiff, he was merely the owner of the equity of redemption, which he conveyed to Taylor by the deed of October 1814. Afterwards Baker proposed to purchase the property; and he admits, that during that treaty Strong informed him, that he had given the plaintiff a judgment, or warrant of attorney, so that he clearly had notice that some [310] sort of security had passed from Strong to Taylor, and that was certainly such notice of an existing prior incumbrance, as should have put him on further enquiry. Soon after that the plaintiff's attorney shewed the deeds to Metcalfe, Baker's attorney, so that, undoubtedly, the treaty and the purchase were completed after admitted notice. Then, Baker having procured the first mortgage to be assigned to him, the Court could not interfere to restrain him from getting the possession by law, because he had clearly acquired the legal estate.

On that part of the case, the rule certainly is, that between parties who have equal equity, whoever gets the legal estate shall be preferred: but then there must be equal equity, not only in their titles, but in the transactions on which their claims are founded. Here (it is true) both parties were equitable incumbrancers, but the plaintiff was a prior mortgagee: and though the defendant Baker had acquired the legal estate, it is clear that before taking his mortgage, and thereby getting the legal estate, he knew that Taylor had, at that time, an honest charge on the estates: and even had it been but a judgment, it would still have been a lien on the land, and therefore such notice of some species of prior incumbrance as would have bound the mortgagee, and it became Baker's duty to ascertain as he might have done the true state of the fact.

[311] In all events, then, supposing Baker to have any right at all against the plaintiff, it could only be on the ground of the money (if any) which had been actually paid by him on Strong's account, prior to the 2d of January. But he would not be entitled even to that, if he had had, in point of fact, notice of the plaintiff's prior incumbrance, which I cannot but consider that he had; and I think that there is no difference in this case, in point of law, whether it was a judgment or a mortgage, and notice of one was equivalent to notice of the other.

As to the costs, notwithstanding the rule, that a mortgagee generally is entitled to costs, yet when there has been unfair dealing, that forms an exception; therefore the defendants Baker and Strong must not be allowed costs.

The ejectment being founded on a legal right, I cannot restrain the defendant from proceeding. In all other respects I shall

Decree for the plaintiff, with Costs.

[312] CORAM RICHARDS, LD. CH. BARON.

RANDOLPH, Clerk, *v.* GORDON AND OTHERS. Tuesday, 20th January 1818.—

Evidence.—A document produced by a party as evidence in his behalf, must be accompanied by proof of the custody whence he derived it, to satisfy the Court of its authenticity; and if no such proof is given, (his own possession not being sufficient) it will not be permitted to be read, for want of its being shewn to have come from such proper custody, as would make it evidence.—Deposition—that a certain book (offered in evidence) belonged to the defendant, F. Stanley, from whom deponent received it: and that he believed the whole of the writing in the said book to be of the hand-writing of W. Stanley, the grandfather of F. Stanley: (through whom the book was connected with the matter before the Court) and “that the deponent was the better enabled to state of whose hand-writing he believed the said book to be, from his having compared the writing in the said book with the original will in Doctors' Commons of the said W. Stanley, which appears to be wholly in his own hand-writing; and that he believed the said book, and the said will, to be written by one and the same person:”—does not furnish such proof of the hand-writing of W. Stanley, as to be evidence that the book was, in point of fact, written by him; because the witness does not state that he has any reasons for believing, or means of knowing, that either the book or the will is of the hand-writing of W. Stanley, as from having corresponded with him, or having seen him write, &c.; for without such state-

ments the testimony of the deposition is merely matter of inference in form, and does not warrant the conclusion in substance.

The defendants in this suit for an account of the tithes of hay and grass, had set up two payments, as moduses, in their answer, by way of defence; and in proof of them offered, in evidence, a certain book, containing entries of customary payments made in the parish, in lieu of the tithes in question.

To establish the propriety of the custody of this piece of evidence, Thomas Mott (the defendant's attorney) deposed, that the book was the property of Francis Stanley, one of the defendants, and that he had received it from him.

And he also stated, as proof of the hand-writing, that he believed that the whole of the writing in the book was of the hand-writing of William Stanley, D.D. (the grandfather of the [313] defendant, F. Stanley), who had been, (as deponent was informed and believed,) rector of the parish from the year 1690 to 1723, or thereabouts; and that he was the better enabled to state of whose hand-writing he believed the said book to be, from having compared the writing in the said book with the original will, in Doctors' Commons, of the said William Stanley, which appeared to be wholly in his own hand-writing, and that he believed the said book and the said will to be written by one and the same person.

Dauncey and Boteler objected to this document being read: 1st, its not having been proved to have come out of a proper custody, (there being no privity between the plaintiff and the party from whose possession it was produced) so as to make it evidence; and, 2dly, that the testimony to the hand-writing of William Stanley was deficient, because the witness had expressly grounded his knowledge on a comparison of the hand-writing in this book with that in a will, the hand-writing of which had not been previously proved.

Fonblanque, Martin, and Palmer, contra, denied that the witness had founded his testimony on the similarity of hand-writing in this book with that of Dr. Stanley's will, for he had only offered that fact as a corroboration of the testimony borne by him to its being of the hand-writing of the doctor; and they contended, that the effect of the primary testimony was sufficient to establish the fact, of this book having been [314] written by the hand of Dr. Stanley, and that it was as much as had ever been required in proof of the identity of hand-writing.

They cited a case from Justice Buller's *Nisi Prius* (p. 236), where Lord Hardwicke admitted proof by similitude of the hand-writing sworn to by a witness, who had inspected parish books, for the purpose of comparing the writing in question with the parson's signature there. So in *Rice v. Rawlins* (7 East, 382), the same sort of evidence was received by Le Blanc, J. In *Morwood v. Wood* (14 East, 327, in notes), the similarity of a signature with the hand-writing of a will, was held to be sufficient proof. All writings, which are not considered as proving themselves, can only be proved, after great length of time, by such means as have been here resorted to, being the best evidence of which the nature of such documents is capable. To the same point, they mentioned a case of *The Earl of Egremont v. Lord Vaneborough*, said to have arisen, some years ago, on the northern circuit, where books coming from a chest, in which the muniments of the manor were preserved, bearing intrinsic marks of having been written by a former steward of the manor, were received without further proof, in consideration of the impossibility of furnishing better evidence of the hand-writing at so distant a period.

As to the custody, they submitted that the possession of the book by Stanley was sufficient. [315] And they cited the case of *Barto v. Beaumont* (ante, vol. ii 307), where a receipt was admitted in evidence, and was allowed to have come out of the proper custody under circumstances precisely similar, without any proof of the hand-writing, the Court holding that the person who possessed the receipt, being of the same name with the person from whom he derived it, and to whom it had been given, that they were so connected, as to make his the proper custody, and reasonable evidence of proper custody, is all that can be required, and is sufficient. Here it is in proof, besides, that this defendant is descended from the family of the owner of the book.

RICHARDS, Lord Chief Baron (dispensing with the reply). There is no doubt that such books as these should, in all cases, be proved to have come from the proper custody: and to prove that, in this case, it was necessary to shew that the defendant Stanley, in whose possession it was, being the grandson of the former rector of that

name, had found this book among his grandfather's papers. If that had been proved, the book, as far as relates to the question of custody, would have been admissible evidence; but that has not been done in the present case. It is said to have come from the custody of a person, who is one of the defendants, and a grandson of a former rector, and that he delivered it to his attorney, but where he himself got it from is not stated, and it might have been from Mr. Martin's library for any thing [316] that appears here. There are many cases in which books of this sort have been rejected, because they have not been proved to have come out of the proper custody; and I recollect a case in which a book was produced, as coming out of the Bodleian Library, but the Court would not receive it. The rule is the same, in regard to these books, as it is with respect to terriers, which must, in all cases be shewn to have been produced from the proper depositories. I cannot, therefore, receive this book, coming, as it does, merely out of the custody of a defendant, without further evidence of the custody from which he also procured it.

Another objection was made to the proof of the hand-writing of the former rector in the book, by whom the book is said to have been written. If it were really written by him, it is certainly of great value, because books written by preceding rectors, are always admissible evidence against their successors. But how is the hand-writing of Dr. Stanley attempted to be proved? A book is produced, which we will say, for the sake of argument, was found in the street, and I am called upon to believe it to be in the hand-writing of the former vicar, because it is said to be very like it. I recollect many cases, in which I have myself been counsel, where books have been rejected, supported merely by the proof of the similarity of the hand-writing, to writings by the same person, although the resemblance had been proved in a [317] tolerably satisfactory manner; and certainly such loose evidence, if admitted generally, would let in great difficulty and inconvenience. In all cases, where such proof has been received, it has passed, *sub silentio*, in cases where no objection has been made to it; but, in the present case, the hand-writing is not proved, even by an apparent similarity; for what is the evidence? The witness, looking at the book, says, he believes it to be in the hand-writing of Dr. Stanley: not because, as a person residing at a great distance, he had ever been in the habit of corresponding with him, but because the hand-writing in the book is the same with that of his original will in Doctors' Commons, which, he only says, appears to be in the hand-writing of Dr. Stanley, and, as he believes, was written by one and the same person, and therefore he considers the will to be in the hand-writing of the rector; but he does not say what means he has of knowing that, either from having ever corresponded with him, or from ever having seen him write, or any of the usual sources of knowledge. Because, therefore, it is a will, and because it appears to have been written wholly by the same person, he ventures to swear that he believes it was all written by the testator; but we all well know, that there are very few persons who write their own wills themselves. All that could be deduced, with any correctness, from the facts stated by this witness is, that as the will appeared to be all in one hand-writing, he therefore concluded that some person wrote the [318] whole of it, but not that that person was the testator himself. The person who wrote the will certainly may have been the person who wrote this book, but does it not follow that either was written by Dr. Stanley.

I cannot omit to observe, that the very terms of the deposition shew, that it was cautiously worded, and manifests an intention not to speak otherwise than doubtfully, and by inference. But it never can be inferred that a will is in the hand-writing of a testator, merely because it is his will, and therefore it is impossible that such evidence as this can be received as proof of hand-writing.

Evidence rejected.

[319] CORAM RICHARDS, LD. CH. BARON.

DREW v. S. B. HARMAN, I. HARMAN, AND BERNARD. Wednesday, 21st January 1818.—A purchaser of property, collaterally charged to secure a bond debt, for which he mortgages the purchased estate, and pays the remainder of the purchase-money, is not entitled to insist on having the property re-conveyed to him free from the incumbrance, before he pays the sum so secured by the mortgage: and

if he file a bill to have the estate re-conveyed to him, and a declaration of the Court as to the persons entitled to receive the money, where there are two sets of claimants, he will be considered merely as a mortgagor, filing a bill to redeem, and must pay all the costs, although he have paid the money into Court.—An interlocutory order for an injunction, cannot be considered in argument as affecting the ultimate decision of a cause.—If there are *cestuis que trust*, who ought, in strict regularity, to be made parties to such a suit, and are not so brought before the Court, their interests may be ascertained and protected (by indulgence of the Court), by a petition to be presented by them for that purpose, to obviate further delay and expense.

This bill stated, that Petters Harman, deceased, had, in his life-time, executed a bond to the defendant Bernard (and another person, since dead), for securing 500*l.* to be paid to them when Elizabeth Day (whom he afterwards married) should attain the age of twenty-one, upon trust, for the benefit of her and her children; and that he also delivered to them the title-deeds of certain free-hold property, as a collateral security. Elizabeth Harman attained the age of twenty-one, soon after the execution of the bond. Petters Harman died without paying the money, having by his will devised his said freehold property to the defendants, S. B., and I. Harman, and another person, in trust, to sell, and with, &c. to pay off the said bond; and he appointed them his executors. I. Harman proved the will, and with the consent of S. B. Harman (the other executor having re [320]nounced), mortgaged the premises to the said obligees for 500*l.* The Harmans afterwards agreed to sell the premises to the plaintiff for 700*l.*,—to discharge the bond out of the personal estate of the testator—and to procure the title-deeds to be delivered up to the vendee; 500*l.* of the purchase-money was to remain in the plaintiff's hands, in the mean time, as a security, until the bond debt should be paid, a mortgage to be executed by him to them for that sum, and the plaintiff was, in the mean time, to be let into possession. The premises were accordingly conveyed to a trustee, for the plaintiff, in October 1807, and plaintiff executed the mortgage, and a bond for 500*l.*, to S. B. Harman, in December following, and paid 200*l.* S. B. Harman signed an undertaking, to procure the delivery of the deeds, and to pay off the original bond; and also gave his bond of indemnity against the misapplication of the money, but stipulating that the plaintiff was not to be thereby deprived of his right, to apply the mortgage money for his protection, in satisfaction of the trusts.

The bill then averred plaintiff's readiness to pay, &c. upon performance of S. B. Harman's undertaking, and a reconveyance, &c.; and that he had offered, on such conditions, to pay, &c. But that Bernard (the surviving obligee) had claimed the 500*l.*: and the Harmans disputed his right, claiming the payment of plaintiff's bond to S. B. Harman, they refusing to procure the delivery of the title-deeds, and Bernard [321] refusing to give them up, until payment to him of the 500*l.*: and that the plaintiff, therefore, knew not to whom to pay the 500*l.* but was ready to pay it into Court, for the benefit of the persons entitled.

The bill then prayed a discovery of the persons entitled, &c. the plaintiff paying principal, interest, and costs, into Court; that plaintiff might redeem, and defendants re-convey the premises; and that the defendant, S. B. Harman, might be decreed to indemnify the plaintiff from all costs and expences of this suit, and otherwise incurred by him, by reason of the premises aforesaid: and that he might, in the meantime, be enjoined from further proceeding in the action at law, commenced by him on the bond.

The injunction was granted, as prayed.

The cause now came on to be heard, when Fonblanque and Wray, for the plaintiff, contended, that he ought not to be called upon to pay the money until the property was conveyed to him, freed from the incumbrance of the bond; that the 500*l.* was a general charge upon the estate: that the delivery of the title deeds, and the payment of the purchase money, were concurrent acts; and the defendant could not, by any proceeding, have compelled payment of the 500*l.* till they had delivered up the title deeds; and that the plaintiff was entitled, under such circumstances as affected this case, to indemnify himself [322] by the sanction of the Court, through the medium of such a proceeding as the present bill, and so the Court must have thought, when they granted the injunction.

[The Lord Chief Baron. I wish it to be understood, that the circumstance of an injunction having been granted, is not to be considered (as I observe it frequently is

in argument) as any thing like an indication of an opinion of the Court on the merits of a cause. An injunction is but an interlocutory order, made for the sake of security, and very often the Court, as will most probably be the case here, ultimately decides exactly the other way.]

They then submitted, that the money, which was the consideration of the contract, having been paid into Court, it ought not to be parted with till the purchaser had got possession of the title-deeds, and till the defendants had shewn who were actually entitled to receive the money; and that where so many claims were set up, whereby this bill was made necessary for the plaintiff's security, he ought to be allowed his costs, and the more especially, as the payment of the purchase-money into Court ought to be considered as equivalent to a tender.

Dauncey, Wingfield, and Lovatt, for the defendants, admitted that the plaintiff, as mortgagor, was entitled to file a bill to redeem: but, they submitted, that it must be on the usual terms of [323] payment of costs; and they contended, that notwithstanding the rather peculiar circumstances of this case, the plaintiff was not entitled to any extraordinary interference of the Court.

RICHARDS, Chief Baron. It is admitted, that all debts have been satisfied, except this 500*l.* and I have no doubt that that sum was a charge upon the real estate: I shall, therefore, not dispose of the purchase-money, till I know who has an equal charge. I shall then order the title-deeds to be delivered up, on payment of the remainder of the purchase money to the persons who shall be entitled to it. It then becomes a mere question of costs, which I shall certainly not make this estate pay. [His Lordship then went into the general facts, saying that this was, in effect, a bill by a mortgagor to redeem, who, generally speaking, pays costs.] The duty of the trustees under the will was clear, and they, as they were directed, have sold the property. A general arrangement was made between all the parties. The surviving obligee had a right to receive the 500*l.* and he would become a trustee for the persons, for the benefit of whom the bond was given. Bernard having knowledge of the arrangement, and having approved it, Drew had nothing further to do than to pay Harman the money: but now, having filed this bill as mortgagor, it is impossible to say that he should not pay the costs.

That which has been stated for the plaintiff, [324] that the mortgage-money ought not to be paid before the title-deeds were delivered up, making that a *sine quâ non*, is a proposition that cannot be maintained, for a vendor may refuse to execute, without the consideration being paid. As to the effect of a tender, it is sufficient to say that none has been proved: and it may be also observed, that a tender in equity is a very different thing from a tender at law.

The order to be made, therefore, will be, that it be referred to the Deputy Remembrancer to tax the costs of this suit of the several defendants, and also the costs of S. B. Harman at law, and that they be paid by the plaintiff: and, on payment, S. B. Harman to re-convey the mortgaged estate to plaintiff, at his expense; and I. Harman and S. B. Harman, and Bernard, to deliver up, on oath, all deeds, &c. in their custody, to the plaintiff.

[His Lordship afterwards observed, that in strict regularity the *cestuis que trust* should have been made parties to this suit: but to obviate that difficulty, without further delay or expence, he recommended a short petition to be considered of, on the part of the widow and child, that their interest might be ascertained, and their rights protected, and ordered the cause to stand over, *pro formâ*, in the mean time, with liberty to present such petition: which being afterwards presented, stating, in substance, the above facts: the [325] money in Court was ordered to be transferred to them, in due proportions—the costs of the petition to be borne by themselves.]

Decree accordingly.

WRIGHT AND OTHERS, *v.* BELL. Wednesday, 21st January 1818.—The Court will entertain a suit for the specific performance of a contract, for the purchase of a debt. It is within the exception to the rule, that Courts of Equity will not compel specific performance of contracts for the sale of personal chattels—Doubts as to, and the proper mode of assignment, referred to the Deputy Remembrancer.

This was a bill, filed (Mich. Term 1811) by the assignees of a bankrupt, and the bankrupt, to compel the specific performance of a contract for the purchase of a debt,

due to the bankrupt before his bankruptcy, and his then partner, from a merchant resident at Demerara, since deceased.

The bill stated, that the plaintiff, Compton (the bankrupt,) and Pourtales, (who resided abroad,) carried on business in partnership together, in London, as merchants; that, in 1806, Compton (Pourtales being out of the kingdom) was duly declared bankrupt, and the other plaintiffs were chosen his assignees; that at a meeting of the partnership creditors (12th November 1808) it was resolved, that the outstanding debts should be sold, and amongst others the debt in question, due from the estate of Lespinasse, a West India merchant; that the defendant proposed to purchase it, and authorized his managing clerk, David Milne (who was the executor of Lespinasse) to treat for it; (that he (Milne) having ascertained the balance to be 550l. agreed, on the part of the [326] defendant, to give 500l. for it, as would appear by his letter (2d June 1809) to the plaintiffs on the subject, to (which they referred); that the plaintiffs then caused a deed of assignment to be prepared, and submitted to the defendant's solicitors; who, after making some slight alterations in it, returned it to the plaintiffs with a note, stating, that they considered that the plaintiffs had no right to transfer more of the debt than Compton's share, without Pourtales joining in the assignment; when plaintiff Compton having then obtained his certificate, agreed to indemnify the defendant, which his said solicitors accepted, and inserted a covenant to that effect in the draft, and returned it approved.

The defendant, by his answer, admitted, or did not deny any of the circumstances stated, the main facts on which the bill was founded, except as to the proposal having originated with him, but said, that it was made by the plaintiff Compton to Milne, who the defendant admitted acted as his agent in the treaty; but he submitted, that as plaintiffs could not make a complete title to the whole debt without Pourtales, he was not, therefore, bound to purchase; and he stated, that he never intended to accept Compton's indemnity, but that on having a complete assignment of the whole debt he was still ready to give the 500l. for it.

By an amendment in their bill the plaintiffs stated, that to obviate all difficulty they had pro-[327]-cured an assignment (dated May 1811) from Pourtales to the assignees, of his share of the debt, and that he had constituted them his attorneys.

Dannecey and Girdlestone, for the plaintiffs, (having adverted to the facts and dates,) submitted that the present was a valid, equitable agreement, for the assignment of a debt, and one which a Court of Equity would enforce; that this was a chose in action of an assignable nature, and the consideration was fair. The facts being established, they observed, the only question before the Court was, whether this is a contract of such a description as the Court will recognise to be one of those which they will order to be carried into execution; and they contended that, though there might be no case precisely applicable to the present, it was, nevertheless, within the governing principle, on which, on all other occasions, the Courts had interfered to assist a party, on a bill for the specific performance of an agreement.

Agar and Roupell, for the defendants, (having observed that this was a case of much novelty, and great importance,) acceded to the facts as stated, for the sake of argument, and in order that the question might be as fully and fairly discussed as if it had arisen on demurrer.

Admitting that a debt was assignable in equity, they insisted that the plaintiff's source of redress was purely legal, and that a contract for such an assignment as was now in question, was one of [328] which a Court would not compel a specific performance. This being the case of a chattel, the general rule is against the plaintiffs; for, in all the cases on the subject, it has been held that the remedy for non performance of such contracts as these, is properly by action at law, for damages, and therefore Courts of Equity have not jurisdiction, and cannot interfere to order the parties to carry them into execution. And they cited *Harrison v. Westbrook* (5 Vin. Abr. 540, pl. 22), *Capper v. Harris* (Bunb. 135), *Cud v. Rutter* (c), *Douglas v. Vincent* (2 Vern. 202), and *Pearne v. Lisle* (Amb. 75).

In *Burton v. Lister and Cooper* (3 Atk. 383), which was the case of a contract for the purchase of timber, Lord Hardwicke goes fully into the doctrine, and declares the

(c) 1 P. Wms. 570; cited also in 5 Vin. Ab. 538-9-40, pl. 21, (where it is called *Cuddee v. Rutter*;) and in *Mussell v. Cooke*, Pr. in Ch. 534, (there called *Scudley v. Rutter*;) and 2 Eq. Ca. Ab. 18, pl. 8.

rule to be, that bills for the performance of contracts for the sale of a chattel, could not be retained by a Court of Equity, and that the party should be left to his remedy at law. The reason there given is, that contracts for the sale of stock, corn, hops, &c. vary according to different times and circumstances, so that parties might be ruined by a suit in equity, when in a court of law, perhaps, only a shilling damage might have been recovered. If that doctrine applies to goods, a fortiori will it to cases of this sort, where the daily accidents affecting the credit [329] and solvency of parties, subject such contracts to fluctuation in value.

[Lord Chief Baron. That objection, I take it, would apply equally to contracts for the purchase of land, which sinks and rises in value in an extraordinary manner. We all know very well that the same quantity of land was worth very considerably more four years ago, than it is at the present time.]

In the case of land the distinction is, that the specific thing can always be given. Here the Court cannot give the thing demanded, which is a debt: it can only give what will confer a right of action. This is not a contract executed, but merely and peculiarly executory. Nothing has passed in writing between the parties: no act has been done on either side. The Court is therefore literally called upon not to compel the performance of a contract, but to compel the parties to contract, and that founded on what may be considered as merely conversation.

Then it is obvious that the Court could not effectually decree what is prayed. To give the defendant a title to sue at law, Pourtales must be ordered to permit his name to be used, and the Court cannot make any such order against him, who is not a party to the suit, and is resident out of the jurisdiction.

[330] Adverting to the dates, they argued *ab inconvenienti* against the interposition of the Court in cases of this sort, submitting that in the lapse of time the party may have become insolvent: or the Court might be called on to entertain such suits, in cases where the debt might be barred by the statute, before a decree could be obtained.

Dauncey, in reply, submitted that the real question was, whether the Court can interfere in this case, and order the assignment prayed? The novelty of the case furnishes no objection to it: on the contrary, it fully justifies the bill. In the case of *Burton and Lister*, which was quite a new case, the principle was admitted generally by the Chancellor, that bills of this nature might be entertained. In this case the party has no remedy at law, and that it is which forms the ground of his equity. Lord Hardwicke said, in *Burton and Lister*, that he would decree a specific performance of an agreement between two persons, to carry on a trade together, notwithstanding it is in relation to a chattel interest. The decision in that case is therefore entirely in favor of this bill, and as the engagement between the parties is completely proved, performance of the contracts ought to be decreed.

RICHARDS, Lord Chief Baron. I certainly do not remember any case of this description before. I acknowledge the principle of the decision in *Burton and Lister*, which has been quoted by the [331] counsel for the defendant. My only doubt is, whether this case does not come within the exception. As to the other cases, I do not think they have much application.

This contract was made in 1808, by the defendant, through the medium of Milne, and his acts were undoubtedly binding on the defendant. He agreed to purchase the debt for a sufficiently ample consideration, where any doubt existed about it. All that was wanted to enable the purchaser to assert his claim of this debt was the authority to use the plaintiffs' names. Now there is not the least suggestion that any difficulty was thrown in his way by them, as that they had been required to permit their names to be used, and had refused. It does not even appear that the defendant applied to them for that purpose: he was completely quiescent: and if he did not use diligence, what right has he to complain of the consequences of delay. It is not at this moment suggested that there is any doubt about the debt being recoverable. One party agrees to purchase the debt, and the other agrees to give the best assignment they can, and they can now make a perfect assignment.

But the nature and object of the bill, and its principle, is what has been chiefly objected to in argument. It is said that the contract is not for the payment of money, but to enable the party to recover a debt. So it certainly is: and then the question is, whether this Court can and ought to [332] assist the plaintiff in such a suit? And, on the present answer, I think the case is brought within the exception noticed in the

case of *Buxton v. Lister*, and that the Court may make such a decree. [His Lordship read the admissions from the answer, that the defendant had acceded to the proposal of purchasing the debt.] The only object of dispute then was the assignment, and it seems that now, the plaintiffs are enabled to furnish an effectual assignment. I, however, cannot order a complete assignment to be made, without a reference; therefore the parties must go before the Deputy Remembrancer, and if he is of opinion that an assignment can be made, he must also prepare the draft, which is all that I can order.

On this answer I cannot compel the defendant to receive the assignment, when made, unless there be an existing debt, which is not admitted: and that must also be referred to him, to ascertain the fact.

Decree accordingly, and Reference ordered.

End of sittings after Michaelmas Term.

[333] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER. HILARY TERM, 58 GEO. III.

MEMORANDA.

Sir William Grant, during this vacation, retired from the profession, having resigned the office of Master of the Rolls; and was succeeded by

Sir Thomas Plumer, Knt. Vice Chancellor of England: when that office was conferred on

Sir John Leach, Knt. one of his Majesty's Counsel in the Law, at that time Chief Justice of Chester, and Chancellor to His Royal Highness the Prince of Wales.

This Term William Draper, Esq. one of the King's Serjeants, resigned the office of Attorney General to his Royal Highness the Prince of Wales, and was appointed to that of Chief Justice of Chester.

[334] STEVENS v. ALDRIDGE. Wednesday, 28th January 1818.—Semble.—A farmer claiming the exemption, under the custom, from tithes for green-cut food for foddering husbandry horses, must shew that such horses were used in husbandry, and that he had no other sustenance (of any sort) for them on his farm.—Both those points are questions of fact, and the finding of the jury is conclusive. The amount of the tithes sought to be recovered being small, is a ground for refusing a new trial, or, at least, a second new trial.—Garrow, B. dubitante on a question like the present, on an action affecting a right, and likely to be of frequent recurrence, and therefore important in the first result. Semble.—A lessee and farmer of tithes declaring as owner and proprietor, is bad.—Husbandry horses being used occasionally by the farmer for other purposes, or for other persons, does not deprive the farmer of his privilege of exemption, where he would be otherwise entitled to it.

This was an action brought by the plaintiff, who was farmer and lessee of the tithes of part of the parish of Cookham, against the defendant, the owner and occupier of a certain farm, called White Place, for 6l. 10s. (the single value,) for not setting out the tithes of clover and vetches, under the 2d and 3d Edw. VI.

The declaration stated the plaintiff to be owner and proprietor of the tithes: and, in the second count, farmer and proprietor.

The defendant pleaded the general issue.

The cause was tried at the Lent Assizes for Berks, in 1817, before Mr. Justice Parke: when it appeared from the evidence, (the plaintiff having put in and proved his lease of the tithes,) that the defendant had had more hay on his farm than was sufficient for the sustenance of his horses, (ten in number): but that he had, notwithstanding, cut clover and vetches green, with which he had fed them all. It was also proved, that the defendant was in the habit of occasionally using his horses in towing barges for hire on the river Thames; and that he had given the [335] horses so employed clover and vetches, cut green, for fodder.

The defendant offered no evidence; and his Lordship, on that case, directed the jury that there were two points for their consideration: first, whether there was on

the defendant's farm a sufficient quantity of other sustenance for the support of his husbandry horses, without having recourse, of necessity, to the green fodder; and, secondly, if there were not sufficient sustenance, whether the horses which had been fed with such green fodder were husbandry horses, and used solely for purposes of agriculture; that if either of those considerations were negatived, the plaintiff would have a right to recover in this action, because, in either case, the defendant would not be entitled to claim the right of exemption insisted on; and his Lordship stated further, that he was himself of opinion, that neither ground of exemption was made out by the evidence, for that the horses having been proved to have been worked in towing barges on the river, deprived the defendant of the privilege afforded to the employer of horses in husbandry, to feed them on the green-cut fodder, without paying tithes; and that there having been other sustenance of any sort on his lands at the time, (of which there had been proved to have been considerable quantities,) would have taken away the defendant's right, even if he had been entitled to it on the other ground; but notwithstanding that [336] direction, the jury found a verdict for the defendant*.

Dauncey applied for, and obtained an order nisi for a new trial, in the following Easter Term, on the objection to the verdict, that it was contrary to the evidence, the law, and the express direction of the judge.

Cause having been shewn, the Court made that rule absolute.

The action was then tried a second time at the next assizes, before the same judge, and a jury, composed of three special jurors, and the remainder supplied by a tales prayed by the plaintiff, when the evidence was more fully gone into, and the defendant also examined witnesses on his part.

The plaintiff then proved, in addition to the evidence given on the former trial, that the defendant, on the failure of one Shepherd, who had kept horses for the purpose of towing barges on the river, had bought his stock of horses, and taken up the business of letting them out for that purpose, in which they were more frequently employed than on the farm; that he occupied a larger quantity of grass and meadow land than arable on White Place Farm, (seventy-five acres of meadow and green food, and seventy acres of arable and corn land,) and that the defendant had sold and bought considerable quantities of hay; in short, that there was a sufficient quantity of other food on the farm, to prevent any necessity of resorting to the green meat.

On the part of the defendant it was proved, that the same horses worked sometimes on the farm, and sometimes in towing barges.

On that second trial (as appeared from the learned judge's report, which was now read by Garrow, Baron) the jury were directed as on the former occasion, but they again found a verdict for the defendant.

A rule to shew cause why there should not be another trial, having been obtained, Jervis, and Taunton, W. E. now shewed cause. They took a preliminary objection to the declaration in the action, which they contended was bad in the description of the plaintiff, as owner and proprietor of the tithes, whereas, in fact, he was proved to be lessee and farmer; and submitted, that if the plaintiff were not bound so to describe himself as should accord with his true title, and should obtain a verdict as owner and proprietor, he might, notwithstanding, afterwards, on some [338] other occasion, sue the defendant as lessee and farmer; and he would not be precluded, by the result of the present action, from recovering, as the defendant could not plead a verdict recovered by one in one right, to an action brought by another in a different right.

[Graham, Baron. That might, perhaps, be a ground for granting a new trial, if the plaintiff, and not you, had succeeded; but that is not so in this case, and it is surely not a reason for you, the defendant, to urge, particularly on this application (the objection not having been taken below,) why the plaintiff should not have a further investigation on the merits.]

[Wood, Baron. There have been many instances of new trials being refused, where a fatal objection appeared on the record.]

* The verdict which the jury had brought in, in the first instance, was "for the defendant, he paying the plaintiff 5s. in consideration of the green fodder given to the horses employed in towing the barges;" but that verdict being rejected, they then found for the defendant generally.

[Garrow, Baron. They would otherwise go down to trial at the peril of a nonsuit.]

But the main question, they admitted, was, whether the defendant was bound to shew by evidence, in his defence to this sort of action, that he had not on the farm a sufficiency of any sort of fodder, dry or green, for the horses employed on that farm; or whether he would not be entitled to the benefit of the exemption, if he had not a sufficiency of grass, or of meadow and pasture, for them, whatever quantity of dry fodder he might have had besides; or whatever quantity [339] he might have sold or bought. And they cited Watson's Clergyman's Law, (page 552,)—a book (they observed) allowed to be cited,—to shew that proof of the latter was all that was necessary to exempt such green fodder, so cut and given to husbandry cattle, from tithes. In that book the position is, that "if a farmer do cut down his grass, and only doth put it into swarths, and then carry it away, and doth give it green to his own cattle for their necessary sustenance, not having grass sufficient to maintain them otherwise, no tithes shall be paid thereof;" and the author refers to the case of *Crawley v. Wells* (1 Rol. Abr. 645, pl. 5), in support of that doctrine. They also cited the case of *Perry v. Soan* (2 Leon. 27, and Cro. Eliz. 139), where the Court held such a prescription good.

They also submitted that the law, as laid down by the learned judge, which was represented to be taken from a dictum of Toller, was incorrect in principle, for it could not be supposed that a farmer may not sell his hay made on his farm, without losing the benefit of the exemption given him by the custom. Hay, besides, pays tithe, whether given to husbandry horses or not; and if the farmer have made the grass growing on his farm into hay, for sale or home consumption, instead of giving it cut green to his husbandry cattle, it would be strange to say, that therefore he shall not claim the exemption which the green fodder would otherwise have borne, if it had been [340] so cut and given, and had not been suffered to have ripened into a titheable article.

Anticipating the case of *Mantell v. Paine* (4 Gw. 1504, and 4 Wood, 561), they contended that that decision does not decide the point which it was said to involve, as bearing on this question: for in that case the attention of the Court was not called to the distinction now taken: and they submitted, that if that distinction were not admitted, the doctrine would go to exclude a farmer who purchases hay, and brings it home: he would be deprived of the exemption, although he might have bought it merely to sell again, which would defeat the beneficial enjoyment of the custom.

They then adverted to the evidence given on the trial, and drew the consideration of the Court to the testimony of certain of the defendant's witnesses, who proved that the defendant had purchased and brought to the farm more hay than he had sold off it; that he had not had more than ten horses at any time on the farm, six of which had belonged to Shepherd, and those six had not been fed with the tares, and that four horses were necessary for working the farm, and that they did not do the less work on the farm in consequence of their occasional employment in drawing the barges on the river.

On the whole they contended, that the points of the cause were pure questions of fact, and de-[341]-pendent entirely on the evidence: and were, as such, therefore, properly left to the jury, who were the fittest judges of the question, whether the horses so fed were bona fide husbandry horses, and whether it was according to the due course of husbandry, that they should have been foddered with tares.

They ultimately submitted, that at all events the plaintiff ought to pay the costs, according to the rule which prevailed in all the courts, in cases of applying for new trials; and they urged also, that the smallness of the sum in demand was a reason why this second new trial should be refused, citing *Roberts v. Karr* (1 Taunt. 504), where the Court of Common Pleas said, they would not grant even a first new trial for so trifling a sum as 5l.: and that this was, moreover, a penal action.

Owen Sir William, in support of the rule, first submitted, that although this were the second motion of the same kind, and was an application for a third trial, yet, according to the practice and usage of all the courts, there was no definite limit assigned to the number of new trials which might be granted in the same cause, on good grounds, as where a jury, from perversity or prejudice, find verdicts contrary to the opinion of the judge, on a point of law; and he cited the case of *Bird v. Appleton* (8 T. R. 562), as an instance, where a case was on such grounds sent several times to

a jury. He [342] adverted also to a dictum of Lord Ellenborough, in a case argued before his Lordship at a recent sittings at Guildhall, where, he said, that he would never suffer a jury's caprice to work injustice, through the medium of a trial. And as to the objection of the smallness of the amount of the sum sought to be recovered, he contended that it had been frequently held, that that did not apply in cases where a verdict had been found against law. In *Tindal v. Brown* (f) the Court said, that "though it was a rule in general, the Court would refuse to grant a new trial where the sum in litigation was small: yet that the rule did not apply, where a verdict had been given against law." He adverted to the fact of the jury, on the first trial, having in effect originally found a verdict for the plaintiff in special terms; and suggested, that their refusing to find generally for the plaintiff at last, was on account of the costs. In this very case also, the Court had not thought on the former application, that the objection now made on that ground was available.

It was then pressed on the Court, that another urgent reason why the plaintiff, if entitled to it on the merits, should have a new trial, notwithstanding the smallness of the sum, was that this was a trial of a right, and would, in its ultimate determination, be of great and serious consequence to the plaintiff, who had taken the tithes of a large district at a very heavy rent.

[343] As to the present being a penal action, it was observed, that that was a mere formality in such cases, where the party seeking to recover tithes, had no other mode of trying his right to them at law.

On the main point of the claim to the exemption insisted on, it was put, that it was an exemption founded on custom, and ought to be strictly proved. Com. Dig. tit. Disme, H. 1. *Moul v. Thurman* (Cro. Car. 393). Toller on Tithes, p. 83. [The Court refused to admit that treatise as an authority, where it was not borne out by decisions.] And they contended, that even then it was necessary that the party claiming it should shew, not only that the horses were wholly employed in husbandry, but, in the exact words of the case of *Holls v. Crawley*, as given in Roll's Abr. tit. Disme (Z.), pl. 7, p. 645, and not as altered by the reference in Watson; that it should be given to the cattle for their necessary sustenance (the farmer), not having sufficient for their sustenance otherwise; and they cited the case of *Mantell v. Paine* (4 Gw. 1512, and Wood's Tithe Decrees, 566), where this Court, by having ordered it to be referred to the Deputy Remembrancer, to enquire whether Yalden (one of the defendant's there) had sufficient fodder to support his cattle used in husbandry, without the green fodder in the pleadings mentioned, must have been of opinion that both those facts were necessary to be proved, to give him a [344] right to the exemption claimed, and that, because it was founded on the consideration of the benefit derived to the husbandman and consequently to the tithe owner, from the labour of the cattle on the farm, from whence the tithe arose; and he submitted, that neither of those material circumstances had been proved, but, on the contrary, that they had both been negatived by the evidence in this cause, and that, therefore, the defendant had failed in his plea of exemption on that ground.

On the question of costs they insisted, that the plaintiff was entitled to have a new trial, if the Court should be of opinion that the rule ought to be made absolute, without costs: for where the verdict is against the justice of the case, and the direction of the judge, where that direction was right, the Courts have always granted new trials, without compelling the party applying to pay costs. *Edie v. East India Company* (2 Bur. 1224; and 1 Bl. 298, and 670), and *Jackson v. Duchaire* (3 T. R. 551).

To the last point made they answered, that a lessee, or farmer of the tithes, was an owner or proprietor, within the meaning of the statute, (2d and 3d Edw. VI. c. 13, s. 1) and that such words are expressly used, in contradistinction from person or vicar. The words of the statute are, "No person shall carry away any tithes, before [345] they are set out, or he has otherwise agreed for the same with the parson or vicar, or other owner, proprietary, or fermor of the same tithes:" that every person entitled to take the tithes was, in fact, owner of them for the time being, and they are his property. It has been determined, in the case of *Sanders v. Sandford* (Cro. Jac. 437), that as actions on this statute are founded on a tort for not setting forth tithes, for which the plaintiff demands the penalty, he need not make a title, and that it is

(f) 1 T. R. 171, and *Metcalf v. Hall* (there cited).

sufficient that he bring the action as firmarius vel proprietarius, without shewing any particular title. In *Wheeler v. Heydon* (ib. 328), which was also an action on the same statute, the plaintiff declared on a lease of the rectory for six years, if the parson lived so long, and continued parson there, the latter condition not being in the lease, and it was held no variance, because it was implied by law: and, that because "the lease is not the ground of the action, nor is the declaration founded upon the lease, but upon the carrying away the tithes, and for remedy of the wrong was the action brought. The allegation of the lease is but an inducement to the action: and the jury, finding that he hath a good lease, and a good title, to ground his action, although it be not in the same manner precisely as he declares, it being found for the plaintiff, he shall have judgment." So in *Babington and Wife v. Matthews* (2 Bulstr. 228), which was an action of debt on this statute, after a verdict for the plaintiff on nil [346] debet, it was moved, in arrest of judgment, that the declaration was not good, because the husband claimed the tithes in right of his wife, and in the declaration averred the life of his wife, but did not shew how he had the same. The answer was, and Man, Secondary, informed the Court, that to say generally, possessor, occupatur, firmarius, or proprietarius, good and sufficient pleading on the statute 2 Edw. VI. and so it had been adjudged. Coke, and the whole Court, held the declaration good, because that was but an inducement to the action, and judgment was given for the plaintiff. And in *Chumpon v. Hill* (a), the plaintiff shewed that the vicar had demised to him by leases, and he so being proprietarius of the tithes, defendant carried away, &c. and held good, because (as was said) it sufficeth generally to shew, that the plaintiff is firmarius or proprietarius of the tithes, without saying of what title, for this is a personal action, and founded on contempt of the statute. *S. C. Chumpon v. Hill*, Yelv. 63. If, therefore, (he submitted,) proprietor be a sufficient designation of the person suing, the word owner might be rejected as surplusage. For these reasons he urged, that this rule ought to be made absolute.

GRAHAM, Baron. The first question, now made, of the plaintiff having subjected himself to be nonsuited, for want of a proper description [347] of himself in his declaration, was not sufficiently made the subject of consideration on the former occasion. It appears to me that it was necessary, in declaring upon this act for the plaintiff, to state on the record the specific character in which he sued, as whether it were ecclesiastical, or lay, original, or derivative: for a man cannot sue for tithes claimed under a lease without shewing it, and if he were allowed to state his title generally, no plaintiff so circumstanced would ever declare as lessee, in order that he might avoid the necessity of producing his lease. Therefore, I think, that he has not stated his title sufficiently, with reference to the words of the statute: and it would be quite nugatory for us to send down the record, with such a fatal defect upon the face of it.

Then there was another point raised, on this application, of great nicety, and of some difficulty certainly, on which I will say a word or two, although I do not mean to give any decisive opinion at present: for it is not on that point that our opinion, — that this rule should be discharged, — proceeds: yet as there are several other objections, each of which would be alone decisive, and, as other cases may occur of the same nature, it may be useful to parties so circumstanced, to say something on the legal question, (however cursorily) for the purpose of intimating the understanding which I have of it. I therefore think it right to express my sentiments upon it, though somewhat doubtingly, on the present occasion: I speak of the question of the exemption claimed by the defendant for tithes, for green [348] food cut to fodder his horses employed on the farm. We have been referred to old cases, to shew that the learned judge who tried this cause was wrong in the law which he pronounced to the jury, at Nisi Prius, in his direction to them in this case, as to the exemption from tithe of tares cut green, and carried away, to be given to husbandry horses in stating that it must be considered as confined to cases, where the farmer has no other fodder of any kind for the sustenance of the horses bona fide employed on the farm. Now, I certainly agree with Watson, (whose book is entitled to be considered as a book of authority, and is, out of respect, permitted to be cited,) on the main point of the position stated by him, yet it is clear that he goes a much greater length, than the principal case in Roll, from

(a) 2 Vin. 44. Actions, Joinder, U. (a), pl. 48, and 9 H. 73, Dismes, H. (b), pl. 5, in notis, where the cases cited above are referred to.

whence he took the doctrine, warrants ; for it is observable, that though Watson uses the word "grass," Roll himself (who is always most singularly accurate) does not introduce that word in his report of the case, cited as the authority for the proposition, which makes a most material difference. [His Lordship read the case, as stated in Roll.] That single word omitted, makes this case most favorable to the plaintiff ; but, inserted, the case bears the other way. I think also, that the determination in *Mantell v. Payne* to the same effect—that the farmer must be shewn to have no other fodder—is right ; at least, that is the inclination of my opinion at present, (and, in that case the reference as to that fact, was directed after mature deliberation,) for I think that it is incumbent [349] on the party claiming the exemption to shew that there was not enough, not of grass merely, but of fodder, of the general produce of the farm, and therefore, on that point, I think my brother Parke was quite right in his direction to the jury, and were it otherwise, clergymen would often be but badly situated.

But the great difficulty with me in the present case is whether it is possible, after a verdict found for the defendant on the first trial, without any evidence having been given by him—so that it might have borne some appearance of a verdict against the evidence, as well as against the direction of the judge—and a new trial having been awarded on that ground, when another verdict was found for the defendant on questions, which I cannot but consider as questions of fact, on such second trial, (wherein evidence was given on both sides,) and that on a claim, the importance of which, in point of amount of value, is so trifling, (the value of the tithes being only 2l. 9s.)—my doubt (I say) is, whether it is possible that, under those circumstances, we can send the same case down to be tried again, for the third time. And I am of opinion that, on the evidence, we ought not.

There is, besides, really too much uncertainty about the facts of the case, to warrant us in saying that the jury were wanton of their jurisdiction, in finding for the defendant, and I have certainly great doubt on the evidence. There was some puzzle as to the horses used on the farm, and [350] those employed with the barges ; and notwithstanding, that it was inferred that the husbandry employment was only colorable, (which would, without doubt, be a fraud,) yet if the jury find that it were not so, that should be conclusive. Sending his husbandry horses occasionally to work the barges, would not deprive the defendant of his privilege of exemption, for there is no farmer who does not employ his team on other jobs besides his own farm-work incidentally, and they have clearly a right to do so.

[His Lordship having pointed out more minutely the contradictory results of the evidence,] added, Then the question ultimately comes to this, whether the defendant had or had not fodder enough on his farm to sustain his cattle, without cutting and giving the green food to them for their necessary sustenance. And that is one which ought not to be weighed too nicely : for if he shews (as the jury seem to have thought the fact was) that he bought more hay than he sold, it might be sufficient : and if that were not fully and satisfactorily proved, yet where there was not a gross and palpable case, it would not be enough to call on us to impeach the verdict of a second jury, by granting a third trial.

Then the smallness of the amount of the value of the tithes sought to be recovered by this action is another, and would perhaps alone be a sufficient reason for our refusing the extraordinary interference of sending this cause down to be tried a [351] third time. At the same time, the plaintiff is clearly entitled to his tithes, unless the exemption be fairly made out. As to the authority of the cases in the Court of King's Bench, (*Tindal v. Brown*, and *Metcalf and Hall*,) where it was said, that the cause had been sent down over and over again, till the jury came to a right conclusion, the question there was, whether the notice given of the dishonour of a bill of exchange was reasonable notice, and that was clearly a pure question of law ; and for the sake of certainty in commercial matters, juries should not be suffered to trifle with established and settled questions. This, however, proceeds rather on questions of fact : and whatever points of law may have been discussed in the course of the argument, it was not on the law that the verdict rested ; for it depended on the finding of the jury, whether those points would arise in this case or not, and therefore I think this rule should be discharged.

Wood, Baron. I am of opinion that there ought not to be another new trial in this case. There have been two trials had already, and there has been no misdirection

on either; or, if there had, it has been in favor of the plaintiff, and therefore he, at least, could not complain of that. But I think the judge stated the law clearly, from the cases of *Crawley v. Wells*, and *Mantell v. Pain*; and having so stated the law, he properly directed the jury as to the two points to which he drew their attention. But those two points depended on the facts, and those facts were entirely [352] for the consideration of the jury: for they were the proper judges, whether the horses were used in husbandry, and whether the green fodder cut for them was proper and necessary. Those questions of fact have now been laid before two several juries, and they have both found verdicts for the defendant. The true principle of all new trials is, that the case has not been properly considered, so that justice may not have been done, and therefore alone it is, that the Court orders a further enquiry. That principle was laid down by Lord Mansfield, the case of *Bright, Executor, &c. v. Egnon* (1 Bur. 393), where the origin and history of that practice, are entered into, and the reasons detailed.

In this case (in the first instance) the Court thought that there was some doubt as to the facts, and they sent it down to a new trial. The plaintiff got a special jury, (and he himself prayed a tales, so that he could not be dissatisfied on that ground,) when, on full consideration, that jury also found a verdict for the defendant. After such repeated investigation, I think that the case ought not to be sent to a third trial.

It is true, as Sir William Owen has said, that there is no limit to the discretionary power of the Court, to order as many new trials as it thinks right; but that is where the jury mistake, or neglect, or abuse their duty, by finding, from preju- [353]-dice, contrary to law, on a question of law; but it would be a very great stretch of authority, to send a mere question of fact to a jury three times successively. You might as well, at once, annex a mandamus to the record, ordering them to find in the way proposed, and thus, at once, take away from them their peculiar and constitutional province altogether.

As to the point of the plaintiff not having sufficiently described his title in the declaration, I am of opinion, that if there be a palpable nonsuit apparent on the record, the Court should not send it down again in that state, for that would be absurd. I certainly myself think, that this declaration is bad, but I do not mean to decide that point. It is not necessary, certainly, for a plaintiff to set out particularly his whole title in the declaration, but he must state enough to bring himself within the words of the statute under which he sues. He should have stated himself to be the farmer, and he must have proved it: for it is necessary for him to bring himself within some of the denominations enumerated in the statute. I think, therefore, that there is, at least, great weight in that objection.

Then the smallness of the sum sued for is, in itself, a sufficient ground for refusing to send this cause down to trial a third time; for if we were to do so, there would be no end of litigation.

[354] GARROW, Baron. The Court can never have any wish to invade the province of a jury, and I should be amongst the first to regret it, if any such jealousy were well founded; but it is the duty of Courts, where juries wantonly find verdicts against law and justice, out of mere perverseness, to grant new trials without limit, and to send down the facts again and again, till they find a more sober-minded jury. On the evidence given in this case, the verdict which has been found is not one which I should have given, and so the first jury thought: for they found the plaintiff entitled to something, at least, although they ultimately gave their verdict for the defendant. I much disapprove of the manner in which that verdict was given altogether, and I think the just preponderance of the evidence was against it. I do not, however, join in the opinion, that in a case of this sort, where the subject matter is one that may be the ground of many other actions of the same nature in future, the smallness of the sum sought to be recovered is alone a sufficient reason for refusing a new trial; yet, as the plaintiff must have paid the costs, that makes it matter of serious consideration how far, even on his account, we should be justified in granting it: and, as it has turned out, it would have been mercy to him if we had refused it on the former occasion (7). Taking all these circumstances into consideration together, therefore, [355] I concur generally in thinking that this rule ought to be discharged.

Per Curiam. Rule discharged.

IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LD. CH. BARON.

WILMOT, Clerk, v. HELLABY AND OTHERS. Thursday, 29th January 1818.—Where an adverse title to the tithes is set up and established, against a demand by a rector, who offers no evidence to impeach such title, he is not entitled to an issue.—The defendant was permitted to go into the evidence of his right to the tithes, where his title appeared likely to be clearly established, although he had inaccurately stated the subject-matter of his defence in his answer.

The plaintiff, rector of Trusley (Derby), filed this bill against the defendants, occupiers of lands, within that parish, for an account of tithes generally.

The defendants denied the plaintiff's title to the tithes of the lands in their occupation, which formed part of two estates, called Grangefield and Nunsfield; and for those liberties (as they were called) two of the defendants set up a claim to the tithes, by reason of the former having, before the dissolution, belonged to Croxden Abbey, and the latter to Kingsmeade Priory; when (as [356] the answer stated) the said farms, together with all tithes and ecclesiastical dues, became vested in the crown.

The answer then set forth a grant of Henry VIII. to Robert Fytches of the said farms, and also all the tithes; and alleged that thereby the said farms and estates, together with all the tithes or ecclesiastical dues arising therefrom, duly vested and united in possession in the said Robert Fytche, and all such tithes therefore became due to him, &c. his devisees or alienees; and the defendants having asserted their title, derived from the grantee, insisted that the said lands should therefore be presumed to be exempt or discharged from the payment of any tithes to the rector.

In support of that defence several old terriers were put in (professing to state in detail the rights of the rectory); most of which, after having stated the rector to be entitled to tithes in kind, and certain money payments, contained an express exception of Grangefield and Nunsfield. Letters patent of Henry VIII. to Robert Fytche of the estate, and also all and all manner of tithes, and several old deeds, mesne conveyances, &c.: whereby it appeared that former owners of the farms had dealt separately and eo nomine with the tithes, as forming part of their estates, as well as the land: and the defendants gave full evidence of non-payment of tithes.

[357] Martin and Dowdeswell, for the plaintiff, objected to the duplicity of the pleadings, as putting on the record a defence of exemption from tithes, on the ground of the estate having belonged to the religious house, and a claim of title derived from persons under whom the defendants claimed: and they contended, that on such a record the evidence offered could not be given, and that it was not sufficient for the defendants, in the case which they had attempted to make, merely to shew that the tithes were not in the rector, unless they also proved them to be in themselves, if on such an answer they were entitled to do either; but,

The Lord Chief Baron, observing that the answer was certainly very inaccurately drawn, and that it had deduced wrong conclusions, held it sufficient to let in the evidence (a), as there might be a title to tithes made at a different time from, and independent of the title to the land, by some new grant. And the defendants had stated, and clearly shewn, the tithes not to be in the rector; and though they had also stated them to be in themselves, it was not necessary, in the present stage of the case, that they should prove that more particularly, although (judging from the evidence already given) it would, most probably, not be a difficult matter for them to do so.

On such a case, therefore, his Lordship said, he could not decree an account.

[358] An issue was then demanded on the part of the plaintiff, as rector.

Dauncey, Cooke, Wingfield, and Phillimore, for the several defendants, submitted, that in cases like the present, and proved as this had been on the part of the defendants, the rector was not entitled to an issue as a matter of right; and they adverted to the decision of *Barker v. Barker* (Wightw. 398), and the cases there cited.

Martin replied, that in those cases the right to the tithes, on the part of the party claiming adversely to the rector, was clearly and satisfactorily made out.

RICHARDS, Chief Baron. This case is also sufficiently clear, and the authorities cited are precisely in point against the plaintiff. I have always considered the general

(a) See *Strutt v. Baker*, 4 Gw. 1430.

rule to be certainly, that a rector and an heir at law are entitled to an issue : but the cases cited afford instances, where it has been refused to a rector. The bill must therefore be dismissed.

Bill dismissed *.

[359] BOWDEN AND ANOTHER, Assignees, &c. v. GLASSON. Saturday, 31st January 1818.—The Court will discharge a rule obtained by a defendant to change the venue in an action against him by the assignees of a bankrupt, on the usual affidavit, that the cause of action arose in another county, and that his witnesses reside there: the plaintiff swearing, that the cause of action arose in a third county, and that his witnesses reside at a very considerable distance from the county to which the venue is sought to be removed, and undertaking to give evidence in the original, or the third county: and that although the defendant have agreed to admit every fact establishing the bankruptcy, except the petitioning creditor's debt.—The costs to abide the event.

Jones, D. F. had obtained a rule nisi, for changing the venue in this action from Devon to Cornwall, in consideration of the inconvenience and expense to the defendant if it should be tried at Exeter, on an affidavit, that the plaintiff's cause of action arose in the latter, and not in the former county; that certain persons, whom defendant was advised would be material witnesses for him, resided at Falmouth, near one hundred miles from Exeter; and that defendant intended to admit the trading, and all other matters relating to the bankruptcy of the bankrupt, except the petitioning creditor's debt.

Owen Sir William, now shewed for cause, that (as the affidavit of the plaintiff's solicitor stated) the bankrupt resided at Exeter; that the act of bankruptcy was committed there; that the petitioning creditor's debt was contracted there; and that some of the witnesses, to prove the petitioning creditor's debt, resided there, and others in Devon (eastward of Exeter), and Somersetshire, and [360] one eighty miles north of Exeter. And he submitted, that although (as Exeter was a county of itself, and the cause of action arose there) the plaintiff could not undertake to give material evidence in the county where the venue was laid, which would at once enable him to discharge this rule, according to the daily course; yet, as it was now the practice, where the plaintiff shews the defendant's affidavit to be false, as that the cause of action arose, in fact, not in the county mentioned in the affidavit, but in a third county, he (plaintiff) shall be at liberty to retain the venue, on undertaking, in the alternative, to give material evidence in the county where the venue be laid, or in a third county —(*Neale v. Nevill, Savory v. Spooner* (6 Taunt. 565))—he would here undertake to give material evidence in Exeter or Devon, and that would entitle him to retain the venue. In *Dick v. Norrish* (7 ib. 178) it was held, that where the defendant could not legally and truly swear, according to legal apprehension, that the whole cause of action arose in the county to which it was sought to change the venue, because a material part arose in another county: and where there would be so material inconvenience on both sides, the Court would not change the venue (3 Taunt. 464. 6 ib. 565).

He then urged that, although where the witnesses on both sides reside in the defendant's [361] county, the Court will change the venue: they will not do so, where the inconvenience, in respect to the residence of witnesses on either side is mutual. *Flecke v. Godfrey* (1 T. R. 782, in notis), and *Holmes v. Wainwright* (3 East, 329).

Costs were applied for, on the ground of the defendant's affidavit having been falsified.

Jones, in support of the rule, insisted that it was necessary, that to be entitled to

* The cases of *Barker v. Barker*, and of *Scott v. Ainsy*, and *Strutt v. Baker*, there cited, are not perhaps (strictly speaking) exceptions to the rule of law, which gives a rector a right to demand an issue: because, in those cases, as in the present, the defendants all claimed, and successfully, the tithes: that is, they claimed to be rector pro tanto, or, at least, to stand in loco rectoris, as to the land from which the tithes were sought to be recovered, so that the plaintiff's right as rector, as against the adverse claimant, was negatived; or, as the distinction is well taken by the Court, in *Barker v. Barker*, "they were all cases of one common law right opposed to another." The party succeeding, therefore, must have proved himself to be rector.

retain the venue, the plaintiff should undertake to give material evidence in Devon, the county in which it had been laid, and cited *French v. Copinger and Another* (1 H. Bl. 216). In *Henshaw and Another v. Rutley and Another* (1 N. R. 110), it was held necessary and indispensable that the plaintiff should undertake to give material evidence in the county where the venue is laid, in discharging a rule to change the venue, where the cause of action arose partly in one county, and partly in another. As to the plaintiff's inability to give the usual undertaking, Lord Ellenborough distinctly says, in the case of *Price v. Woodburne* (6 East, 434), where the venue was laid in the same incorrect way, the action having arisen in a third county, so that the defendant's affidavit was falsified, but still the plaintiff could not give the necessary undertaking: "The plaintiff's have brought this difficulty upon themselves, by having laid their venue in a wrong [362] county, where no part of the cause of action arose, which prevents them from giving the usual undertaking, always required, to enable a plaintiff to bring back the venue, after it has been changed: and such being the general rule, it is better to abide by it, otherwise we shall have to try every cause on a motion to change the venue," and that is precisely applicable to the present case: and in agreeing to admit the fact of the bankruptcy, the defendant brings himself within the reason of Lord Ellenborough's decision in *Holmes v. Wainwright* (3 East, 330). Therefore he contended the plaintiff was not entitled to retain the venue.

But the Court were of opinion, that the plaintiff had shewn sufficient cause in the distance of the residence of his witnesses from Launceston; and therefore they

Discharged the rule.

Costs to abide the event.

[363] THE ATTORNEY GENERAL v. FRANCIS KING. Saturday, 31st January 1818.

—The Court refused, on cause shewn to discharge a side bar rule, allowing the Attorney General to amend an information for penalties incurred under the Excise Laws, on payment of costs, as to ten new counts which had been added, charging other offences laid on days long subsequent to those in the original information, and to the filing of that proceeding, and the issuing of process thereon, and although the name of a succeeding Attorney General had been introduced; and although the defendant was served with process on the first information, in Easter Vacation, returnable the first day of Easter Term: and the side-bar rule for amending, was not obtained till the first day of the following Michaelmas Term, nor the information so amended filed till the Seal-day after Michaelmas Term.

Jervis had, on a former day, obtained a rule, calling on the Attorney General to shew cause why an order of the 6th November last, giving him liberty to amend this information for penalties, on payment of costs, so far as to strike out ten new counts added to the original information, for supposed offences said to have been committed after that information was filed, and the addition made in the twenty-fourth count, in claiming double duties for non-payment of single duties, alleged to have been incurred after the day the said original information was filed, should not be restricted accordingly.

On moving for this order it was stated, from the affidavit of the defendant's solicitor, filed in support of the motion, that this prosecution originally arose out of a seizure of soap, by certain officers of excise, on the 3d March 1817, and which had been claimed by the defendant in this Court, on a proceeding in rem, who gave security for the crown's costs in case of condemnation: and an information was filed in the claim cause, on the 23d April 1817, consisting of four counts.

The first, charging the said soap, seized on the said 3d March 1817, to have been fraudulently hid and concealed, and thereby become forfeited.

[364] The second, that the said soap was found in a private place belonging to the claimant, and by him made use of for the keeping of soap, he being a maker of soap, whereby, &c.

The third, that the claimant did, on said 3d March 1817, knowingly receive into, and have in his custody and possession the said soap, after the same had been removed from the place where the same had been made and manufactured, and where the same ought to have been charged with the duty, before the duty had been charged on such soap, whereby it had lawfully become forfeited.

And the fourth charged that the said soap was fraudulently deposited in a certain

place, with an intent to defraud his majesty of the duty, whereby the said soap was alledged to have become forfeited.

The trial of that information in rem came on at the Sittings after Trinity Term 1817, when, after a long investigation, and witnesses had been examined on both sides, the Attorney General withdrew the record, and had not since proceeded in that cause.

On the 17th April 1817, the defendant was served with the process, tested 12th February, and returnable on the 23d, the first day of Easter Term last, to which an appearance was entered as of the same Term, but no informa-[365]-tion was filed until the Seal-day after Trinity Term following, and after the trial of the said claim-cause. That information was filed in the name of Sir William Garrow, Knt. his Majesty's then Attorney General, and intitled as of Easter Term, and delivered over on the Seal-day after Trinity Term. It consisted of fourteen counts.

The 1st, charged the hiding and concealing soap on the 3d March 1817. The 2d, the same offence, on the 26th February 1817, and ten other days, between that day and the said 3d March.

The 3d, 4th, 5th, 6th, 8th, 9th, 10th, and 11th, 12th, and 13th, various other offences in respect of making soap, on the said 3d March: each alternate count varying the days, as in the 1st and 2d.

The 14th charged the defendant, on said 26th February 1817, and from thence continually until the 23d April, (the day of exhibiting the information,) with making soap, whereby certain duties, amounting to 1250l. became due to his majesty, and that defendant did not, within the time limited by the statute, pay the same; wherefore he had forfeited double the amount of said duty.

On the 1st day of Michaelmas Term last, a side-bar rule was made for amending the inform-[366]-ation, upon payment of costs: and, on the Seal-day after Michaelmas Term, an amended information was filed, intitled, on Friday next, after fifteen days of St. Martin, in Michaelmas Term, in the 58th year, &c. and was in the name of Sir Samuel Shepherd, his Majesty's then Attorney General, and not of Sir William Garrow, as in the first information: and after some unobjectionable alterations in the first thirteen counts, there were added ten new counts, alleging similar offences to have been committed by the defendant long subsequently to the days laid in the original information, namely, in June, July, August, September, and October 1817: and the 24th count charged offences committed between the 6th July 1816, and the day of exhibiting that information, being the 28th day of November 1817.

It was urged that so extensive and substantial an alteration of the record could not, in fact, be made as an amendment, but was altogether a new information, and ought to be so considered by the Court. That a new process ought to have been issued on it, as if it had been in date, as well as subject-matter a new information, and that the defendant was entitled to plead *de novo*; and therefore it was submitted, that as to those ten new counts they ought to be struck out of the information; for that such counts could not, under the circumstances of this case, be now added to the old information.

[367] Dauncey and Walton now shewed cause, relying mainly on the amendment (extensive as it was) working no injury to the defendant, because a new information or informations might have been filed, so that it would produce no benefit to the defendant, except what he might derive from the delay thrown in the way of the crown, which they urged was a benefit, of which the Court would hardly suffer him to avail himself by such a motion as the present. And they submitted, that the day of laying the offences in the information was not material, (*Attorney General v. Weeks* (1 Bumb. 221)), and therefore the defendant could not, on this application at least, be entitled to the motion prayed.

Jervis endeavoured to support his rule, by arguments drawn from the analogy of such proceedings as the present information, with those in ordinary cases of penal actions, where the Court had frequently refused to suffer the declaration to be amended, lest the defendant should be deprived of the benefit of any bar, as the statute of Limitations, &c.: contending, that the introduction of the new counts was an abuse of the side bar rule; and he adverted to the lapse of three terms, which had been suffered to pass before the amended information had been filed as strengthening the objection.

[368] Per Curiam. [Wood, Baron, dubitante, inclining to the opinion, that there was an irregularity in so connecting the subsequent information with the previous process.]

There is no objection to the process at present before the Court, and we will not strike out the additional counts which have been regularly added. Therefore the present order to shew cause must be discharged.

Rule discharged.

[369] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LD. CH. BARON.

DRAKE, Clerk, v. SMYTH AND OTHERS. 3d February 1818.—Proof of payment (as a modus) of 8d. per acre for hay, by parol testimony and receipts; [although opposed by an extract from the ecclesiastical survey, valuing the tithe hay of the vicarage at 3s.—a terrier recording that all tithes (except a moiety of the corn tithe) belonged to the vicar,—several others stating the vicar to be entitled to the tithe of hay, or a modus of 8d. per acre,*—and an entry in the parish register of a memorandum, that the vicar had, in a certain year, taken the tithe in kind of some of the occupiers, and agreed with the rest for compositions exceeding that sum], held so strong, as that the payment was sent to an issue.—The same evidence, in support of a sum of 5s. in lieu of tithe of hay payable by all and every the occupiers of lands and tenements within a certain township, outweighed by terriers, stating that sum to be payable “for all the hay in their crofts, and nothing paid for all other except herbage.”—Payments, professing to cover articles stated in terriers nominatim to be titheable, held not to be moduses.—Terriers of the highest order of evidence in tithe causes, and (semble) paramount to usage: and where they record tithes to be payable for certain articles speciatim, are presumptive proof of such tithe being payable in kind. Where also they state any fact concerning the mode of rendering the tithe, such statement is evidence of that fact, and is allowed to qualify the render, and to define, in great measure, its legal character.—The more ancient documents, as the Ecclesiastical Survey, &c. &c. are only *prima facie* evidence requiring to be supported by proof of usage, or other confirmation, and may be rebutted.—A payment of 3d. a head for tithe of lambs not rank, and is issuable where supported by proof; but terriers, stating the vicar to be entitled to “tithe of lambs,” are sufficient to destroy the presumption, that such payment is a modus.—A memorandum, entered by a former vicar in an old book, called a parochial register, and kept in an iron chest at the vicarage, is admissible evidence on behalf of the vicar. Such custody is proper for such a book, which is common property.—See, in page 376, a distinction made as to the common course of practice established at the bar, in addressing the Bench, between Courts of Law and Courts of Equity.

This bill was filed by the vicar of Warmfield (York), for an account of tithes.

[370] The plaintiff claimed all the tithes, great and small, a moiety of the tithes of corn and grain only excepted.

The bill having been amended, prayed the usual account; and also that the Earl of Westmoreland, now made a defendant, might state whether he claimed any, and what right to any, and what part of the tithes claimed by the plaintiff.

The defendants (the occupiers) set up the following moduses:—

Eight-pence an acre for hay within the township of Warmfield, Heath and Kirkthorpe—1d. for every sheep shorn within the parish, in lieu of the tithe of wool—3d. a head in lieu of the tithe of lambs—2d. for every milch cow, in lieu of her milk and calves—10½d. for the occupiers of every ancient messuage, and of every messuage built upon the site of an ancient messuage, and called house dues, in lieu of the tithes of the titheable matter, grown in the gardens and orchards belonging to such messuage, and of eggs and poultry, and young pigeons produced in the yards, gardens, and orchards of such houses. And one of the defendants set up a modus of 5s. a year, in lieu of all tithe hay in Sharlston, (another of the township,) payable by all and every the occupiers of lands and tenements within, &c.

The Earl of Westmoreland, one of the de-[371]-fendants, claimed a right to the tithe of the corn and grain, and peas, beans, and pulse, within the township of Sharlston,

* These terriers were considered as inclining rather in favor of the payment being a modus, and as repugnant to and subversive of the former terriers.

a sub-division of the parish of Warmfield: against which no evidence was offered by the plaintiff.

20th January.—Martin and Simkinson, for the plaintiff, put in and read an entry of the endowment of the vicarage of Warmfield, from Walter Grey's Roll of Endowments, produced and read by the officer from the Registry of the Archbishop of York, and several terriers of different years, between June 1716, and June 1809^{*1}:—when his Lordship called on the counsel for the defendants to proceed.

Dauncey and Barber, for the defence, relied on the moduses; and they fully proved the payments, by parol testimony and old receipts.

[372] In answer to that case it was contended, that the evidence of the money payments was rebutted, as far as it had been offered to shew that such payments were moduses, by the plaintiff's documentary evidence; and they read an extract from the Ecclesiastical Survey, wherein it was stated, that "the vicarage is valued, in a mansion, 3s. 4d.—tithe grain, one year with another, 3l.—tithe lamb and wool 16s.—tithe hay 3s.—oblations commonly 13s. 4d.—minute and privy tithes 20s.—in the whole, one year with another, 5l. 12s. 8d.;" which, they argued, was not consistent with so large a payment as was now set up as a modus. They then read the terriers^{*2}; which [373] kind of testimony (they submitted) had been held to countervail parol evidence of usage, in the recent case of *Mytton v. Harris* (ante, vol. iii. p. 19); and they urged, that it was evident from their express terms, that neither payment for hay could be a modus: that the latter payment of 5s. for Charlston, if it were a modus, was specifically confined to the hay grown in crofts, which are small closes of land adjoining the house; and that even so partial a defence was defective, because it had not been stated, or proved, that any part of the defendant's lands were crofts. They also objected to the latter hay modus, (5s. for Charlston:) that it was ill laid, and could not be supported: for that a payment to be made by all the occupiers of lands and tenements, whether they have hay or not, would be unreasonable, even if such a custom were capable of proof.

They then took the objection of rankness to the payment of 3d. a head for lambs^{*3}:

^{*1} The terriers, beginning with that of 1716, ran thus:—"The tithe of hay, or a modus of 8d. per acre for all hay within, &c. (the two first townships,) but in Charlston 5s. per year for all the hay in their crofts, and nothing paid for all other except herbage—also all wool, and lambs, pigs, geese, ducks, apples, pears, plums, and throughout the whole parish." And some of the terriers had the following additional memorandum:—"What these moduses are founded upon is not known at present. It appears by a memorandum entered into the Register's Book by Mr. John Leake, formerly vicar, that he took hay in kind from some of the inhabitants of the township of Warmfield, in the year 1687, and had agreed with others for 12d., 14d., and 16d. per acre; but this agreement was over-ruled in the Court of Exchequer, and reduced to 8d. per acre."

^{*2} The first of these was in the shape of an entry, made in a book which was called a register of the parish of Warmfield, commencing in 1652, and was dated 26th September, 1693; and it stated, that "one moiety of the tithe of corn, and all other tithes, great and small, except the other moiety of corn tithes belonging to the vicar."

The terms of the other terriers have been already stated.

Another entry from the same book was read, dated in 1668, which was a memorandum signed by the then vicar (Leake), that the vicar had, in that year, gathered hay in kind of three persons, and had agreed with the rest at 12d., 14d., and 16d. per acre:—but to that memorandum was added, in a different hand, "This was over-ruled by a commission in the Exchequer, and brought to 8d. an acre." The book was produced from an iron chest in the vicarage-house.

[On that book being produced, it was objected to, on the part of the defendants, as not being evidence against them, for that entries in such a book by a vicar, and coming out of his own possession, could not bind his parishioners.

On the other hand, it was said, that the public parochial nature of this book, and its antiquity and custody, made it evidence; and

The Lord Chief Baron being of that opinion,

Over-ruled the objection, and received the evidence.]

^{*3} The arguments used, and the authorities cited on that point, were the same as those which may be found in *Bertie v. Beaumont*, ante, vol. ii. page 303.

[374] 26th January. Dauncey, citing the case of *Bertie v. Beaumont* (ante, vol. ii. p. 303), against the objection of rankness, and the cases of *Hardcastle v. Smithson and Slater* (3 Atk. 245), *Shelton v. Montague* (Hob. 118), *Couper v. Andrews* (ib. 39), *Scarr v. Trinity College* (3 Anstr. 760, and 4 Gw. 1454), and *Chaytor v. Trinity College* (3 Anstr. 841, and 4 Gw. 1459), in answer to the charge of the modus having been ill laid, rested the merits of the defendant's case, upon the evidence of usage already before the Court. They distinguished the present case from that of *Mytton v. Harris*, because there the terriers had recorded distinctly, that the tithe was payable in kind, whereas here it was left in doubt what mode of rendering the tithe was used.

Martin and Simkinson again opposed to that testimony the evidence of the Ecclesiastical Survey, the terriers, and the memoranda in the parish register, dwelling particularly on the earlier terriers, and the last of 1809^{*1}; the effect of all of which was (they submitted) to shew, that the tithe [375] of hay was payable to the vicar, and that it was payable in kind; one of them stating, that a former vicar had actually received the tithe of hay in kind, and had raised the amount of the composition for that tithe. No modus was mentioned in either of them, and that omission had been made matter of observation by the Lord Chief Baron (Thomson) in *Mytton v. Harris*, and formed a part of the ground of his judgment: the last terrier (n. p. 374) too, stated a fact, which proved almost expressly, that the payments for wool, lambs, and milch cows, were modern temporary compositions. They then observed on the memorandum at the foot of several of the terriers (n. p. 371) expressing doubt of the existence of the compositions recorded there, under the denomination of moduses; and stated that search had been made for the commission there spoken of, among the records of this Court, and that no trace of it could be found.

27th January.—Dauncey having replied, in right of his having been called on by the Court, in the early part of the hearing, to proceed with the defendant's case.

Martin rose to address the Court, in conclusion, as counsel for the plaintiff; when

Dauncey objected to that course as irregular, inasmuch as it would be, in effect, a second reply.

The Lord Chief Baron, however, allowed Martin to take the course he was about to pursue for [376] the present, intimating, at the same time, that the objection was, perhaps, well founded, and that he would ascertain the course at present obtaining in the Court of Chancery, as to the practice at the bar under similar circumstances^{*2}.

3d February.—Richards, Chief Baron, [having at once directed that the bill should be dismissed with costs, as against Lord Westmoreland,] proceeded to state the plaintiff's claim, and the several defences of the respective defendants, as far as regarded the money payments for hay, wool, lamb, milch cows, and house dues, which his Lordship pronounced to have been so fully established, by the evidence of long-continued payments, as far back as living memory reached, unimpeached by evidence

¹ That terrier, (which was signed by the church-wardens, and many of the parishioners, amongst whom were five of the present defendants, but it was not signed by the vicar), is particularly noticed in the judgment, on account of the effect of the following sentence, which formed part of it:—"In lieu of tithe wool and lamb, there has been paid to the late vicar 1d. for each fleece of wool, 3d. for each lamb, and 2d. for each milch cow."

^{*2} His Lordship has frequently, when discussions of this sort have arisen at the bar, insisted on an obvious distinction in regard to a departure from the usual practice, as properly permitted, in a court of equity; although it is not allowed in courts of law, from the nature and constitution of the former tribunal, where a single judge presides, of practical experience and legal knowledge, and who is not likely, as a jury is, to receive erroneous impressions from statements of counsel on matters of fact, or to abuse the latitude assumed by him. Yet he may frequently require information, which a strict observance of the rule would preclude him from, and which, in a court of equity, is oftentimes absolutely necessary to the ministering justice to the suitors, in consequence of the complexity of detail, unavoidable in the business of such courts, the great purpose of which is to accommodate differences between parties, by relaxing, rather than insisting on the strict rules adopted, and usefully adhered to in courts of law.

of the tithes having been taken in kind, as to require the plaintiff to oppose a strong case to the merits proved.

[377] It has been contended, (continued his Lordship,) that the evidence furnished by the ecclesiastical survey, aided by the terriers, rebuts the conclusion that the payment of 8d. for the tithe of hay is a modus. If implicit reliance could be placed on that document, it certainly would do so; but I have had sufficient experience to enable me to say, that that is a document which cannot be considered conclusive on such questions. We have then a parochial register produced from the parish chest (and I am still of opinion that that custody makes it evidence, for it is, as one may say, common property), which contains an entry of 1693, purporting to be (though it cannot be called so in strictness) a terrier. That entry notices that one moiety of the tithe of corn, and all other tithes great and small (except the other moiety of the corn tithes), belong to the vicar. That piece of evidence, however, is, by being somewhat at variance with the documents afterwards produced, deprived of much of the importance with which it has been regarded by the counsel for the plaintiff. It appears to have been intended more to mark the division of the tithe, than the mode of paying it, and the favourable presumption which the vicar would deduce from it is altogether negatived by the other documents, and even by subsequent entries in the very same book; for immediately following the entry read, is a note, that that was over-ruled by a commission in the Exchequer, and brought to 8d. per acre. Now that note, connected with the fact of payment for so long a period of the precise sum, [378] makes a very important feature in this case. It makes it evident that that sum was a modus. It is so termed in the book, as opposed to the former agreements compounding for the tithe. It is there called a modus for tithe hay, and the vicar has himself signed the book. The terrier of 1716 calls it so, and all the other terriers, which are regularly signed by the vicar, are in the same terms. And as these documents are confirmed by the fact of payment, there must be an issue directed as to that modus.

The payment of 5s. set up as payable for hay in the township of Sharlston rests on different grounds. The defendants, as to that, would have made out a good *prima facie* case by evidence of the payment; but here again the terriers apply, though there is no reference to any such payment in the register book alluded to. Now that payment is stated to have been made for all the hay within the township, whereas many of the terriers, though they recognize the payment, expressly confine it to the hay grown in crofts. All the terriers are quite correct in point of form, and though those just adverted to seem to import a *non decimando* for all the rest of the township, yet I think the evidence of the payment in a greater degree consistent with the terriers, which confine it to the hay grown in crofts, than with its being a payment for the whole of the township, as the defendant's evidence would make it. The terriers stating that 8d. an acre is payable for hay in Warmfield, Heath, and Kirkthorpe, say that it is [379] for all the hay in the township. Those terriers are instruments entitled to great respect, and they form a connected chain of evidence from 1716 to 1809. From the best view, therefore, that I have been able to take of this case, I cannot but consider myself bound by the authority of the terriers, sanctioned as they appear to have been year after year, for so great a length of time, without the slightest impeachment. I shall therefore decree an account of the tithe of hay in Sharlston, which I do not think covered by any modus.

The other moduses set up are parochial, and are all payable at Lammas, except the payment of 10½d. for house dues, which is payable at Easter. The parol evidence supports those moduses, but the receipts are of very modern date, at least with reference to our view of ancient payments. We must here also resort to the testimony of the terriers. The first furnish negative evidence against the modus. I do not, however, mean to say, that the modus not being mentioned in them would alone be sufficient to countervail the parol testimony; but it is the mention made of the articles in specie, as wool, lamb, pigs, &c. as paying tithes to the vicar, to which I allude: and though it was put in argument, that the enumeration of such things do not prove that they are titheable in kind, yet as it is the office and purpose of a terrier to specify in what the property of the church consists, it must be taken to do so; and certainly no one ever saw a terrier which did not expressly state that there [380] was a modus, where there was any, or some fact which might serve to ascertain the nature of the mode of rendering the tithe: and therefore it is that a terrier, recording in general

terms what tithes are payable, must be construed as speaking of such tithes as being payable in kind*.

The other terriers of the intermediate years are all nearly in the same words, and they are all signed by the vicar, churchwardens, and principal inhabitants, except the last, which the vicar being absent did not sign. That circumstance, however, gives it much more weight as evidence in favour of the vicar, because it was voluntarily on the part of the parishioners, as they framed it in the absence of the vicar. And yet I am called on by the defendants to decide, that the parol testimony adduced by them ought to weigh down this mass of documentary evidence in favour of the plaintiff's claim.

In the terrier of 1809 there is an entry that, in lieu of tithe wool and lamb, there has been payable to the late vicar 1d. for each fleece of wool, 3d. for each lamb, and 2d. for each milch cow. Now these terriers are ecclesiastical records, and made to be preserved in rei perpetuam memoriam. That entry accounts for the receipts for the money payments, and shews them to have been given in consequence of some recent arrangement with the preceding vicar. These pay-[381]-ments cannot therefore be moduses, but are rather, under such circumstances, evidence of the vicar's right to tithes in kind, and connected with the other terriers, which are equally strong in favour of the same suggestion, they form together an express recognition and declaration by the parishioners themselves, of the vicar's right to the tithes in kind of all the articles enumerated therein.

The payment of 10½d. is laid as covering several of the titheable matters mentioned in the terriers; and if I am right in thinking that the terriers outweigh the other evidence, that payment cannot be contended to be a modus, because the terriers prove that the articles they profess to cover are titheable in kind, and there is besides no allusion to that payment in the answer, which is drawn with great care, as to its being a modus for any particular tithes. There is no allegation (notwithstanding the evidence given) which puts it in issue as a modus: nor is there any proof that any of the defendants occupied ancient messuages, and that alone would preclude me from deciding in favour of that payment in this case: but I am clearly of opinion, that it is bad on the other ground. I say thus much with a view to any future consideration of these payments. On this part of the case, therefore, I cannot do otherwise than over-rule that modus. There must consequently be an account decreed of those titheable articles.

[382] On the modus of 3d. for a lamb, I have certainly entertained considerable doubt: but I have no difficulty in declaring it to be my firm opinion, that it is as much the duty of a court of equity to decide on questions of fact, as it is that of a jury. If, therefore, I saw a modus set up of 1s. for a lamb, no man living can doubt that I should be bound by my oath to decide that it was rank; and if that be not denied, the whole of my proposition is admitted: for I know of no distinction between fact and fact: and in most of the cases brought before a court of equity, a judge is bound to consider and decide on the facts alone.

With respect to the present payment, although in my private opinion I think it impossible to support a payment of 3d. for a lamb as a modus, yet if the fact of the payment were clearly made out, I should not think myself warranted in refusing an issue, and for this reason: (although I am aware that it is an incredibly high price,) yet it is difficult to know what was a fair price in a contract made before the commencement of legal memory. So it is with respect to farm moduses. It is difficult to ascertain what might have been considered the fair value before the time of Richard I. and therefore it is, that that is a fact proper for the consideration of a jury, who have knowledge of land cultivation. A lamb might have been worth more in the north than in any other part of the kingdom, and one can hardly conceive what in a luxurious country might be [383] the estimation of the thing. Even now the value of a lamb is very different in various parts of the country, and there can be no comparison drawn. It may therefore be best in doubtful cases, perhaps, at once to send it to a jury, who may, from reference to the state of agriculture, or the luxury of the time, and from the examination of witnesses *vivâ voce*, which may be more satisfactory than on paper, have better means of acquiring a knowledge of the fact than I have at this moment. I should therefore, as I have observed, in obedience to other decisions,

* Vide *Halse v. Eyston*, ante, vol. iv. p. 419.

have sent this payment to a jury; (although a time may yet come when there may be a more general and correct understanding on the doctrine of rank payments than obtains at present), but that the existence of the terriers shews these payments not to be moduses: and I consider such instruments to be of as solemn a nature as any documents which can be produced on these occasions. Therefore I feel myself enabled to decree an account of all the titheable matters prayed by the bill, except hay, in the townships of Warmfield, Heath, and Kirkthorpe; but as to the modus for that tithe there must be an issue.

Decree:—Bill to be dismissed against the Earl of Westmoreland, with costs.

An account to be taken of the tithe of hay in Sharlston, and of wool, lambs, milk, and calves, and all [384] other titheable matters of the other defendants, as prayed by the bill.

With respect to the tithe of hay in the townships of Warmfield, Kirkthorpe, and Heath, an issue whether the *8d.* is payable as a modus, in lieu of tithe hay. Costs reserved.

TRIPP v. BELLAMY. Tuesday, 3d February 1818.—Practice. If the Court open a rule, made absolute on the usual affidavit of service, to give an opportunity of shewing cause, they will not hear affidavits sworn after the day on which the rule had been made absolute.

Casberd having made this rule absolute, on an affidavit of service, on the 17th November, it was afterwards opened again, by the indulgence of the Court, to afford the party an opportunity of shewing cause.

Moore was now about to read his affidavits for that purpose, when Casberd objected, that as they appeared to have been sworn on the 22d November, they ought not to be permitted to be read, because they were made subsequently to the making the rule absolute.

In answer to that objection it was suggested, that the reason that cause had not been shewn in [385] course was, that these affidavits had not been furnished in time, and that therefore the party ought to be allowed to read his affidavit, notwithstanding the day of the caption was subsequent to that on which the rule was made absolute, particularly as there was nothing in the affidavits themselves which would shew that any advantage had been derived from that circumstance, and that otherwise the party would be unable to avail himself of the indulgence which had been granted to him; but—Casberd persisting in the objection—

The Court said, that it was not to be got over. The re-opening the rule was matter of courtesy and favor, and probably would not have been granted if the Court had been aware of the objection now made, which might give an undue advantage: therefore (the party not being able to shew cause on the affidavits on which the rule nisi had been granted), again made that

Rule absolute.

[386] THE ATTORNEY GENERAL v. LAMBIRTH. Tuesday, 3d February 1818.—The Court will not order a bill of particulars of the charges meant to be relied on in an information for arrears of duties, to be furnished to the defendant by the Attorney General, or other officer of the crown, or any measure of a similar nature, although the charges cover a space of thirty years, and the defendant have conducted his business at two separate brew-houses, at a distance of twenty miles from each other; at least unless the defendant furnish the most satisfactory ground for such an application.—The Court will not suffer an application of this nature to stay the trial; and, in the present case, they permitted the Attorney General, notwithstanding a rule was granted to shew cause, to give notice of trial in the mean time.—Quere, whether, on a strong case, satisfactorily made out, the Court would not interfere on a qualified application, to assist a defendant to a certain extent.

Jervis, on a former day, obtained a rule, calling on the Attorney General to shew cause why he should not deliver to the defendant's solicitor, or clerk in Court, a particular in writing of the duties (of excise on beer) demanded from the defendant, and sought to be recovered by this information.

The information was not filed for penalties, but was in the nature of an account, for arrears of duties. The first count charged, that the defendant was indebted to his majesty in the sum of 10,000*l.* in respect of the duties on beer brewed by him between the years 1787 and 1802. The second count, in the sum of 10,000*l.* on ale brewed by him between the same periods. The third count, in the sum of 10,000*l.* for beer brewed by him between the 1st day of May 1802, and the 6th day of July 1803. The fourth count, in the sum of 1000*l.* for ale brewed by him between the last-mentioned periods. The fifth count, in the sum of 10,000*l.* for beer brewed by him between the 5th day of July 1803, and the day of exhibiting the said information, being the 6th day of November last. And the sixth and last count, in the sum of 10,000*l.* for ale brewed by him be-[387]-tween the last-mentioned periods, extending together over a lapse of time of thirty years. The rule was granted on the affidavit of the defendant's solicitor, stating the counts of the information as above, and that on account of the generality of the charges, and the great space of time covered by the demand, application had been made to the solicitor of excise for the required particular, which had not been furnished. And the affidavit further stated, that the defendant had, in fact, carried on the business of a common brewer for several years past, at two separate breweries, at a distance of twenty miles from each other, at neither of which in particular the information charged the duties demanded to have accrued.

Under these circumstances, the motion was originally made on the ground of its having a reasonable object—that of enabling the defendant to prepare himself to meet a charge of which he could thus only, with any degree of certainty know the extent and foundation: and as without the order prayed being made, the length of time embraced by the information, the total absence of any positive charge, and the general and vague mode in which the counts were framed, rendered it impossible that a defendant could come prepared against every, or any part of it, as to the time, place, or circumstance, on which the excise might chance to fix, as that on which they should think proper to give evidence on the trial: the effect of [388] all which must necessarily tend greatly to distress and embarrass a defendant in the situation of the applicant.

As the only authorities, affording any analogy with a case like the present, the following determinations were cited from Bunbury. In that of *The Attorney General v. Weeks* (Bunb. 223), in 1726, where the information was also debt for duties on goods imported, the crown gave evidence of an importation in April 1719. One of the objections taken was, that evidence of an importation before the day laid in the information ought not to be received: which the then Lord Chief Baron answered by saying, that any difficulty arising on that ground might have been easily obviated by an application to the Court, who would have made an order for confining the evidence to a certain time: and that, it was submitted, was in fact the whole substance of the present application. In the case of *The Attorney General v. Hatton* (Bunb. 262), which was also one of similar circumstances, it is noticed in the report, that the plaintiff had given the defendant a note of the times of the importations.

[The Lord Chief Baron observed, that the latter case did not apply in favor of this motion, because the particulars given there must have been furnished voluntarily by the Attorney General, [389] and not ordered by the Court, and that it appeared that a note of the places was refused.]

To shew how much the Courts had favored motions of this sort, even in extraordinary cases, he cited the cases of *Doe, on the Demise of Birch v. Phillips* (6 T. R. 597), where an ejectment on a lease forfeited, the Court ordered the plaintiff to furnish particulars of the breaches of covenant on which he meant to rely, and that on the sole ground of its being, in its full extent, highly reasonable; and *Collett v. Thompson* (3 Bos. & Pul. 246), which was an action for non-performance of a contract for the sale of a house, and there the Court ordered the plaintiff to furnish a particular of the objections intended to be taken to the abstract, arising on matters of fact.

The Court [Wood, Baron, excepted, his Lordship expressing himself in favor of the application] having intimated that they considered the application not only novel, and without precedent, but in derogation of the prerogative of the crown, and therefore one of considerable difficulty, granted the rule: giving the Attorney General liberty to give notice of trial in the mean time.

The Attorney General and Dauncey now shewed cause. They submitted, that there having been no instance heretofore of any such order being [390] made by the

Court, a very strong case should be made out, to create a new precedent in so important a matter, where the object was to tie down the crown in the exercise of its functions for the public service; but the main ground on which they principally took their stand was, that the nature of such cases rendered the delivery of a particular almost impossible, consistently with the course and object of revenue proceedings, at least further than was afforded by the information itself: for it had never yet been the practice, and as the object of such proceedings was the detection of frauds long practised, and only recently discovered, and bringing the defaulters to an account, by means of an investigation on the part of the officers of the crown, it would be in most, or in many cases defeated, by such orders as the one now required. Such proceedings most commonly owed their chance of complete success, or at least the extent of their success, to evidence which might not be got at till the hour of trial, and that often from the mouth of the defendant's own witnesses. Cases of this nature they distinguished from the common-place transactions brought into courts of justice between subject and subject, whose mutuality of dealing often made the practice of delivering particulars easy, and where it was so, it was often useful, and even necessary. A plaintiff, in a private action, must be well aware of the items, and all the particulars of his demand, and capable of giving precise information of every part of the subject-matter of his case. In these revenue cases, on the contrary, [391] the officers of the crown can know nothing of particulars, either as to time, place, circumstance, or amount of the various frauds committed against the revenue laws, all of which the defendant, if guilty, must himself well know, and be well prepared against, with any such defence as he may be advised to make. If he were not guilty, he could require no other case than his innocence: but if he were, his own consciousness would best furnish him with the charges intended to be substantiated, and with devices for his defence, most likely to be successful. Yet while the crown officers might have no sort of particular evidence of the facts on which they proceed, they may have a conviction of the general guilt of the defendant, and even of the extent of his frauds, without being able to tell where they began, or where they end, or when or how they were put in practice: all of which they may, however, extract from the opportunities furnished at the trial of the cause. The information itself might be founded, perhaps, entirely on a *prima facie* case, and which might be weakened or betrayed by furnishing what the defendant calls the particulars which he now asks the Court to require on his behalf—the particulars of his own fraudulent proceedings, of which, most probably, the excise know but little more than the general fact.

The revenue ought not to suffer, or fraud go undetected, because those whose duty it is to endeavour to protect the public, and bring the [392] defaulter forward, are unable to state the particulars, as to time, place, and circumstance, of the fraudulent acts, where the fact is ascertained, and its effect felt—nor should it be tolerated that an Attorney General should be bound by his particulars to a precise day when the fact (which shall be clearly proved) may happen to have taken place on another.

They next submitted, that no advantage could possibly be derived by the defendant from any result of the present motion, but that, on the contrary, granting his application would increase his difficulties, his trouble, and his expence—for other informations would be filed *de die in diem* on every new disclosure of each newly developed fact of fraud, and for every substruction of duties not enumerated in the bill of particulars.

They then submitted, that inasmuch as on the acknowledged principle of law, the crown cannot be bound by the acts, or even by the mistakes of its officers, that principle would render futile, in effect, the proceeding now sought to be established in practice, if the Court should think that they have power to do what is required of them.

They distinguished this species of information, (which was merely for an account of arrears of duties) from cases of proceedings for statutory penalties, for the sake of the argument *à fortiori* in a civil case: protesting, at the same [393] time, against the existence of any right on the part of a defendant, even in a penal information, to obtain what was now sought; and they submitted, that like the attempts made in *The Attorney General v. Green* (ante, vol. iv. p. 224), and *The Attorney General v. Harding* (ante, vol. iv. p. 381), this new experiment should also fail on similar grounds, which (whatever supposititious advantage it might appear to afford, if successful to the many defendants against whom it was the duty of the crown to proceed), would

infinitely embarrass such proceedings, or would have the effect of defeating them altogether, and that without being at all for the good of the subject, who must be still harassed, day after day, by renewed proceedings, although, perhaps, they might turn out to be useless to the public, from the effect of the technical restrictions imposed by the Court on the officers of the crown.

On the cases which had been cited, they observed, that the first, which was the only one that even appeared to be in point, was distinguishable; for that case was a strong one certainly for the interference of the Court, and they might there perhaps have thought it right to make the order; but still it was at most a mere observation made in the way of recommendation of the experiment by the Lord Chief Baron at the moment, and if such an application had been made, it must have been discussed, and the result might have been, [394] that even there it would not have been granted. The act of importation, in that case, took place four years before the day laid in the information, and there was only one importation charged. Had there been a general charge, it would then indeed have more resembled the present case. The other case from Bunbury, they submitted, was, as far as it went, against the present application, for the Lord Chief Baron over-ruled the objection (which was, that where one importation only was laid in the information, the plaintiff ought not to be allowed to prove several at several times), saying, that it was no more than the common case of an *indebitatus assumpsit pro diversis bonis venditis et deliberatis, &c.* where the plaintiff might give evidence of any goods at any time sold.

Jervis and Lawes, in support of the rule, contended that unless there was a distinction made in favour of the crown, giving an advantage which a subject had not, there could be no reason in principle why this rule should not be made absolute; for with reference to the subject-matter, it is nothing more than a common civil proceeding in debt, and if the allegations in the information do not set forth with sufficient certainty and minuteness the objects of the proceeding, the principle of the now common practice applies, and a bill of particulars ought to be furnished, as is now universally done in all such cases, and is the received and common practice of all the Courts. The cases which had been cited (they observed) had not been brought forward as being [395] exactly in point, for in those days the practice of calling for bills of particulars had not yet obtained, but they were cited because they furnished the principle of the present application, and shewed that the Court might do that which was now asked of them; and although it had been contended that the Court had no right so to interfere, the first of those cases was admitted to have been one on which the Court might have made a similar order. The crown has been held not to be bound by acts of parliament, where not expressly named: but it never was asserted that the crown is not bound by the principles of justice. If it is contended, that because there is no precedent of any such application having been granted, it may be answered, that the practice is but of modern date, and there was a time when there was no precedent for the present every-day practice of the Courts in that respect, in cases between subject and subject. It is also probable that informations of this comprehensive description have not been usual.

[Graham, Baron. I have known an instance of an information where the crown recovered 30,000*l.* for arrears of duties accruing during a space of twenty-three years.]

It was a saying of Lord Hardwicke's, where he saw that justice might be effected by the adoption of any unusual proceeding, that if there were no precedent for it he would make one, where there can be no doubt the Courts are at all [396] times entitled to do in a mere question of practice as this is.

In this case particularly (and there cannot be a stronger for such an application), the defendant has, during many years, been paying the excise duties as a common brewer for two distinct breweries. Those duties are collected eight times a year, yet in a business of such a complicated nature, the transactions of a defendant's whole life may be entered into, on a question of this sort, when his witnesses may have been long dead, or are not to be found, although in cases of penalties the legislature has fixed a period within which the crown must proceed, or be barred. But the main ground of the application (they urged) was the extreme difficulty which a defendant, without the benefit of such an order as was now prayed, must labour under in preparing for so indeterminate and vague a charge, and the expence and inconvenience he must necessarily be put to in bringing as witnesses all the various persons who have been for so long a time in his employ, and the almost impossibility of instructing

his legal advisers, while he himself remains totally ignorant of the offences intended to be charged against him. As to what had been said of a new information being filed on every new discovery, that perhaps may be, but it is no answer to this application, that to grant it would be more inconvenient or more expensive to the defendant. What he seeks is something like certainty with respect to the charge to be brought [397] against him, that he may know, or at least be able to guess, what it is that he is called on to defend himself against, and that would be more advantageous to him, even if he were sued every day, than to be hampered with the intricacy of one such single information as this. And therefore they prayed that the Court would make absolute the rule which they had granted.

The Attorney General, in reply, observed, that the practice and usage itself of the courts of law had been properly said to be indicative of the laws and rules by which that practice was regulated and modified, and where in important matters there could be no precedent found, it was to be presumed that there was no such practice, and that the law did not authorize it. As to what had been said of cases between subject and subject, as distinguished from those wherein the crown was a party, he repelled what he regarded as an attempt to invest the present question with popular erroneous prejudices, by repeating the position often insisted on on similar occasions, that the term "The crown," in these questions, means nothing more in truth than the interest of the community of the subjects of the realm, who would be one and all injured by the effect of these frauds on the public revenue, as opposed to the illicit advantage to be derived to the individuals who adopt such practices for their particular gain.

Having recapitulated his former arguments, to [398] shew that the principle in common private cases could not subsist in public proceedings, he then adverted to the practice on a bill filed against the Attorney General, who, as a public officer, could not be called on to answer otherwise than in the usual general way, an usage resulting from the privilege of his official situation, which was an exception from the course of practice of the Court in all ordinary cases, and argued from thence that there were existing privileges in the case of the Attorney General, suing on behalf of the crown, and that they were recognized by the Court.

[Graham, Baron. We have held in this Court that that general answer cannot be excepted to*.

Richards, Chief Baron. The Attorney General is in that respect within the rule with respect to infants, who may state any thing they mean to prove, but cannot be themselves called on to answer further; for he is only to protect the interests of the crown.]

He then observed, that there were many other instances where the Courts had refused to inter-[399]fere in cases where the crown was party, as they would do in common cases. The Court of Common Pleas had refused to change the custody of a prisoner confined at the suit of the crown, who had been brought up before the Court for that purpose by habeas corpus, and they said that they had no power to do so without the consent of the crown.

All these objections therefore being considered, he relied that the Court would not sanction the attempt to introduce a new precedent, not founded in practice, and which would be attended with so much manifest inconvenience, to the obstruction, and perhaps defeat of proceedings for enforcing the collection of the public revenue, and on no better reasons than had been offered in support of the present application.

RICHARDS, Chief Baron, [having stated the object and terms of the application]. This motion appears to divide itself into two branches; the one arising from the circumstances of the particular case, the other from a necessary consideration of the effect it must have on the future practice of the Court, when the same circumstances may hereafter produce a similar application. In the latter respect, this motion is certainly one of very great importance, and therefore if I had any doubt upon the

* *Davison v. The Attorney General*, (30th June 1813,) in which the then Lord Chief Baron, Macdonald, delivered the unanimous judgment of the Court, deciding—after very considerable argument on exceptions to the formal answer, put in by the Attorney General to a cross bill filed by Davison, for a discovery of matters alleged to be material to his defence, in the information then pending against him, that it was in the discretion of the Attorney General whether he would answer further or not.

subject of the opinion I am about to give, I should take further time to consider that opinion; but I have no doubt on the subject.

[400] Although the motion comes before the Court, as if it were almost a matter of course, it is nevertheless certainly perfectly new. If we are to give credit to the note to the second case, cited from Bunbury, it must have been an ancient practice in this Court, for the crown to give a bill of particulars, before that practice had begun to prevail in suits between subject and subject; which is an absurd supposition. But it does not any where appear, that any such application was ever made to the Court for an order for such purpose, and on that account I cannot think that it ever was, in fact, the practice; and, indeed, if Bunbury be correct in his note added to that case, the Chief Baron, in ruling the point, as he is reported to have done, must have been wrong. There being therefore, in point of fact, no precedent for the application, I shall treat it as a perfectly new case.

It then becomes necessary that we should examine the grounds on which the motion is founded. [Here his Lordship stated the facts from the affidavit.] Now there is no particular or positive inconvenience stated to be the immediate effect of the generality of the charges which is complained of, nor is any even suggested. The defendant himself makes no affidavit. There is no precise allegation of any substantive evil arising to the defendant from the cause complained of, as that any of his witnesses have, in the mean time, died, or that any other such circumstance has occurred, to the injury of his cause. It is [401] not even stated generally, that the defendant is obstructed in his means of defence. In truth, there is nothing at all positively stated, but we are left to infer whatever possible inconvenience we may. Then in what situation does the defendant actually stand? He is called on to pay the arrears of duties which he has not paid, and surely he must himself best know to what extent, if at all, such a charge is well founded, and principally by reference to his own accounts. But he chuses to call on the Attorney General to furnish him with particulars of the various frauds meant to be charged against him. Now there is certainly no instance of any such thing having been done by a court of law, in any case at all analogous, in the course of the now usual equitable practice, which has been adopted by the Courts in modern times. The application therefore being quite new, contrary to the course of practice, and without precedent, it becomes necessary that the applicant should make out a very strong case for the extraordinary interference of the Court, which he seeks, shewing that he cannot otherwise prepare a good defence, or, at least, that he could not safely go to trial without. But he does no such thing. In this particular case, therefore, it is quite clear, that there is no sufficient reason given to induce the Court to establish a precedent of new practice, in favor of this defendant.

Then, as to the general principle, and what might be done in a case where strong grounds should be laid, for obtaining such an order, it is un-[402]-necessary for me to give any opinion, when deciding a case like the present, where there is really no foundation laid, in fact, for the application. The practice which has obtained in courts of law, arises from a motion of convenience adopted from the courts of equity, who would, on a proper case, always have done what is now more shortly effected by the more summary mode of an order of the judge—a practice, however, which even the courts of law now begin to think has been carried too far already. But what is the inconvenience suggested here, as affecting this defendant. He has not stated any himself, nor has it been taken up at the bar, on the ground of any actual inconvenience shewn to affect his case, and no prejudice can arise to him from the length of time which has elapsed, whether he have or have not actually committed the frauds imputed to him. On the contrary, all the inconvenience is on the other side.

There being no foundation then for calling on the Court, in this instance, to do what is required of them, that also renders it unnecessary to enquire whether the Court has any power to do so. But I may observe, that in the case of the Attorney General, if a bill of particulars should be ordered by the Court, it would be, in effect, so much waste paper, for the Attorney General would not be bound by any omission which he might make; and it is even admitted, that another information might be filed the next day, so that [403] the defendant would not be ultimately much benefited by it, if made. On that latter consideration alone the Court ought to refuse the order, for it is their duty to preclude any necessity, as far as in them lies, for multiplicity of informations. In fact, the only result of a bill of particulars would be, that consider-

ably more paper would be employed, without furnishing any thing more substantially specific. The defendant's embarrassments would be augmented, and no sort of inconvenience would be obviated.

GRAHAM, Baron. It goes very far with me in the opinion I have formed, that there has been no instance brought forward, in practice, apposite to the present application, for I think that, with that view, we may put out of our consideration the cases which have been cited from Bunbury. The first is, a very short, imperfect, and loose report; but such as it is, the whole result of it comes to this, that the evidence given of the actual importation not having been confined to the time of the offence, as laid in the information, when that was made matter of objection, the Court threw out cursorily, that an application might have been made to the Court for the purpose of obtaining an order to that effect. Now, though that is the language attributed to a very great judge, yet it was not used on the occasion of a decision, and if an application of the sort had been made, the Attorney General might have put a short end to it by amending his information. The case of *The Attorney General v. Hatton*, certainly goes [404] somewhat further. Both, however, fall short of the principle contended for.

Then the defendant's counsel put the application on the ground of analogy, with the practice of courts of law, as adopted from the courts of equity; and if so, we must pursue that analogy, and see that a proper case be made out for our interference; but that has certainly not been done. The stress of the argument is, the length of time which this information professes to cover. But if the information had taken it up from a shorter distance of time, as from 1802, there would, it should seem, have been no objection taken: then where are we to draw the line? Another answer to the arguments, founded on the same basis, is, shall a defendant call for the interference of the Court in his favor, because his conduct has made it necessary? As to its being put, that this is no more than a common case of debt, that is not so. It is a charge of fraud upon the crown, to the injury of the public revenue, to an unknown extent, and that from day to day, during all this length of time: and yet that very length of time, which is in itself an aggravation of the fraud, in all respects, is now sought to be made a means of advantage to a defendant, in procuring on his behalf an indulgence, by means of the interference of this Court, and for no other reason than that the frauds have not been discovered till of late. It is quite manifest, that if he has any reason to complain, he has brought it on himself, and if the burthen is heavy, it is he alone who [405] has made it so. The same answer may be made to the representation of the difficulties in which the defendant becomes placed by the generality of the charge. [His Lordship then adopted much of the argument used by the counsel for the crown.]

Then again, we cannot but take notice of what is quite obvious, that it is really impossible for the Attorney General to do what is required of him: and that would therefore put an end to the proceedings, whereas nothing is more easy than for the defendant to furnish himself with all the information that he can require, from his own accounts. There is no doubt that, if he is guilty, he well knows to what extent, and on what occasions; and if innocent, it cannot be necessary, and all the burthens is, in the first instance, on the crown. He has thus every opportunity of defending himself against the charge, however general it may be, and much more than the Attorney General can have of substantiating it.

I cannot admit that this is a case, where the crown being the party, is to be considered as in the situation of an individual having a personal interest in the suit. "The crown" is merely a phrase importing the legal concentration of all the subjects of the realm, whose private rights are injured by delinquents in revenue matters, and they are, in fact, the party who contend with the particular individual. In such a case the Court is bound to protect the public interest, and to see that the [406] duties which they have to perform in the administration of justice, are not embarrassed by factitious difficulties, and to obviate whatever else may tend, by creating inconvenience, to obstruct the officers of the crown in the fair exercise of their high and important duties, or put them to unnecessary expence or delay in the course of their proceedings.

WOOD, Baron. I confess I have all along entertained great doubts on the present question, and I certainly think that the application ought to be granted to a certain degree. However much I may incline against all frauds of every description, which I do as strongly as any man, I yet think that every subject has a right to know the full extent of any charge which may be brought against him, and to be informed of

what he is called upon to answer, in order that he may be better enabled to prepare himself fully with his defence.

This information charges that the defendant is indebted to the crown for large arrears of duties. It has been said, that the statement in the information is in itself a particular, and so it certainly is to a given extent, because it states times and sums, but then the periods are tolerably long ones, and the sums pretty large. But it says in fact no more than that so much money is owing from the defendant to the crown, for duties accruing for so many as thirty years, without charging any particular fraud during all that time. Now that is certainly a charge of itself which it is some-[407]-what laborious to repel, and more particularly where, as here, the defendant has two distinct and distant concerns. The consequence must be, that he might be obliged perhaps to collect and bring to the trial all his servants whom he may have employed during all that time, at both breweries, and that I consider a difficulty which ought not to be imposed on any man. There is no limitation as to the time of proceeding for arrears of duties, although there is in the case of penalties. In suits for penalties too, a defendant has also the advantage of having every thing material specifically stated on the record.

Then it is said, that there is great difficulty in doing what is now required of the Attorney-General in cases of this sort. There is no doubt that that is so, but still I say that something may be done more than is furnished by this record, although not coming up to all that is asked by this motion, and that would be more satisfactory. It may be done too without admitting that the whole duties for the years not mentioned in the particular, have been in fact paid, so that the defendant might still be afterwards sued for any arrears which might be subsequently discovered.

It has also been said, that the Court has no power to do what is sought by the application as against the Attorney-General proceeding on behalf of the crown. If there be any such prerogative as denies that right, it is entirely unknown [408] to me, and I think that if the Court saw that it was expedient to grant the order prayed, there is no doubt that they have the power to do so.

That a mistake of the Attorney General does not bind the crown, is certainly true, but that does not militate against the principle of this application, or in any way operate against granting the object of it, if the Court should think proper to accede to it.

In civil cases, it is now the general practice in all the Courts, although it was not so formerly, (and therefore there could have been no precedent for it when the application was first made), to compel a plaintiff to give the defendant a bill of particulars of his demand. It is a practice founded on convenience, and I well remember the beginning of it. There are also inconveniences attending it certainly, and it is no doubt often required for the mere purpose of delay; but those inconveniences are greatly overbalanced by its beneficial effects. On that account it was adopted in practice in the Court of King's Bench; then by the Court of Common Pleas, and this Court, and in all without precedent. The same answer as has been given to this application might have been given in the first instance in all those cases. It might have been said that it never had been done before, but where it is proper or just to do it, that should not be received as a conclusive answer. In a recent case, on a motion made for taxing a crown solicitor's bill, it was urged that [409] there was no precedent for it, and that it never had been done, yet the Court notwithstanding made an order that it should be taxed.

I think certainly that a somewhat more specific particular should be given by the solicitor of excise, and which, though perhaps difficult, may be effected so as to give the defendant a general idea of the charge to be attempted to be established against him, or at least of the nature of it, to assist him in preparing for his defence: and in making the order, it will not be necessary to tie them down very strictly as to dates, or other minute particulars, but there should be some guide furnished, which may be at least much more particular than this information.

GARROW, Baron. When the present application was first made to the Court, I had considerable doubts whether we ought to grant the rule; however, I concurred, because I thought the question of great importance, and well merited to be fairly and fully discussed. I now think it quite clear that the rule ought to be discharged, for I am of opinion that there is nothing tenable in it. There is no precedent for it, nor is there any such practice. And as to the principle said to be deducible from the

cases which have been cited from Bunbury, they do not furnish any authority, because it does not appear that any such application as is alluded to there was ever even made to the Court, which not to have happened in matters of this nature, is almost conclusive [410] against the probability of its success. It has been said, that it has not been common to file informations over-riding so great a length of time. If that were true in point of fact, it would be no answer on a question as to the right. It is also stated, that this species of information is nothing more in point of form than a proceeding to recover a debt—a legal demand of so much money due. Whatever it may be in point of form, in substance it appears to me to be founded on conduct very different from that which gives rise to demands in courts of law for money due to a plaintiff. A man is daily putting into his pocket the revenues of the crown for a great number of years, to an enormous amount, and the fraud is not detected till after the whole lapse of time, (and who is there that is to learn that in revenue cases that is a matter of very frequent recurrence?) and when at last his frauds are discovered, he relies on the great length of time during which he has been practising them.

As to the cases which have been cited, it would be matter of great astonishment to the Editor to find them cited for the purpose of inducing the Court to grant the present application. Nothing can be more inapplicable than those cases. But if a particular should be furnished in a case of this sort, what would it be more than to accumulate charges of substruction on substruction, till the defendant would be much more embarrassed with than without it. The only chance of benefit which the defendant could hope to derive from [411] such a measure, would be, that some variance might arise on the trial between some parts of a voluminous particular and the evidence. His Lordship concluded by saying, that if any thing short of a circumstantial detail of particulars would suffice, that had been furnished already by the information.

Per Curiam. Rule discharged.

The Lord Chief Baron expressed a wish that he might not be understood as saying that the ground on which he refused this application was, merely because it was without precedent; for, on the contrary, in a proper case, even between the crown and the subject, he would say, as Lord Hardwicke had done, that he would make a precedent; but that his principal reason was a determination not unnecessarily to embarrass the proceedings of this Court, by granting such a motion in a case like the present.

[412] PARTRIDGE AND WIFE, Administratrix, &c. v. COURT. Demurrer. Wednesday, 4th February 1818.—Counts, on promises made to an intestate, may be joined in a declaration by an administrator in an action of assumpsit on such promises, with counts, on promissory notes given to the administrator since the death of the intestate, as administrator because the amount, when recovered, would be assets in the hands of the administrator. Semble secus, if a bond, or other higher security, had been given, because the effect of such new and higher security would be an extinction of the simple contract debt.—And semble, that an administrator de bonis non might claim on such promissory note, against the *prima facie* right of the personal representative of the administrator of the intestate. The Court will not permit a defendant to withdraw and plead after a demurrer has been argued.

The declaration stated, that Philip Partridge and Mary his wife, (which said Mary was administratrix, &c. of Dennis Bradley,) complained, &c. For that whereas the defendant, in the life-time of the said Dennis, &c. was indebted to the said Dennis, &c. for money lent and advanced—paid, laid out, and expended—and had and received. Promises to the intestate in his life time—breach non payment to intestate in his life-time, or said plaintiff and Mary, &c. since his decease.

The 4th and 5th counts were founded on two promissory notes, given after the death of the said Dennis, whereby the defendant promised to pay, six weeks after date, to the said Mary, as administratrix, &c. two several sums of money, with interest—promises to the husband and his wife, as administratrix, &c. And there were other counts for money paid—money had and received—and on an insinual

computassent.—In all the counts the wife was described as “administratrix, &c.”—common breach—non-payment to said Philip and Mary, &c. or either of them.

[413] Demurrer.—For that the said Philip and Mary had declared against the defendant for the non-performance of certain promises and undertakings, made by the said defendant to the said Dennis in his life-time, in respect of certain causes of action accruing to him, the said Dennis, in his life-time: and also for the non-performance of certain other promises and undertakings made by the said defendant to the said Philip and Mary, after the death of the said Dennis: and also, for that the said Philip and Mary had joined in the said declaration causes of action, which, by the laws of this land, cannot be joined in one declaration.

Joinder.

Littledale, in support of the demurrer, contended, that the present case was wholly distinct from the class of decisions*, which had determined, that—counts for goods sold, for money lent, &c. &c. by a testator on intestate, might be joined with a count, or an account stated with the executor or administrator: for all such counts were consistent, and in joining them one right only would appear on the record, and the money, when recovered in all those cases, would be assets: whereas in this case a new security [414] was taken, which not only gave the administratrix a right to sue in her own name, but made it absolutely necessary. And he cited on that point the case of *Betts v. Mitchell* (10 Mod. 316), where the plaintiff, an executor, declared on several promises to the testator, and also on a promissory note given to him, ut executori, for a debt due to the testator, and made payable to the plaintiff, or order: and on demurrer the Court held, that that promise was of such a nature, as that it could not be joined with promises to the testator. In that case (he observed) it was submitted in argument, and adopted by the Court in delivering judgment, that though the note was made to the plaintiff as executor, that was only a description of his person—that promissory notes being transferrable, might be endorsed, so as to give another a right of action: and that the plaintiff might have brought an action on the note, without naming himself executor. It might be contended here, as there, that this was as much a new contract as if a bond had been given to the plaintiff for the money: and this note would go to the personal representative of the administratrix, and not to the administrator de bonis non of the intestate.

He also cited, as a very recent decision on this point, the case of *Hosier and Another, Executor of Hosier, v. Lord Arundell* (3 Bos. & Pul. 7), where it was held that a count on a bond given to a testator, could [415] not be joined in an action brought by the executor, with a count on a bond given to him as executor: and, in that case, Mr. Justice Chambre, in delivering judgment, said expressly, “If executors take a note or bond from a creditor [debtor] to the estate of their testator, the old debt is thereby extinguished, and a new one created, which must be declared upon as such.” Another reason given by Lord Alvanley in the same case is, that the costs could not be severed, and the plaintiffs would be liable to costs on one count, and on the other they would not. He submitted besides, that the same plea could not be pleaded to this declaration, for the defendant could not plead to the action a set-off of a debt due to him from the testator, (*Shipman v. Thompson* (Willes, Rep. 103)), nor would the judgment be the same.

Chitty, in support of the declaration, contended that the counts were properly joined, for that the money received on the note would be assets in the hands of the executor. The counts on the note, being expressly laid in the plaintiff's character of administratrix, he submitted, might be joined with promises made to the intestate, because, he contended, the note given did not alter the nature of the debt, but only more clearly ascertained its existence and amount, and was, in effect, only the common result of a settlement of accounts, and was therefore no more than an insimul computassent, which all the cases deter-[416]-mined might be joined with promises to a testator, although the account stated was alleged to be with the executor, *Cowell & Ux. Administratrix, &c., v. Watts* (6 East, 405), *Thompson & Ux. Executrix, &c., v. Stent* (1 Taunt. 322),—*Powley and Others, Executors of Powley v. Newton* (6 Taunt. 453); and in *Ellis v. Bowen, Executor* (Forrest, Exch. Rep. 98), the converse was held.

The case cited for this demurrer from Mod. Rep. of *Betts v. Mitchell*, he submitted,

* The leading decisions on that point are cited in the argument in support of the declaration, *infra*, p. 416.

had been subsequently over-ruled by that of *King and Others, Executors, &c., v. Thom* (1 T. R. 487), where it was determined on special demurrer, that the plaintiffs, to whom a payee of a bill of exchange had endorsed it, as executors, might declare as such in an action against the acceptor. And he distinguished the present case from that of *Hosier v. Lord Arundell*, by the circumstance of the executors in that case having taken a bond from the debtor, which made it a new debt to him in his private character, and that distinction was made the groundwork of Mr. Justice Rooke's opinion, in the judgment delivered by him. He said, "Where executors change the nature of the debt due to their testator, after their testator's death, they must sue for the new debt in their own name, and not in their character of executors." In this case the note was given for the same debt as was due to the intestate, and it is competent to a party to go into the consideration of a debt, notwithstanding [417] he have given a promissory note, (*Trueman v. Hurst* (1 T. R. 40)). It was also much relied on, that the note in question was not made payable to order.

Then it was submitted, that the plaintiff would not be liable to costs, if he should fail in the action on this promissory note, on the general rule in favor of executors: and, on the whole, that there was no objection, either in principle or authority, to joining the counts of the declaration, as they stood on this record.

Littleale, in reply, observed, that in none of the cases cited in support of the declaration, had there been a promissory note given by the debtor, or any new security, and on that circumstance this demurrer mainly rested. In the regular course, a promissory note would go to an administrator along with the administration, and not to the administrator de bonis non; and though it was given to the plaintiff, as administratrix, she must have endorsed it in her own right. He dissented from the proposition, that this note was assets in the hands of the administratrix: and submitted, that nothing appeared on this record, from which it could be collected that it was part of the effects of the deceased, or it might have been the only effects of the intestate, and the wife, as administratrix, might have retained the note in satisfaction of a debt due to her, which she would have had a right to do. In all the cases cited, [418] on the other hand, it appeared on the face of the pleadings, that the money, when recovered, would have been assets: and in the case of *King v. Thom*, which was so much relied on, the joinder of the counts was not made the question on the demurrer: the only point was, whether the action could be supported. The authorities of *Bell v. Mitchell*, and *Hosier v. Lord Arundell*, proceeded on the principle of the debt having been changed in its nature by a new security, and that from having been due to the executor in his representative character, it had become due to him personally: and for these reasons, he submitted, that the declaration could not be supported.

GRAHAM, Baron [having fully stated the pleadings, and the objections raised by the demurrer]. It has been contended, that these several counts are inconsistent, and that not being open to the same plea, or the same judgment, they cannot therefore form one entire record. Up to a certain period, the case from Modern Reports, cited in support of this demurrer, might have served as an authority that such counts as these could not be joined, as being founded on distinct claims, the one in a personal, the other in a representative character. But the later cases, and particularly that of *Cowell v. Watts*, founded on the old cases in *Levinz*, have brought the question more fully before the Courts, and from the opinions of the several judges who have given their reasons at some length, it is to be collected, that a rule is now completely established, [419] that wherever the money when recovered shall be assets, counts in each character may be joined, and that is a fair and sound criterion, and one which is sufficient to prevent all ambiguity and doubt: it ought therefore to be adopted as a never-failing rule.

Then we should look to this record with a view to see whether the money which is sought to be recovered would be assets in the hands of the administratrix, and in my opinion I think the judgment for the plaintiff would be conclusive, if produced, to shew that assets had come to her hands, and might be used for that purpose.

We were certainly puzzled with the argument, that a promissory note, being purely personal, would go to the representative of the executor or administrator, and not to the administrator de bonis non, but I think that it would be fair evidence to use in the ecclesiastical court in obtaining administration de bonis non, which would withdraw it from the personal representatives of the administratrix.

The two cases which have been pressed on us in behalf of the demurrer, certainly

raised great doubt in my mind: but on consideration I cannot but think that Mr. Justice Chambre, in the case of *Hosier v. Lord Arundell*, carried his opinion too far in putting a promissory note on the same footing, in a question of this nature, as a bond. In that case where a bond was given to the executor [420] in his own name, I think the judgment right, because such a specialty would have the effect of annihilating the previous debt, creating a new and personal obligation of a higher nature: and therefore I am obliged to say with deference, that I cannot hold the opinion of Mr. Justice Chambre to be right, in putting a promissory note on the same footing as a bond.

Then this case is much strengthened by the circumstance of the note given being payable to the administratrix, expressly as administratrix, and therefore it could not have been negotiated. It is still further an answer to the proposition said to have been stated by Mr. Justice Chambre, that a promissory note having been given would not preclude the defendant from going into the consideration, whereas it is not so in the case of a bond. The former does not change the nature of the debt, and is in fact very little stronger than, or different in effect from an account stated, and may therefore be declared on as if it were a common count of insimul computassent. The defendant's arguments, therefore, do not impugn the later decisions, which have held, that that count, in the person of an executor, may be joined with others on promises to a testator. There is as much of new contract in the one case as the other: the only difference is, that the promissory note puts the acknowledgment in writing. The main difficulty in this case is the position laid down by Mr. Justice Chambre, in the case of *Hosier v. Lord Arundell*, and having got over [421] that, I think there should be judgment for the plaintiff.

WOOD, Baron. The objection to this declaration is, that it contains several counts which are distinct, and cannot be joined, some being framed on demands in the plaintiff's representative character, and others on demands which should be asserted by her personally, and no doubt if that were so, the declaration would be bad: but I am of opinion that all these counts are on demands arising to her in her representative character, and not in person.

The true criterion of that is certainly what has been already stated, that where the money, if recovered, would be assets, the causes of action may be joined, and in this case I take it that the money, when recovered, may be clearly so considered.

There have been two cases cited against that opinion. The first, from *Modern Reports* (k), is certainly in point to that effect: but I consider that case to have been since properly over-ruled by subsequent decisions, and on very good grounds. The next case (*Hosier v. Lord Arundell*) I think is entirely distinct from the present, because there a bond had been given, the effect of which is to extinguish simple-contract debts. [422] But this is a very different thing; and if the plaintiff had not declared on the promissory note, they might have given it in evidence on the count of insimul computassent, in support and proof of that count. That is a strong criterion by which it may be determined that the money recovered would be assets, for there can be no doubt that money recovered by an administrator, on an insimul computassent, would be assets. The main and only difference is, that the note bears interest, but then it is given for value received from the intestate, and it is given to the administratrix as administratrix, and that is not merely, as has been argued, a description of the person, it is a description of character, and of the character in which the debt is to be paid to her. Thus it appears on the record, as it must in evidence, that the cause of action accrued in the life-time of the intestate, and the subsequent transaction does not change the original right.

Then it has been said, that this note would go to the representative of the administratrix, and not to the administrator de bonis non. I differ entirely in opinion from that proposition, and think that in some way or other he might recover on this very security. A bond certainly is a very different matter, but this sort of acknowledgement is not in point of law a security of a higher or different nature than the original debt, and therefore I think the plaintiff is entitled to judgment.

[423] GARROW, Baron, concurred. This question has certainly in effect been already decided by very many of the judges. The main question is undoubtedly whether the money sought, when recovered, would enure to a different fund than that in right of which the plaintiff sues, and I think it clearly would not, and that

(k) *Bells v. Mitchell*.

the plaintiff could only recover on these promissory notes in his representative character—that it would be part of the intestate's estate, and would be liable to his debts,—and that the plaintiff might be charged with it in answer to a plea of plene administravit. The case of *King v. Thom* has over-ruled that of *Betts v. Mitchell*, and it is altogether on this point quite decisive with me. (His Lordship stated the case.)

It was urged in argument, that a plea of set-off, for money due from the intestate to the defendant, could not be pleaded to these counts on the promissory notes given to the plaintiff. I think otherwise, however, and that such a plea, founded on a debt due from the plaintiff, could not be pleaded to those counts.

In the case of *Hosier v. Lord Arundell*, Mr. Justice Chambre was not called on to go so far as he is represented to have gone, and I cannot, therefore, consider any thing said by him on that occasion as deciding at once the case now before us. That was a question arising on a bond given to the executor, and was therefore totally [424] different from the present, where no new character was given to the original debt as due to the intestate, by what has been done, as was the case where the executor had taken the debtor's bond.

Per Curiam. Judgment for the Plaintiff.

It was then asked of the Court, as matter of indulgence, and in consideration of the novelty and difficulty of the point raised by the demurrer, that the defendant might be at liberty to withdraw and plead.

But the Court refused to permit it, giving as a reason that it was a rule not to grant such an indulgence, where the demurrer has been argued, and judgment given.

[425] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LD. CH. BARON.

THE ATTORNEY GENERAL, ON THE RELATION OF JOHN PHILLIPS, Informant, v. FREEMAN AND ANOTHER. Thursday 5th February 1818.—Construction of devise with reference to an act of parliament. Money bequeathed to trustees, to lay out the same, and pay the interest and dividends to the poor inhabitants of a parish for ever, by half-yearly payments—claimed under a local act of parliament, enacting that all gifts, donations, benefactions, and sums of money, which should thereafter become payable to the use of the poor of the parish, not being directed or liable to be applied for the support of any private or particular poor or charity, or by the respective donors, or otherwise particularly appropriated, and not being sacramental money, should be paid into the hands of the treasurer of the guardians of the poor, thereby appointed in aid of the rate, with power to appropriate it to indigent persons, who had not become chargeable—held on a claim by such guardians of the poor to be within the exception of the private act, as being a gift particularly appropriated by the testatrix.

The guardians of the poor of St. Luke's under a local act of parliament*, had claimed on an advertisement on a decree in this cause, for legatees under the will of a testatrix, who had bequeathed (after certain legacies) all the rest of her money, and securities for money, to the de-[426]fendants, "In trust, to lay out the same, and pay interests and dividends to the poor inhabitants of the parish of St. Luke for ever, by half-yearly payments: and on the decease of either of them, (the defendants, the appointed trustees,) then that the survivor appoint other trustees in the parish, and

* Enacting, that "all gifts, donations, benefactions, and sums of money whatsoever, now payable, or which shall hereafter become payable for and to the use of the poor of the said parish, not being directed or liable to be applied for the support of any private or particular poor or charity, or by the respective donors, or otherwise particularly appropriated, and not being sacramental money, shall, from time to time, be paid into the hands of their treasurer for the time being, for the use of the poor of the said parish, to be applied in aid of the rate for the relief of the poor thereof, unless the said guardians shall think proper to appropriate and apply the same, or some part thereof, to and in relieving or assisting any indigent, poor, aged, or industrious persons, who have not become chargeable to the said parish."

so from time to time, as often as the trustees to be appointed as aforesaid shall, by death or resignation, be reduced to two."

That claim having been disallowed by the Deputy Remembrancer, the claimant excepted to his report, and the exception was now supported by

Damney and Shadwell, who contended that the act of parliament had vested this bequest in the guardians which it had appointed -and that it did not come within the excepted cases in the act, which had reference entirely to the beneficial enjoyment of the sum bequeathed, and not to the persons to whom it was nominally to be paid. And they submitted, that if the advantage of the charity were a matter of consideration on such a question, a corporate body appointed by law was a much safer custody in all respects than individuals, who would be more likely to misapply the funds.

THE LORD CHIEF BARON [without hearing the counsel for the defendants]. I am, in fact, called on to set aside this will, and to give the property [427] of the testatrix to the guardians of the poor of this parish, notwithstanding she has herself made a selection of the persons to whom she has chosen to entrust the distribution of it in charity. This is clearly an appropriation by the testatrix within the exception of the statute. The guardians must not have a power to select the objects of the testatrix's charity, in exclusion of the trustees of her own appointment, to whom she had expressly confided that duty.

Report confirmed.

[428] THE KING v. LAMBTON AND OTHERS. On an Extent. Demurrer. Friday, 6th February 1818.—A parcel made up by a banking-house, sealed, and addressed to another banking-house, containing cash-notes and cheques of the latter, and bills of exchange, specially endorsed by the former, to make up a balance due from them on their general account, and deposited on the 3d July, after the bank was shut, with a woman-servant left in the care of the banking-house, to be given to the postman in the morning of the 4th, who was in the habit of calling for such parcels before banking hours—held to be seizable under an extent in aid, tested 2d July, returnable 6th November, on special demurrer to a plea, stating those facts, and tendering issue on the property: and that although the inquisition, finding the debt due to the debtor of the crown debtor was not taken till the 4th of November following.—Because such circumstances do not amount to a delivery of the parcel to the persons to whom it was addressed, or their agent, and therefore confers no right of property. Aliter if delivered to the postman.—A writ of extent binds from the teste: and such property as bills of exchange is bound, while in the custody of the debtor.—A special endorsement does not transfer property in bills of exchange till delivery.—The contents of such a parcel, while remaining in the banking-house, under such circumstances, remain there at the risk of the bankers who made it up, and is still subject to their controul.—It is sufficient, in such a case, if the defendant traverse the property in the debtor to the crown's debtor, "at the time of the seizure, or of taking the inquisition:" and it is not necessary to say, "at the time of the issuing of the extent."

By writ of extent, tested 2d July 1816, and returnable on the 6th November following, reciting, that by an inquisition taken on the former day, on a writ of extent against Bruce & Co. it was found that John Cooke, of Sunderland, in the county of Durham, banker, on the day of taking the said inquisition, was justly and truly indebted to Bruce and Co. And by an inquisition, taken 4th November 1816, on the usual commission, to find debts due to Cooke, it was found—"That on the 3d day of July last, Lambton and Co. sent over to Cooke, in a parcel, by a messenger, 1773l. in cash-notes of Cooke and Co. with a [429] small charge of 2s. 6d. for noting a bill for them, which was delivered to the said John Cooke, on the same day, about one or two o'clock. That the above parcel, with two cheques, amounted to 2039l. 18s. That when the above parcel was received by the said John Cooke, he (Cooke) held cash-notes of Lambton and Co. to the amount of 931l. and two cheques drawn by Robert Reay upon Lambton and Co. for 165l. 12s. 3d. making together 1096l. 12s. 3d. and then had no other claim upon them. That after deducting the sum of 1096l. 12s. 3d. the amount of Lambton and Co.'s cash notes and Reay's cheques in the hands of the said John Cooke, there was a balance of 943l. 5s. 9d. due from the said John Cooke

to Lambton and Co. if the cheques upon, and the cash notes of the said John Cooke sent by Lambton and Co. could be considered as a payment of the cash notes of Lambton and Co. then in the hands of the said John Cooke. That the said John Cooke, on the same day, and in return for the cheques and parcels of cash notes received from Lambton and Co. made up a parcel for Lambton and Co. of the above cash notes of Lambton and Co. and which were particularly specified and described in the schedule thereto annexed, marked B. and Reay's two cheques, amounting together to 1096l. 12s. 3d. and of six bills of exchange upon London, to the amount of 946l. 7s. which said cheques and bills were also particularly specified and described in the schedule thereto annexed marked C. which was 3l. 1s. 3d. more than the amount previously remitted by Lambton [430] and Co. the said John Cooke having no ready drawn bills to come nearer the balance. That all the above bills were specially endorsed by the said John Cooke to Lambton and Co. as follows:—"Pay Messrs. Lambton and Co. or order, by procuration of Cooke and Co. H. Tanner." That the said parcel, with the above contents made up by the said John Cooke, was sealed up and directed to Lambton and Co. Newcastle, by H. Tanner and B. Armstrong, clerks of the said John Cooke. That on the same day an account of the transaction before mentioned was stated and closed in the books of the said John Cooke, with the balance of 3l. 1s. 3d. to the debit of Lambton and Co. to be settled for next exchange day. That the parcel was taken out of the bank-office by the said Armstrong, in the afternoon of the 3d July, and delivered to Alice Ovington, the servant of the said John Cooke, in the house where the said bank-office was kept. That the clerks soon afterwards locked up the bank office, and went to their respective homes. That the parcel was left with the said Alice Ovington, as usual, to be delivered to the postman when he called, which was usually near seven o'clock in the morning. That a little before seven o'clock in the morning, of the 4th day of July, there was a rap or ring at the house door of the said John Cooke, and the said Alice Ovington believing it to be the postman calling, as usual, for the parcel, took it in her hand, and upon opening the door it was seized and taken from her by the sheriff. That the above was the usual mode of making the exchange be [431] tween the two banks. That at the time when the balance was struck by the said John Cooke, and the amount closed as between them and Lambton and Co. and also at the time of making the special indorsement on the London bills before specified, and delivering the parcel to Alice Ovington for the postman, for Lambton and Co. the said John Cooke was entirely ignorant of an extent having been issued against him, and that the several acts above-mentioned were done by him without contemplation of bankruptcy, or of stopping payment, and in the usual course of his business.

To that inquisition the defendants Lambton and Co. pleaded, "that the said John Cooke, long before, and at the time of the teste, and issuing the said writ of extent against the said John Cooke, and long before, and at the time of the seizing of the said cash-notes, cheques, and bills of exchange, mentioned in the said inquisition taken before the said sheriff of Durham, upon the said writ of extent, was a banker at Sunderland, in the county of Durham, to wit, at Westminster, &c. carrying on business under the stile and firm of Cooke and Co.; and that the said defendant, Lambton and Co. long before, and at the said several times last aforesaid, and long afterwards, were bankers at Newcastle-upon-Tyne, to wit, at, &c.; and that the said John Cooke, and the said Lambton and Co. being such respective bankers as aforesaid, they, the said John Cooke, and the said Lambton and Co. before and up to [432] the times of the teste, and issuing of the said writ of extent, and of the said seizures by the said sheriff of the county of Durham, were in the habit of exchanging their cash notes and cheques belonging to each other, on Wednesday in each week, except that they did occasionally, when they received cheques of each other's customers, which they deemed in any degree dubious, send them over to each other more frequently, and when they did so, they were accounted for in making and settling the exchange on the usual exchange-day, and that the difference in amount between the notes and cheques of each house of the said respective bankers, was settled by bills on London, to wit, at Westminster, in the county of Middlesex aforesaid."

And the defendants further alleged, "that the said exchange of the said cash notes, cheques, and bills of exchange, so made between the said John Cooke and the said defendants, as such bankers as aforesaid, were made through the medium of a postman or messenger, who resided at Sunderland, and left that place for Newcastle daily,

about seven o'clock in the morning, and returned about one o'clock at noon. And the defendants further alleged, that on the 1st or 2d day of July, in the year of our Lord 1816, they sent over to the said John Cooke two cheques, amounting to 266l. 15s. 6d. drawn upon the said John Cooke by the customers of the said John Cooke, and for which cheques the said defendants had given value, and were to receive it back again on the day of [433] exchange, either in cash, notes, or bills upon London." And the defendants further alleged, (stating the above facts, as found by the inquisition,) "that by reason and means of the premises, the property in the said cash-notes, cheques, and bills of exchange, together amounting to 2042l. 19s. 3d. became, and were, and continued the property of the said defendants. Without this, that the said Cooke, at the time of the seizure of the said, &c. or at the time of the taking of the said inquisition to the said writ of extent against the said Cooke, had any property in, or right to the said cash-notes, cheques, and bills of exchange. Parati verificare. Wherefore they prayed judgment, and an amoveas manus."

To that plea the Attorney General had demurred, and the defendants joined in demurrer.

Nolan, in support of the demurrer, submitted, that the two questions raised by these pleadings were, first, whether the facts which the defendant had put on the record, shewed such a sufficient title in himself as traversed that of the crown, whose right (he insisted) might be established merely by the weakness of a defendant's title. And he contended that the debts of the crown's debtor were bound from the teste of the extent, and that all his property, not absolutely and completely divested at that time, remained liable to seizure. He cited *The King v. Cotton* (Parker, 112), [434] *Stringfellow's case* (Dy. 609), and *Reg. v. Arnold* (Vin. Abr. tit. Creditor and Banker, Z.), *The King v. Wynn and Parry* (Bunb. 39), and *The King v. Wells and Allmott* (16 East, 278). In some of those cases the crown was held entitled to property seized, after a distress levied, where the goods had not been actually sold, and in others, the last particularly, goods taken by the sheriff under a fieri facias, were held bound, where there had not been a sale, although the writ of extent bore teste, after the delivery of the writ of fieri facias to the sheriff.

The second question he submitted was, whether the intention on the part of Cooke, to appropriate the contents of the parcel, and what had been done by them in furtherance of it, and the indorsement of the bills of exchange had given Lambton and Co. such a right, as enabled them to set up the present claim against this extent: which he contended it did not, for want of an actual delivery to the defendants, without which the endorsement of the bills of exchange did not pass the property or interest in them; and he insisted that nothing had been done by Cooke, which could be considered as even tantamount to a delivery to Lambton and Co. The parcel was never, at any time, out of Cooke's custody or controul, and if the contents of the parcel had been stolen or destroyed, it would have been Cooke's [435] loss; and the female servant, in whose possession it was found, could not, in any sense, be considered as the agent of Lambton and Co. as the postman, if it had been delivered to him, might, perhaps, have been.

[To a question by the Court, on the right of the crown to sue the acceptors of the bills of exchange, it was answered, that for the present argument it was only necessary that they should have been seized (as they had been) as so much paper merely, and therefore that question did not now arise: the crown acquired the same sort of property in the bills as Cooke had had, and he had such a property in the parcel, and its contents, as would have supported trover, if they had been lost.]

It was also objected, that the plea had not effectually traversed the title of the crown, and that the inducement to the traverse was wholly insufficient, for that instead of denying that Cooke and Co. had any property in the cash-notes, &c. at the time of the seizure, or at the time of taking the inquisition to the writ of extent against Cooke only, it should have carried the denial to the time of issuing the (original) writ of extent*: for taking it as it stands, the inducement is, that Cooke and Co. had endorsed the bills, &c. on the 3d of July, whereby the defendants acquired a [436] property therein: and the traverse is, that therefore, on the 2d, Cooke and Co. had then no property therein.

* Quere, if not matter of law, and therefore not necessary for the defendant to traverse it. *Sir Edward Dimock's case*, Lane, 64.

He submitted, that the debts due to the crown debtor, or to his debtor, at the time of the extent, and all property of which either of them shall have become possessed or entitled to subsequently, are bound by the teste of the original writ, and not merely from the taking of the inquisition against the debtor of the crown's debtor, and that that point was fully settled by the decision in the case of *The Queen v. Arnold* (f).

Littledale, in support of the plea, on the objection taken to the terms of the traverse, observed, that the defendants could only traverse such matters as were relevant and consistent with their defence—that they had done so—and that their traverse was material and issuable. They had certainly admitted Cooke and Co. to be possessed, at the time of the issuing of the extent, or otherwise they must have failed in proving their issue: but they have traversed the title of the crown, or found by the inquisition, of the 4th of November, against Cooke and Co. And he urged, that in extents in aid, debts in the second degree are not bound by the teste, but from the day of taking the inquisition against such debtor, as was held in the case of *The King v. Green* (Bunb. 265, and West, 329, S. C.); and the reason is, because the party has no notice [437] of the process, and is necessarily ignorant of the time when it bears teste: and had such writs relation, in all cases, to the day when they were tested, it must destroy all confidence in the general course of dealing between one subject and another. The principle of the cases which had been cited he admitted, but the distinction, he insisted was, that although the teste of the writ bound the property, yet where the property has been altered between the teste of the writ, and the taking of the inquisition, the writ does not reach the goods; but neither a fieri facias, nor a distress without sale, alters the property in goods. In a subject, who has knowledge of an extent issued, transferring the property in his goods, is a fraud, but where there can be no knowledge there can be no fraud. A debt having been found by inquisition, although it becomes thereby a debt of record, is not notice.

It was then urged, that the nature of some of the property which had been seized under this extent (the bills of exchange) was such that it could not be considered as bound; for as to the argument of a property in the paper, that could hardly be seriously put. The cheques too had been discharged, and were no longer of any value.

The bills were choses in action, and were specially endorsed to Lambton and Co. and if seized would not be available against the acceptors, in the hands of the crown, but Lambton and Co. had acquired by the endorsement Cooke's right to de-[438]-mand payment from the acceptors. If a bona fide endorsement between the teste of the writ and the seizure should not be held to be good, it would put an end to the free negociability of bills of exchange. To put an instance of the probable inconvenience of such a state of things, it was supposed that these bills had already passed through many hands. As well (it was said) might it be urged that the money paid by Cooke in the course of the day, for the necessaries of his house, might be taken from the several trades people by whom he had been supplied. On the whole, it was pressed, that the principle of the authority of *The King v. Green*, was strongly in the defendant's favour on this point. In that case, as here, the debt was paid between the teste of the extent and the finding of the inquisition.

On the second question, whether the delivery of the parcel in the manner found by the inquisition was a delivery to Lambton and Co. it was contended, that under the circumstances of this case it was: for they made the servant of Cooke the servant of Lambton and Co. Cooke had done all he could to transfer the property, and that in conformity with an agreement which had been long acted on. The bank had closed on the whole transaction, and would not open till after the parcel should have been gone; and Cooke had so far parted with the possession, and all controul over it, as that, aided by the existing engagement between them, it would have been a fraud in Cooke to have dealt with it afterwards as his [439] own property. The servant with whom it had been left, was a mere passive depository till the postman should call for it, and she may have given it to the sheriff's officer by mistake, taking him for the postman. Then, even if Cooke had any controul over the parcel, the sheriff, who was a stranger, could have none, nor had he any right to defeat the inchoate delivery of the parcel to the postman, nor could he oblige Cooke to countermand its original destination. It could not be said, that if the servant had been in the act of delivering the parcel to

the postman, that the sheriff could have snatched it out of her hands. She was a trustee for Lambton and Co. and they could have maintained trover for the parcel, though Cooke could not. If it had been lost, Lambton and Co. must have been the losers, as much as if they had purchased the contents, and paid the consideration money. On each point therefore, he submitted, there ought to be judgment for the defendant.

Nolan, about to reply, was stopped by

RICHARDS, Lord Chief Baron. If the subject-matter, which has been taken under this extent, had been of a different nature, it is admitted that the seizure would have been right. On the 2d of July, no appropriation of the contents of the parcel had been made, and if it be a general rule which must prevail, that the inquisition having put the debt on record, binds the property of the [440] debtor, these papers were as much bound by it as his chairs and tables. On the 3d this parcel was made up, and delivered in the evening to Cooke's woman-servant by his clerks, who is to keep it in safe custody, and in trust for Cooke, till the next morning, when she has orders to deliver it to the postman. When delivered to him, it would have been a delivery to Lambton; but, in the mean time, it is delivered to no one, and is entirely subject to the controul of Cooke, as much as if he had put it into his desk. The crown is placed by the seizure in the same situation as Cooke. There can be no question, therefore, but this demurrer is right.

GRAHAM, Baron. There have been three questions made on this demurrer. The first, as to the form of the plea, I put out of my consideration, for there is no doubt but that the traverse is consistent with the defendants case. The next question is one which, if we decide it in favor of the demurrer, at once puts an end to the other; and on that my opinion is against the defendant, for the extent against Bruce is tested the 2d of July, and an inquisition is taken thereon on the same day, which having been returned, finding Cooke's debt due to Bruce, at once assigns it to the crown, and from that moment it is seizable, although another process is necessary to make it available. Then the extent of the 4th of November, in the same year, attaches on the goods found by the inquisition of the 2d of July.

[441] I was certainly much struck by the argument founded on the bills of exchange, and the distinction taken between goods and chattels, and choses in action, and I would wish, since it is not necessary in the present case, to avoid giving any decisive opinion on that point, but I cannot help saying, that if Cooke, not being cognisant of the extent, had, before actual seizure, endorsed the bills *bonâ fide*, I should have great difficulty in holding that the indorsees would not be entitled to recover on them, or that the acceptors would not be bound to pay them. But with every inclination in favour of the defendants on that point, I cannot say that there was in this case any delivery of the parcel to Lambton and Co. and without a delivery an indorsement is of no avail. The parcel, when seized by the sheriff, had never been out of the custody of Cooke, and he might have changed the contents for any other notes, or if any exigency had required that he should revoke its destination, he might have done it. The agreement between the banking-houses was of a specific nature, but it contains nothing to bind the parties to settle their balances in the particular way in which they were accustomed to do so, by this transfer of bills of exchange. In case of any accident happening to this parcel, Cooke must have borne the loss, until it had been delivered to the postman. Had the woman mistaken the officer for the postman, there might have been a shade of difference in the case, but she knew his person, and the officer seized the [442] parcel out of her hands, and had he robbed her of it, it would have been at Cooke's risk.

I am therefore clearly of opinion, that there was no delivery to Lambton and Co. and that there must be judgment for the crown.

WOOD, Baron. It is necessary to consider, in this case, at what precise time the crown's right attached: for without doubt, if the debtor had this parcel in his custody at the time of the seizure, the crown had a right to seize it. The custody of Cooke's servant was the custody of Cooke, and therefore I think it was liable to be seized under this extent in her hands.

As to the argument of the bills having been specially endorsed, it is clear that a special indorsement does not transfer the property in bills until they are delivered over; and that must be averred in the declaration. The form of pleading is, that the party endorsed, and then and there delivered, &c.

I remember a case in the books, where, on a motion in arrest of judgment, the court said that it was necessary that the plaintiff should prove a delivery.

Whether it would have been a good delivery in the hands of the postman, or not, is another [443] question, but in this case it never was given to the postman, or was out of the custody of Cooke, till it got into the hands of the sheriff.

It was said, that no one but Cooke had the power to deliver the parcel, but if Cooke had that power, then certainly the crown had a right to seize it. There is an old case to be found *¹, where a person had made over his estate to another, reserving to himself a power of revocation, and that estate was held to be seizable. Whatever power of revocation Cooke had as to this parcel, belonged on the seizure to the crown.

GARROW, Baron, of the same opinion, and for the same reasons. This has been compared to a purchase of the bills; but it is nothing like it, for Cooke might have altered their destination, and withdrawn the notes and bills, and substituted better or worse paper, and in short have done what he pleased with the parcel up to the moment of its seizure. If the postman had not come as was expected, would not the period of his controul have been extended? Or if Lambton and Co. had refused to take the bills enclosed, would they have been bound by the fact of their having been put up into this parcel? If a burglary had been committed in the banking-house, the loss would have been Cooke's and not Lambton's. While they were in the hands of Cooke, they were [444] not a payment to Lambton discharging Cooke to their amount. There was nothing like an appropriation, or a delivery of the bills to Lambton and Co. and therefore I am of opinion that there must be

Judgment for the crown.

BONHAM AND OTHERS *v.* LEIGH AND ANOTHER. Friday, 6th February 1818.—The affidavit of an insurance-broker, the agent of underwriters, sued on a policy, will not be received in support of an application for a commission to examine witnesses abroad.—The party himself, or his attorney, should make the necessary affidavit in all such cases, and it should contain very satisfactory statements.

Dauncey moved, pursuant to notice, on the part of the plaintiffs, for a commission to examine certain persons residing at Lisbon, whom he stated to be necessary and material witnesses for the plaintiffs, in the trial of an action at law, commenced by the defendants against them, as underwriters, on a policy of insurance, for a total loss. The bill had been filed for a discovery—a commission—and an injunction; and it charged, that the ship insured was not sea-worthy previous to the voyage, which was denied by the answer: but,

Before the merits were entered upon, it was objected by Martin, for the defendants, that the affidavit filed in support of the application was insufficient in itself, and was besides made by a person from whom, for want of such connection or privity with the parties, as would enable him [445] to make an affidavit of the contents, it ought not to be received.

It was, in fact, made by one who described himself to be an insurance-broker, and agent to the plaintiffs, and he swore that "he had investigated the circumstances attending the loss demanded upon the said policy, and that, in his judgment, the said plaintiffs had several material witnesses to examine, residing at Lisbon, in the kingdom of Portugal, as deponent had been informed and believed, and particularly, &c." (naming certain persons at Lisbon). And he further swore, that the plaintiffs would not be able to make a good defence to the action without the testimony of such witnesses, and that the injunction sought by the said plaintiffs, to restrain the defendants from proceeding in the action, was not for delay, but for the purpose of trying the action on the merits.

It was submitted, that an affidavit in support of such a motion, (which always caused great delay,) ought to be made by the party himself, or his solicitor *², and that the statements in the present were not such, or so satisfactory, as the Court is in the

*¹ Probably *The King v. The Earl of Nottingham*, Lane's Rep. 47.

*² See the case of *Lacagnoty v. The Attorney General*, (ante, vol. ii. p. 172,) where an affidavit made by the attorney concerned for the party was held sufficient, where it stated that his belief of the facts sworn to was founded on documentary evidence in his possession,—but that otherwise bare information and belief would not have been sufficient.

habit of requiring, on motions for a com [446] mission to examine witnesses abroad, which were by no means of course, but were granted only on properly authenticated facts, shewing that the justice of the case could not be otherwise attained.

RICHARDS, Chief Baron. Most clearly a proper affidavit, made by the insurance-broker of the party, cannot be sufficient to obtain a commission; and as clearly, such an affidavit as this, if made by a proper deponent, would even then be insufficient. The party himself, or at least his attorney, should make the affidavit in support of this sort of motion, in all cases.

Per Curiam. Motion refused.

[447] THE KING, IN AID OF THE KENT INSURANCE COMPANY, v. RAMSBOTTOM AND OTHERS, Assignees of Penfold and others. Saturday, 7th February 1818. — Where an extent had issued in aid of a company of individuals, (not incorporated), and the inquisition found that their debtor “was indebted to L. and H.” — (two of the company who had executed the usual bond to the Crown as taken from joint insurance companies under the 22 Geo. III. ch. 48, on behalf of themselves and the company) — “and the other partners and proprietors of a certain Society, called,” &c. — held sufficient on motion in arrest of judgment: and that it was not a fatal objection not to have named all the members of the company, in the finding of the debt by the inquisition. — Nor is a finding, that two persons were indebted to L. and H. and the other partners and proprietors of the unincorporated company, at variance with a command to the sheriff, to find what debts are due to L. and H. on behalf of themselves, and a certain Society, called, &c. — A recital in a writ of extent, that two persons are indebted to the Crown by bond, (generally,) is sufficient to authorize a command to the sheriff to enquire of debts due to such two persons, on behalf of themselves, and a certain Society, called, &c. — Where the Crown debtor has debts due to him jointly with others who are not debtors to the Crown, and would therefore not be entitled to the Crown process, an extent may issue for such joint debts. — Matters of fact not appearing on the record, cannot be called in aid, in opposition to a motion in arrest of judgment, on objections apparent on the face of the record.

This was a motion in arrest of judgment, on certain technical objections taken to the pleadings. A verdict had been found for the crown on the trial of this proceeding, which was an extent in aid of a certain association of private individuals calling themselves the Kent Insurance Company.

The record set out the writ of extent against the Penfolds, which recited that Larking and Hougham, by their certain joint and several bond *, became bound to the Crown in 3000l. pay-[448]-able at a day past, which was not paid: and that by an inquisition, by virtue of a prior writ of extent against them, commanding the sheriff “to enquire what debts, &c. were due to them the said Larking and Hougham, for and on behalf of themselves, and a certain Society, called ‘The Kent Insurance Company,’ or any other person or persons to their or either of their use, or in trust for them or either of them, then had in” &c. it was found, &c. “that Edward Penfold, and William Margesson Penfold, of Maidstone, bankers, on the day of taking the inquisition, were justly and truly indebted to John Larking and William Hougham, in the said writ named, and the other partners and proprietors of a certain Society or Company, called ‘The Kent Insurance Company,’ in the sum of 2829l. 15s. 6d. for money had and received by them (the Penfolds) as such bankers as aforesaid, to and for the use of the said Society or Company, which said debt the sheriff had seized,” &c. — and commanded the sheriff of the county of Kent to enquire what lands and tenements, and of what yearly values, the said Edward Penfold and William M. Penfold or either of them, had in his bailwick, and what goods and chattels, &c. and the same diligently to appraise and extend, &c. &c.

The sheriff returned, that he had seized, &c. and that the assignees of the Penfolds, who had since become bankrupts, had deposited the said debt in his hands, and had given him notice not to pay it over, as they intended to move the Court, &c. — praying

That bond was given by them to the Crown, as directed by the Stamp Act, (22 Geo. III. ch. 48) in the name of themselves and the company, with the usual condition to make due returns.

directions. The defendants [449] (the Penfolds' assignees) appeared, (14th June,) and claimed the money deposited, &c.—and pleaded the bankruptcy of the Penfolds—traversed the finding of the inquisition, as to the debt due from them to Larking and Hougham, and the other partners and proprietors of the Kent Insurance Company—and prayed judgment, and amoveas manus. Replication taking issue.

Parke, on those pleadings, obtained a rule, calling on the prosecutors of the extent to shew cause why the verdict should not be set aside, and a new trial had, or why the judgment should not be arrested *, and a writ of amoveas manus issued on the following objections:—

1st. That the writ of extent against Larking and Hougham was insufficient to warrant the finding of the debt found by the jury, because it was a debt due to other persons than those recited to be indebted to the crown on the bond: and because it appeared on the face of the record, by the mandatory part of the writ, as set out, and the recital of the debt found by the inquisition, that the sheriff and jury had not pursued the directions of the process: and therefore as their finding under the inquisition did not correspond with the recital of the original debt and the command to the sheriff, that finding was not authorised by the writ of extent.

[450] 2dly. That, if (on the contrary) the finding were authorised, then the debt found to be due to Larking and Hougham was not well found, because the names and other sufficient designation of the persons to whom the debt was found to be due were not stated, and therefore the inquisition was void, for uncertainty.

On the first point, it was observed, that the bond was stated to be entered into by Larking and Hougham only, whereas the command was to find what debts, &c. were due to them, on behalf of themselves, and the Kent Insurance Company, and upon that the inquisition found that Penfold and Co. were indebted to Larking and Hougham in the said writ named, and the other partners and proprietors of the Kent Insurance Company. Thus there was an obvious discrepancy and inconsistency in terms, in three distinct parts of this proceeding, apparent on the record, and therefore, (he contended) that according to the rules of pleading, from which this sort of proceeding was not exempt, the judgment, which was founded on it, could not stand.

He next submitted, that (if the variance pointed out were not fatal,) as the sheriff having exceeded his authority in taking an inquisition not commanded by the writ, that was also a ground for arresting the judgment; and he cited *Viner's Abr. tit. Office, C.*, and the case of *Pretton v. Purbeck* (2 Salk. 563), on that point.

[451] As to the other objection, he insisted that (the company not being a corporate body, but a partnership of individuals: not bound together for any given period of time, and who were a fluctuating body, liable to a daily change of members,) each individual ought to be named in all proceedings in which those persons were collectively concerned, for that otherwise a judgment, satisfied on a verdict recovered by two of them, in the name of the company, against their debtor, for the debt due from him, could not be effectually pleaded in bar to a future action, to be brought by any others, or the whole of the company, for the same demand—that the party defendant could not otherwise know whom, or for what he was called on to answer, and that he might also, in many instances, be deprived of the plea of set off, or tender: and such a general uncertainty would pervade the demand, as the law did not permit. On the point of insufficiency for uncertainty, he cited the following authorities:—*The King v. Harrison* (8 T. R. 598), (where Lord Kenyon held that a conviction of such a one and company could not be supported:—) *Spalding v. Mure* (6 T. R. 635), (where it was held, that on a declaration for money had and received by three defendants, to the use of the plaintiffs, they could not give in evidence money so had and received to their use by the three, and a fourth person, who was dead:—) *Her v. Patrick and Pepper* (1 Leach, Cro. Law, 287, 3d ed.): *The King* [452] *v. Sherington* (1 Leach, Cro. Law, 578): which last was a case of an indictment for stealing articles belonging to the trustees of the poor of the Old Artillery-ground: and there, notwithstanding there existed an act of parliament vesting the property in the appointed trustees and their successors, and empowering them to prefer bills of indictment for larceny, it was held that the trustees not being incorporated, ought to have been named, and that the indictment should have laid the articles to have been the property of A., B., and C. trustees, &c.—and *Rushon v. Houghton*

* The Court, on that occasion, refused the former part of the application, and therefore the motion was now confined to the arrest of judgment.

(3 Leon. 204. Sequ. 2 ib. 121), (where it was found by inquisition on an extent against Rushton, at the suit of the queen, that Rushton was possessed of a term quorundum annorum adhuc venturum, which being excepted to, was held bad for the uncertainty). And the reason given is, because, as the subject might come in again and claim his property, when the crown's debt was satisfied, there ought therefore to be a sufficient certainty, to enable him to do so. In *Wiat v. Essington* (2 Ld. Raym. 1410), where judgment was arrested, because the declaration (in trespass for entering a house, and taking bona et catalla ibidem inventa) did not specify what the goods were: so that that recovery could not have been pleaded in case of another action brought for the same goods. And to the same point he also mentioned the cases of [453] *Bertie v. Pickering* (Bur. 2455), *Copleston v. Piper* (1 Ld. Raym. 191), *Hovel v. Reynolds* (1 Vent. 272, and 329), and *Cook v. Cox* (3 M. & S. 110).

Dauncey, Richardson, and Marsham, now shewed cause. They contended, first, that there was in effect no real discrepancy between the terms of the writ and the finding of the inquisition, even if the mere nice grammatical distinction, attempted to be made, should be acknowledged; for that although the writ recited that the inquisition was by virtue of an extent against Larking and Hougham, and the direction was to find debts due to them, on behalf of themselves and a certain Society, &c. and that it was found that the Penfolds were indebted to "Larking and Hougham, in the said writ named, and the other partners and proprietors of a certain Society," &c.; yet there was enough stated on the record to connect them fairly and intelligibly together: and 2dly, that the directory clause of the writ, and the finding of the inquisition, substantially and to a reasonable intent corresponded in terms; or that at all events the directory part of the writ of extent against the Penfolds was in correspondence with the finding of the inquisition thereon; and they submitted that the other preceding recitals might, if inconsistent, be rejected as surplusage; for that they were not necessary to the authority given to the sheriff, or to the subsequent proceedings:—that as to the recital that Larking and [454] Hougham were indebted on bond to the crown, and its stopping there, without adding (as the condition was) "on behalf of themselves and the company," that could not be urged as an objection, because the nature of the bond which is referred to by the record, and was ready to be produced, would sufficiently shew that they were indebted to the crown on that bond, in the character of persons acting for and on the behalf of the Kent Insurance Company, given them by the act of 22 Geo. III. ch. 48, (the stamp act) which recognizes and authorizes their so acting. And therefore they submitted that the usual omission of the condition of the bond on the record (as was the practice), did not create such a discrepancy as would be fatal to the proceedings. They also submitted, that if that were not so, the objection was now made too late—after judgment—and ought to have been taken earlier, and before the cause was tried, and not now, in the shape of a motion to set aside the proceedings for irregularity, when they had taken the chance of a verdict.

As to the second and principal objection, That the names of all the parties forming the Kent Insurance Company ought to have appeared on the record—they contended (admitting that it was not an incorporated society), that that was not necessary, for that the society was recognized by act of parliament—the 22 Geo. III. ch. 48,—which not only notices the existence of such societies, but provides a power to enable [455] them to act through the medium of two of their members, whom it authorizes to give the bond now in question, anticipating and obviating by that provision, in the dealings of such companies with government, the inconveniences now made matter of objection on the part of these individuals. They also submitted, that an answer might be given, in reason at least if not in law, to the objection, both in the absolute utility (as it concerned the defendant) of putting all the names on the record, and the impracticability and inconvenience of it as it affected the plaintiffs. And to shew that the latter principle was recognized and acted on by the Courts, they cited the case of *Cockburn v. Thompson* (16 Ves. 321),—(to which the Lord Chief Baron added the case of *Adair v. The New River Company* (n), and said, that there were also cases relating to the getting in of prize-money, which proceeded on similar grounds)—where the Chancellor had dispensed with the names even of persons who would, under other circumstances, have been

(n) 11 Ves. 444. There the Chancellor held, that the impracticability made certain cases exceptions to the general rule.

necessary parties, on the sole ground of the incapability to furnish them, in consequence of their number and inaccessibility. As to the cases cited on that point, they denied the applicability of decisions in criminal and penal cases to questions arising on proceedings where the Crown sues to recover its debts.

They then submitted, that payment under this [456] extent would be a legal bar to any suit instituted by the company, or any of them, to recover the same debt, or if the statement of any facts the want of which was now complained of, ought, for that purpose, to have been put on the record, it was for the defendants to have procured that statement, by pleading so as to have produced it. And they urged that this objection also was now made too late.

Parke, in support of the rule, premised that the Court could not take notice of any thing not on the record, in disposing of the present objections, in order that the grounds of its determination might be obvious in case of error brought, and that therefore the bond could not now be considered, in discussing these questions, as it was not set out, and (although adverted to) had not been averred to have been given in pursuance of the act of parliament—and he insisted that these objections being on the face of the record, the defendants were not bound to apply to the Court for the purpose of taking advantage of them earlier than before judgment.

He then resumed the arguments used on making the original motion, insisting that the sheriff was not warranted by this writ, in directing an inquiry as to any debts but such as should be due to Larking and Hougham alone, or to other persons in trust for them.

[Graham, Baron, suggested, that by the *præ*-[457]-tice in cases of extent the Crown might have seized the debts due to Larking and Hougham, and the company, for the Crown debt of Larking and Hougham.]

On the objection of the partners of the company not having been named, on which he principally relied, he observed, that no authority had been cited, nor any effectual argument used against it; for the cases cited from the decisions of a court of equity, where the practice and the rules were subjected to the equitable circumstances of each particular case, (he maintained) were not applicable as authorities on questions of pleading in courts of law: and besides, it did not appear on this record that the company consisted of so great a number of persons, or of any persons except Larking and Hougham: and therefore in point of fact even the equitable exception to the rule of pleading was not applicable here, where it would not have been a difficult matter for the Crown to have ascertained the names of the company in the present instance. If they should have been composed of only four or five individuals, they ought to be named, and perhaps would be, and their number, however large, cannot obviate the rules of pleading.

A defendant in every suit is entitled to a record of such a degree of certainty, and particularity as may enable him to use it in pleading to another action for the same subject-matter, and this is clearly not such a record, because the defendants are not furnished by it with the means [458] of identifying Larking and Hougham with the rest of their creditors calling themselves this company: and he reverted to the cases before cited on that point. He contended, in short, mainly, that the present allegation on this record, on which issue had been taken, was not more certain than if it had been found that the Penfolds were indebted to Larking and Hougham, and others:—and that it could not admit of a doubt that such a finding or averment in any proceeding, whether a declaration or an inquisition, would be an unanswerable ground for a motion in arrest of judgment. An inquisition ought to be at least as certain as a declaration or a judgment, and if so, it is no answer to an objection of want of such certainty, that the Crown is entitled to the debt if properly found. He submitted, therefore, that this judgment ought to be reversed.

Dansey, in reply, said that a similar objection to the last now made, had been taken to the proceedings of the Crown against the Reading Bank, consisting of a firm of five, two of whom only were Crown debtors, and the question was raised whether the firm could use the crown process, two only of them being Crown debtors, when the Court held, that they might: and he submitted that this was very much the same case.

He then observed, that so far from this debt having been found with any thing like uncertainty, the nature of it was described with particular minuteness, in being stated to be a debt due [459] to Larking and Hougham, on behalf of themselves and

a certain society called the Kent Insurance Company—and if not, still the concluding words of the directing part of the writ would take it out of this objection, if it were otherwise well founded, for this debt was due to all the company collectively in trust, for each individual as to his particular share. And he ended by insisting, that the want of information and knowledge of the persons composing the company, which was now made matter of objection, was in effect waived by the defendants having pleaded to the inquisition that they (the defendants) were not indebted to them, the individuals named and the other partners and proprietors of the Kent Insurance Company.

RICHARDS, Chief Baron (stopping further reply). We are of opinion that this rule ought to be discharged. It has been stated as an objection, and very ably urged, that there is a discrepancy even in the two parts of the writ itself. I, however, confess, that as far as I understand it, I see no such discrepancy. It is stated, there is a debt due from these persons to the Crown. That is sufficient to found the process. Then the mandatory part of it directs the debts due to them to be inquired into. [His Lordship then read the questionable passages of the record.]

As to the alleged variance between the finding of the inquisition, and the authority given to seize the debt due from the bankrupts to this [460] company, I cannot understand the drift of the distinction which has been attempted to be made, although I certainly see a trifling difference in the words used, but I do not feel the force of the ingenious arguments which have certainly been pressed upon us with great ability, to induce us to arrest this judgment.

Then with respect to the other objection, that the whole of the persons forming the company are not named, it would be a mischievous rule—if it could operate in the present case to arrest the judgment which has been entered upon this verdict after issue joined—that would oblige us to hold for a moment that these proceedings do not warrant that judgment. I should apprehend that it would be impossible for the defendants to have a better defence against the insurance company, if they should bring another action for this debt, than this verdict supported by the judgment, and therefore I am of opinion that this rule ought to be discharged.

GRAHAM, Baron. I am of the same opinion. It strikes me that there is no defect in this record as it stands. As to the first objection (stating it) it would certainly have been more accurate to have stated that the bond was not given by them alone, but on behalf of the company of which they were members and trustees: but still that which is stated upon this record was sufficient to authorize the issuing of the process. No doubt the framer of the writ was apprised of the condition [461] of the bond itself, for the mandatory part of it is accommodated to the circumstances of this case. [Having read the command to the sheriff, and the finding of the debt as by the inquisition, which his Lordship said he considered not discrepant in effect, or that if it were so in words, the direction being extended to the finding trust debts, the debt from the Penfolds to the company was a debt to them in trust for Larking and Hougham, as well as the other members of the company, which would be sufficient to cover the defect, and that, in point of fact, a debt due to persons on behalf of themselves and others, constituted a debt due to them, as did also a debt due to them and others.] So that I think (continued his Lordship) that there was a fair ground recited to authorize the court to issue the process upon the bond to the two, and that the mandatory part of the writ is effectively complied with by the finding in the inquisition. Therefore that inquisition, in my opinion, authorizes the proceedings subsequently had under this writ of extent.

Then the main objection, and which seemed principally to be relied upon, (and as to which there might perhaps exist in some minds a certain degree of doubt,) is, that there is no return made of the names of the several persons who constituted the Kent Insurance Company when the writ bore teste. Now that objection I answer, by stating the course of this Court to be, that when the sheriff has returned that he finds that A. and B. are indebted to the crown, an amicable writ in the [462] first instance issues, which has always been deemed sufficient to found an inquiry as to what debts are due to them, and it is of no consequence if in the debts found they should be connected with persons whose names may be as numerous as the letters of the alphabet, if the debts be in fact due to the Crown debtor.

They are amenable, and that gives the Crown a right to the whole 5000l. or whatever sum may be due to this company, and it is sufficient that A. and B. are two of

the persons to whom this debt is owing; and therefore there is no injustice done. If we were to say that the sheriff upon every inquisition is bound to inquire what are the different interests of every partner, ostensible and dormant, and who are the different persons who constitute each separate firm, we should throw insurmountable difficulties in the way of recovering the Crown's debts. It is open to the parties who may be aggrieved to apply specially to this Court under such circumstances, and the inquisition does not preclude them from coming forward to contest this writ, and the Court would always direct the proper inquiries, and do what was just in such a case; but it would be too much to say, that a defendant may lie by, and then come forward to move such objections as these in arrest of judgment, when he had had all along full means of ascertaining who were the persons interested in the debt.

Another argument is pressed upon us—that the writ not expressing the names of these per-[463]sons, it wants necessary certainty, and the defendants might thereby be put to very serious difficulty in defending themselves in any future action for this debt. But I think it would not be difficult to obviate that by proper averments in the plea. That part of the case one of my learned brothers will give a better answer to, perhaps than I can. Common sense however, tells us that they would have an obvious defence, if the company were advised to bring an action hereafter against the Penfolds; for it would be an easy thing to state in answer to it the facts appearing on this record.

Then it was said, that you are to look with the same strictness to an inquisition as to a declaration. I own if a declaration had been framed without specifying all the names of the parties, that would be a difficulty, for as the law now stands, they must state the names of all the persons interested in the action; but it is different in cases of this kind, for it has always been the rule of this Court to afford facilities in cases of suits instituted for the recovery of debts due to the Crown, beyond what might be allowed in the case of private individuals*. On these grounds, I am of opinion that the objections will not stand the test of examination, and must therefore be over-ruled.

WOOD, Baron. I agree, that in determining [464] these objections we can only look to the record. We can draw no inference of our own knowledge from any other source. The question now is, whether there is enough upon this record to warrant this judgment for the Crown. Several objections have been taken to it—that the writ is bad because the mandatory part is not warranted by the reciting part—that the finding of the debt by the inquisition does not correspond with the command in the writ itself—and that all the partners in this insurance company ought to have been named and described on the record—and to these has been added another, that the debt itself which has been seized into the hands of the Crown, is not described with sufficient certainty upon this record.

The writ of extent certainly begins by reciting that these two persons, Larking and Hougham, are indebted by bond to the Crown. It does not state the condition of the bond, but merely that a bond was given by them to the Crown. There is however a debt stated, therefore, clearly warranting the inquisition. Now the law upon that is this, where two persons are found to be indebted to the Crown, a writ may be issued to require of and authorize the sheriff to seize debts due to them, and also to others. That was so settled in the *Reading case*. Then there being here sufficient authority for the sheriff to seize any debt due to these two persons: the mandatory part of the writ is, &c. (stating it, page 448), the import of which is that he is to find debts due to these per-[465]sons, Larking and Hougham, jointly with the rest of their partners, constituting the Kent Insurance Company,—that clearly must be the meaning of it—for and on behalf of themselves, (as constituting a part of that company,) and of the rest of the company, and it comes precisely to the same thing as if it had run in the terms of the inquisition, to find debts due to them, (that is, Larking and Hougham,) and the other proprietors of the company. Then that being the sense of the writ, the inquisition pursues it in substance, though not in words, so that there is no substantial variance between them, and the inquisition is warranted by the sense of the writ.

The last objection is, whether this debt is sufficiently described in the inquisition. It is in fact thus described, that the bankrupts were indebted to Larking and Hougham,

* The extent itself is an instance of that principle.

and the other partners and proprietors of the company called the Kent Insurance Company. Now, I think that is a sufficient description of the debt which has been seized into the hands of the Crown; because, according to the cases, all that is necessary is that it should be found with convenient certainty, that the party may be able to defend himself against any other persons who might afterwards be disposed to bring an action on the same account. That is the rule by which we ought to be governed. That has been done in this case; for the defendant might make a defence from this inquisition against any future action, by [466] stating the facts on this record, adding only proper averments of identity, as that the plaintiffs are the same persons as are described by the name of the Kent Insurance Company, and that the debt is the same which is required in every action. Nothing more than that would be necessary to constitute a good defence to any action that could be brought hereafter by this company for the same debt.

GARROW, Baron. This is an application after trial to arrest the judgment, and in the opinion I have formed upon this subject, I have followed my brother Graham. I think we ought not to go out of the four corners of the record, and upon that ground I am of opinion that this rule must be discharged. It was admitted in the progress of the argument, which has been conducted with great ability on the part of the defendant, that almost every thing necessary to sustain the judgment is stated on the record, and it is admitted, that if these two persons, Larking and Hougham, were not connected with the company, but stood alone, and if in their individual characters they had been debtors to the Crown, the mandatory part of the writ would have been warranted—and that the jury would have been justified in finding this debt to be due to them, whether as connected with a banking or insurance company, or any other concern. The command is to find whether the Penfolds are indebted to the Kent Insurance Company, and the [467] inquisition in effect finds they are indebted to Larking and Hougham, and other parties, partners, to the jury unknown, and that has been so returned.

Then the only important question is, whether the Penfolds, after having satisfied this debt due to the Kent Insurance Company, will be furnished by this record with a good defence against any claim that might be made by the company hereafter. I will not weaken that which has been so ably stated by my learned brother Wood, by adding any observations of my own. I however conceive that any thing which is left uncertain may be made certain by supplying the deficiencies by means of such averments as have been alluded to.

Therefore I am clearly of opinion with the rest of my learned brothers, that this rule ought to be discharged.

Per Curiam. Rule discharged.

[468] SIR WATKIN LEWES v. MORGAN. Monday, 9th February 1818. — Application to suspend an order of the Court till an appeal, of which notice had been given, should be determined, would be more properly made to the court of appeal, particularly where that court has already interfered in the cause; but the Court will suspend their order for a given period, and to a certain extent, on motion, for the purpose of giving the party an opportunity of applying to the appellate court.—If a plaintiff do not file his answer to interrogatories, the course is to make an order on him to shew cause why they should not be taken pro confesso.

Notice having been given by the defendant, that he intended to present to the House of Lords a petition of appeal against the several orders, made by this Court in the month of November last.

Dauncey and Raithby now moved, pursuant to notice, that all proceedings in this cause, founded on those orders, might be stayed until after the appeal should be heard.

The Solicitor General and Blake opposed it, and principally on the ground, that the application should have been made to the House of Lords, citing the case of *Huguenin v. Baseley* (15 Ves. 180).

GRAHAM, Baron. I have considerable doubt about the propriety of the present application to us, for I accede entirely to the opinion expressed by the Lord Chancellor in *Huguenin v. Baseley*, that it is, at least, much more expedient that such an application should be made to the House of Lords, and for the unanswerable reason given by his Lordship, that such applications, if encouraged, would paralyze the arm of justice.

In subsequent cases too, the House of Lords has been declared to [469] be the proper court to which to apply on similar occasions (*b*), and that an appeal lodged does not, ipso facto, stay the proceedings. In the present case too, the court of appellate jurisdiction is more especially the proper tribunal to which such an application should be addressed, because the House of Lords have, in fact, framed this case throughout.

As it now appears, however, that Wilder's mortgage was not quite paid off, our orders may have gone somewhat too far; not that I mean to express the least doubt about the propriety of it, on the principle on which such of the Court as made the orders proceeded; but under the circumstances which now present themselves to us, I think we should suspend the order till the 20th of April, but in the mean time the orders, as far as they operate to restrain the defendant in any respect, must be considered as in force, and must be obeyed.

WOOD, Baron. This Court has, most undoubtedly, authority to suspend its own proceedings at any time, and the practice of appeals proves it; for if it were bound by its orders, the right of appeal would, in many instances, be altogether taken away—writs of error from courts of law are writs of right: and when they have been [470] sued out, and bail put in, they suspend the proceedings ipso facto, et ex debito justitiæ. It used to be the same in appeals from courts of equity, until the general order of the House of Lords was made, for the purpose of altering (*c*) the practice in that respect, in 1807. But notwithstanding that order, the Court of Chancery has held that the proceedings may be stayed on special application for that purpose, and that such an application may be made to either the court below, or to the court of appeal: although the Chancellor observes, in the case of *Huguenin v. Baseley*, that it is more expedient that the application should be made to the House of Lords, if it can.

I shall not enter into the merits of the orders now, further than to say, that there are reasonable grounds of doubt, and that is all that is necessary to warrant the present application. I myself thought that the order ought not to have been made, and as I am satisfied that there will be found to be due to the defendant a very considerable balance on the coming in of the general account, I think that that is a sufficient reason we should suspend the orders.

GARROW, Baron, [after having made some observations, justifying the orders, admitting, however, the possibility that they might be rescinded,] [471] expressed his reluctant concurrence with the decision for suspending the orders till the time mentioned, and enlarging the time for paying the money into Court, in the expectation that the defendant would, in the interim, use his diligence in bringing them before the House of Lords, and with the understanding, that the defendant was to be still restrained from receiving the rents and profits.

Ordered, that the time for paying the money into Court, under the orders of 18th and 27th November, be enlarged till the 20th of April, and that the proceedings under the said orders, as to delivering up possession, be stayed till further order.

13th November, 1817.—By an order made in this cause, on Thursday, the 25th day of June last, it was ordered that the plaintiff should, on Saturday then next, shew cause why the state of facts brought into the office of the Deputy Remembrancer of this Court, (to whom this cause stands referred,) by the said defendant John Morgan, should not be taken as confessed by the plaintiff: which said day of shewing cause was, on the 27th day of the same [472] June, enlarged until this day. Now (upon hearing counsel on both sides,) It is ordered by the Court, that in case the plaintiff shall make default in filing his answers to certain interrogatories, exhibited by the said defendant before the said Deputy Remembrancer for his examination, by the 1st day of next Hilary Term, the said defendant, John Morgan, is then to be at liberty to make an affidavit of the several facts to which the said interrogatories so exhibited by him, for the said plaintiff's examination, are intended to apply: which affidavit the said Deputy Remembrancer is then to take into his consideration, and proceed in the accounts and enquiries now before him, under the decree in this cause.

(*b*) *Waldo v. Caley*, 16 Ves. 206. *Willan v. Willan*, ib. 89, 216.

(*c*) *Vide* 15 Ves. 184.

[473] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LD. CH. BARON.

THE MAYOR, &C. OF THE BOROUGH OF READING, AND THEIR LESSEE, v. WINKWORTH AND OTHERS. Tuesday, 10th February 1818.—Bill for the value of tolls charged to be subtracted by the defendant, and claimed to be due for corn sold by sample in their market, and for an account, and a declaration of their title:—retained with liberty to bring actions, &c. although the plaintiffs had not previously established their right at law.—The question itself is a question purely legal, and must be decided at law before a court of equity can make an effectual decree; but the plaintiffs having succeeded at law, the Court will entertain a bill for an account, &c.

The Corporation of Reading filed the present bill (1813) against the defendants,—praying that they might be declared to be entitled, by immemorial usage and custom, to have and receive the tolls thereinbefore mentioned, for or in respect of all corn or grain sold in the said borough, either in the market-place there, or elsewhere in such borough, or on the market-day there, or on any other days, and either by sample or in bulk: and to have such toll paid to them by the sellers of such corn or grain:—and that an account might be decreed to be taken of the several quantities and species of corn or grain sold in the said borough, since the beginning of the year 1811, by or for, or on account of the defendants respectively: and of the quantities and values of so much of such corn or grain, as ought to have been rendered or delivered to plaintiffs, or their lessee, for or in respect of the said toll; and that the full value of such toll might be decreed to be paid to plaintiffs by said defendants, their said [474] lessee consenting to such payments being made to plaintiffs.

The bill set forth the plaintiffs' title, as deduced from the Abbot of the monastery of Reading—that their possessions, on the dissolution, had become vested in the Crown, amongst which was a privilege to take as toll one quart of every quarter of wheat, rye, barley, oats, malt, and other kind of corn or grain, brought into the Reading market to be sold, &c. and a proportional part, &c.—that that privilege Queen Elizabeth had by letters patent, granted to the plaintiffs, in consideration of their keeping the bridges and market-place of the borough, and streets leading thereto, in repair—paying to the Crown a fee-farm rent of 22l.—and finding a schoolmaster, for ever, to teach grammar within the borough.

The bill then charged, that the defendants had sold divers quantities of corn and grain, brought to the market for sale, either in sample or in bulk, and which had been afterwards delivered to the buyers thereof, without rendering the accustomed toll.

The defendants, by their answer, stated that they were (mostly) corn-dealers and farmers—that some of them resided within, and some without the borough—admitted their having sold corn and grain in the said market-place, but averred that all such corn had been sold by sample, and not in bulk, each of such samples being a sack of corn [475] or grain, pitched and exhibited in the market-place on a market-day—and that in other parts of the said borough than the market-place, they had sold corn both by sample and in bulk, all which had been afterwards delivered to the buyer. And they submitted, that the plaintiffs were only entitled to take toll on the corn contained in the sample sacks so pitched in the market-place, and that they were not entitled to any toll, either from buyers or sellers, on any corn sold elsewhere in the borough than the market-place.

Jervis, Agar, and Parker, for the defendants, objected in limine, that the plaintiffs had no equity on which the Court could entertain such a suit—that if there had been any subtraction of toll legally due, the plaintiffs' remedy was at law:—and that they had no right to resort to a court of equity in the first instance, until their claim had been established before a jury. And in support of that objection they cited the following cases from Bunbury—*Disney v. Robertson and Another* (Bunb. 41), where a bill, filed for tolls for landing of goods, was dismissed per totam Curiam, as being a matter proper at law, and as a bill could be of no use, for it could not preclude any body but the defendants, and that because it was not, like a bill of peace, binding on all parties. *The Attorney General v. Ayre* (Bunb. 68), which was the case of a bill filed for the purpose of establishing a right to tolls in a manor, where the Court intimated an [476] inclination to dismiss the bill for want of jurisdiction, but it ultimately went

off on a point made by the evidence. In *The Town of Poole v. Bennet* (Bunb. 269), the Court retained the bill only because the defendant had admitted the plaintiffs' right. In the case of *The Town of Nottingham v. Wood* (Bunb. 330), a similar bill for toll of 2d per ton, for goods navigated on the Trent, was demurred to, on the ground that it was properly determinable at law, by action or distress, and the rather for that it did not appear by the bill that the plaintiffs had ascertained their title at law. On the argument it was insisted for the plaintiffs, that the bill was in the nature of a bill of peace; to which it was answered, that the defendant was a stranger, and therefore it could not be a bill of peace. Secondly, the plaintiffs' counsel insisted, that there being a fee farm rent payable to the Crown, reserved by charter, it was a prerogative case; but that ground failed, because the rent did not appear to be reserved out of the toll, and therefore the demurrer was allowed. So here the defendants are strangers, and the rent is not reserved out of the toll, and there has been no trial at law.

The Lord Chief Baron, however, declared himself to be clearly of opinion, that the plaintiffs were entitled to proceed with the suit.

The plaintiffs then proved, by the depositions [477] of many witnesses, their constant receipt of the toll, as far back as living memory, and that it was taken out of the seller's sample, if sufficient, or, if not, out of the corn afterwards delivered to the buyers, and that it had been taken whether the corn was sold on the market-day or on any other day, or in the market-place or in any other part of the borough. They also proved the repair of the bridges and market-place at the expence of the corporation, and payment of the fee farm rent to the crown, and performance of the other considerations.

They then put in the charter of Queen Elizabeth, and a decree of the 14th of Jac. I. in a suit between themselves and Green and others, and the depositions of witnesses read on the hearing of that cause.

On the evidence of those proceedings being offered, it was submitted on the part of the defendants, that the decree in that cause ought not to be received in evidence in this suit, whatever use the plaintiffs might make of it, in the way of citation as a precedent, because the parties (defendants) were not in the same interest, nor stood *pari jure*, inasmuch as the defendants on that occasion were freemen of the borough, and the present defendants were not—and that this was a bill filed to establish the plaintiff's claim universally, whereas the object of that was a demand of tolls from certain individuals only, and [478] who had admitted that the toll had been paid immemorially, which these defendants deny. In that case, also, none but freemen were interested, and the whole might have been collusive, or at least if a decree between such parties were held to be binding on strangers, it would open a door to collusion and fraud.

The Lord Chief Baron, however, permitted the plaintiffs to give the decree in evidence *quantum valeat*, on its having been shewn that the bill and answer had been searched for and could not be found—saying, that if it were collusive the defendants should shew it to be so.

The foregoing evidence for the plaintiff having been then read,

Dauncey, Martin, and Barber, on that evidence, and the authority of the decree, rested their case.

As to the decisions which had been cited, they submitted that what was to be collected from them was entirely in favour of the plaintiffs' claim, for in none of them had the Court dismissed the bill: and they contended, that they ought not to be driven to the necessity of a previous trial at law, unless their remedy was solely, or more effectually to be found there; but a court of equity has a concurrent jurisdiction. In the case of *The Corporation of Carlisle v. [479] Wilson* (13 Ves. 276), the Lord Chancellor over-ruled a demurrer to a bill for an account of tolls thorough, which raised the question, whether a bill lay for such a toll, the objection being that the plaintiffs' remedy was at law; and in the common case of bills for tithes the plaintiffs had no doubt a remedy at law, yet such a ground of objection had never yet been taken.

In the present case, the decree already made having established the plaintiffs' right, (they submitted) had rendered it unnecessary that the plaintiffs should first proceed at law; and neither the existence of the custom, or the legality of it, has been denied.

[Lord Chief Baron. There have been cases of this sort decided by Lord Kenyon and Lord Thurlow, where no action had been brought.]

They then suggested, that if the Court should consider that an action at law was necessary, the bill might be retained for a year, with liberty for the plaintiffs to proceed in the mean time at law: and they cited the case of *The Duke of Leeds v. New Radnor* (2 Br. Ch. Ca. 338, 519).

For the defendants it was contended, that if the plaintiffs were entitled to toll on the bulk of the corn sold by sample, they might have [480] brought an action against the sellers to recover it. *The Bailiff, &c., of Tewkesbury v. Bricknell* (2 Taunt. 130). And having insisted on the objection before taken collaterally to the bill, of a want of equity, (not having previously established their title at law, without which they would have no right to a discovery,) they submitted, that such a toll as was now claimed never could have had a legal existence, for it was at once a claim of a market toll and a toll thorough, and founded both on prescription and grant: and it is claimed not merely for corn sold on market-days, but on every day in the week, and in every part of the town—that there was no evidence given of what tolls the abbot had, and that the toll decreed to be paid to the plaintiffs in the suit in the reign of James, was quite distinct from that now claimed, and it did not appear for what the bill was filed—that there was no consideration for the toll: for the abbot was bound to repair the bridges, &c. not in consideration of the tolls, but of his possessions in Reading, and the fee farm rent reserved to the crown by the charter, was payable not out of the tolls, but out of the rent of certain houses in the borough, the property of the corporation.

They cited the case of *Hill v. Smith* (4 Taunt. 520), as establishing that a prescription for toll in respect of goods sold by sample, and afterwards delivered, could not be supported.

[481] They also submitted, that the plaintiff should have filed separate bills against each of the defendants, for their interests were not joint. *Dilly v. Doy* (2 Ves. 486).

10th February.—RICHARDS, Lord Chief Baron, now delivered judgment. Having stated the nature and object of the suit—It is (said his Lordship) sufficiently proved, that these tolls formerly belonged to the abbey, and that they passed to the crown on its dissolution and from the crown to the plaintiffs: and I apprehend that the plaintiffs are entitled to the same tolls, whatever they may be, to which the abbey would be now entitled, in case it had not been dissolved, and still retained this part of its possessions.

Then the questions are, whether the plaintiffs are entitled to all or any of the tolls demanded by the bill, and having sued for them, whether they have a right to maintain this suit in a court of equity against these defendants. The first is purely a legal question, and it seems to me that it cannot with propriety be settled in a court of equity, without a decision first obtained in a court of law: but I also think that, with the advantage of a legal decision in favour of the plaintiffs, a Court of Equity has jurisdiction, and may support the claim, and make the decree which is prayed by the plaintiffs—at least to a certain extent, as [482] far certainly as to establish the custom. There are many cases which have been decided within the principle on which this case is founded: indeed most of the cases, (if not all of them which have been cited for the defendants, admit the principle, even where the decisions have been adverse: and it appears to me that Lord Hardwicke decided *The Mayor of York v. Pilkington and Others*, in 1 Atk. upon a ground which calls upon me to maintain this bill in favour of the plaintiffs, against the objection of the defendants,—provided the legal question should be decided against them. I see no difference in principle between the case at the bar and the cases respecting tolls to a mill where several tenants claim a title to profits in the toll, and cases which respect manors and other places where customs prevail, and where the courts maintain suits to establish them. I think, therefore, that this suit is proper with respect to the object of establishing the plaintiffs' right, and if the plaintiffs succeed at law, the Court, I think, must pronounce a decree accordingly.

It has been urged, on the part of the plaintiffs, that a decree has already been made in favor of the corporation upon this subject: and that therefore the Court ought now to proceed upon that judgment, without sending the case to the consideration of a jury in a court of law. Doubtless every just deference will always be paid to the judgment of a Court in former times, but the case [483] referred to does not govern all the questions in this case, and I think also, that in other respects it does not apply to the case now before the Court. That bill, it is true, treated the defendants to it as parties who had no connection with the corporation: but they, in their answer, insisted that they were freemen, and therefore exempt from the payment of the tolls. At the hearing it appeared that they were freemen, and judgment was

given against them, they being freemen according to their own shewing. Now the present defendants are not freemen, and it does not follow that they are in the same condition with those defendants. They thought that the circumstance of their being freemen, excused them from the liability to the toll. We do not know how the Court might have considered this defence, if it had been set up in that case. At all events, it appears that that decision was against freemen, and the present bill is against strangers, that is, persons who are not freemen.

In that view of the case I feel it my duty not to decide in favor of the plaintiffs immediately, notwithstanding that decree: and if that decree had not been in existence I think it would have been impossible to urge the propriety of my deciding without an enquiry in another place, and therefore I feel it my duty to retain the bill for a twelvemonth, with liberty for the plaintiffs to bring an action or actions against the defendants, as they shall be advised, with liberty to the Judge [484] to indorse the *postea*, in respect of what tolls the verdict or verdicts shall be had.

It must be borne in mind too, that this is a case of toll claimed for corn sold by sample, and not only in the market-place but elsewhere, and therefore the issue must be so framed as to meet all those points.

Decree accordingly.

The Costs to be reserved generally.

[485] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LD. CH. BARON.

DE WHELPDALE v. MILBURN AND OTHERS. Tuesday, 10th February 1818.—A measure of oatmeal, payable in lieu of the tithe of corn and grain, is a good *modus*.—Where tithe of corn has never within memory been payable in a parish, and a contributory payment exempting the whole parish, is paid by certain, though not all, of the owners and occupiers of estates, the question of whether farm or district *modus*, must go to an issue.—An answer, by a former rector, to a bill filed to establish a *modus* of a certain measure of meal, as to one farm, admitting that the parish is exempt, in consideration of a commutation for meal, is not only admissible, but strong evidence to prove a district *modus*.—A *modus*, laid to be payable by “certain occupiers,” uncertain and insufficient.—In a bill to establish a *modus* against a dean and chapter, as rector, the ordinary and patron are necessary parties.

The plaintiff was lessee of the impropriate rectory of Cumwhitton, (Cumberland,) under the Dean and Chapter of Carlisle, and he had filed this bill for an account of tithes.

The plaintiff had filed a similar bill, in 1809, for the same object, against other occupiers. They pleaded the same *modus*: but the Court, on that occasion, decreed an account, (without prejudice to the defence in any future suit,) because they had not properly laid the *modus*, in having stated it to be payable “by certain occupiers,” without shewing more particularly by whom it was payable.

Those defendants then filed a cross-bill, to establish the same *modus* against the plaintiff, as lessee, and the Dean and Chapter of Carlisle, as impropriate rectors of the parish; but that bill [486] the Lord Chief Baron ordered to stand over, (giving liberty to amend, on paying the costs of the day,) for defect of proper parties, the Ordinary (the Bishop of Carlisle) not having been made a defendant.

The present defendants set up a parochial *modus* of fifteen eskeps of oat or havermeal, payable yearly, on or about the 1st June, to the rector, &c. in lieu of the tithes of corn and grain, by the several and respective occupiers of lands within the parish of Cumwhitton. And they further stated, that for the convenience of the several occupiers, the eskeps had been apportioned in certain shares amongst themselves, by agreement, but that the rector was entitled to resort to any of the occupiers for payment.

The plaintiff endeavoured, by old leases of the tithes, reserving to the rectors a rent of fifteen eskeps of meal, and other evidence, to shew that the fifteen eskeps of oatmeal were paid, not as tithe, to the rectors, but as rent, in consequence of an understanding between their lessee, and the occupiers, producing a contributory

arrangement, conformable with such payment—or if that were not so, that it was, at most, a farm modus, covering only the respective farms of the several contributors, and not a payment in lieu of the tithe of corn of the whole parish. And in support of that part of their case they shewed, that there were several farms which did not bear any part of the contribution towards the payment: and they [487] contended, that if they were farm moduses, they did not cover any other part of the parish than the particular farms, nor any part of the newly-inclosed lands belonging to the farms inclosed under the 36 Geo. III.—as held in *Mowester v. Watson* (5 Burr. 1375).

The defendants, on the other hand, proved general non-payment of the tithes: and they gave in evidence the answer of the Dean and Chapter in a suit instituted against them in this Court, in the 3d James II. by John Bird, owner and occupier of an estate in the parish, to establish a modus of three bushels of oatmeal in lieu of all tithes. In that answer was the following passage:—"These defendants say, that the tithe of wool and lamb, calves, foals, pigs and geese, and all other mixed and small tithes, are due and payable in kind by the said parishioners; but as for prædial tithes, they do believe that they are payable and paid yearly by the parishioners, in general certain measures of meal, (to wit) fifteen eskeps of oatmeal, for and in lieu of the tithe of corn and grain growing within the said parish and that the complainant, for his particular part and proportion thereof, does pay three bushels of meal, or thereabouts, yearly, for his tithe of corn and grain: but these defendants know not, nor do believe that the said oatmeal was ever paid by the complainant or his ancestors, or accepted and received by these defendants, and their predecessors-[488]-sors, in full of all tithes for the said messuage and tenement, as in the bill is suggested, but only as a modus for and in lieu of the tithe of corn and grain as aforesaid."—The counsel for the defendants also adverted to the local case of *Sewell v. The Dean and Chapter of Carlisle* (1 Wood's Decrees, 139), in which this modus was recognized as being a well-known subsisting modus: and they contended, that this was a parochial modus, and therefore covered the newly-inclosed, as well as the old inclosed lands allotted to the farms. *Stockwell v. Terry* (1 Ves. 115), *Bishop v. Chichester* (4 Gw. 1323).

The discussion of this case occupied several days, and the admission of the answer in the cause of *Bird v. The Dean and Chapter of Carlisle*, as evidence in this cause, was strongly objected to, on the ground, that the Dean and Chapter of that day could not bind their successors by any admissions—that there did not appear to have been any decree in the cause—and that the bill, in answer to which it had been put in, had only set up a farm modus; but the Lord Chief Baron admitted it: and the questions ultimately resolved themselves into that on the corn modus; on which

RICHARDS, Lord Chief Baron, now gave judgment.

It is admitted, that all titheable matters are [489] payable in kind, except corn and grain; with the exception of that, therefore, there must be a decree for an account of all the tithes sought by the bill. [His Lordship then stated the particulars of the claim in that respect, and the defence set up.] The objections which were made to the legality of that mode of commutation (the eskeps of oatmeal) were not very earnestly pressed, and no case was cited against it. The only question therefore is, whether the contract is sufficiently ancient, and whether it is borne out by the evidence.

It has certainly been proved satisfactorily, that no tithe in kind has ever been paid in this parish for corn, as far as memory can reach. The mode of rendering the payment anciently is not very accurately described, nor is there any account of its origin given even by evidence of reputation, nor any explanation of the reason of the render, unless it were in lieu of tithes. All other tithes are payable in kind: it must, therefore, have had relation to the tithe of corn. I have no difficulty in saying, that I feel considerable embarrassment on the evidence which has been given. The observations which have been made on it deserve much attention, and I cannot see any thing which enables me to say, whether the payment has been made as a modus, or whether, if it were, it has been payable for the whole of the parish, or only for parts of it. But the answer which has been read relieves me from great part of the difficulty. [His Lordship read the passage already extracted.] [490] That is clearly a very extensive and general admission. Whether the defendants were well advised or not, in so answering, I do not pretend to say; but after that admission it is impossible that I can decree an account of the particular tithe, unless the plaintiff take an issue, and that shall be found in his favor.

The following issue ^{*1} was therefore ordered :—

Whether from time, &c. there have not been, and was then payable to the rector, &c. by the several and respective occupiers, &c. fifteen eskeps, &c. as a parochial modus or prescriptive payment, for the tithes of corn, &c. on all the lands, as well old inclosures as new.

[491] GIBBONS v. THE COMPANY OF PROPRIETORS OF THE WATERLOO BRIDGE, AND WILLIAM BAYLEY, their Chief Clerk. Demurrer.—Tuesday, 10th February 1818.—A demurrer to a bill, by an annuitant, against an incorporated company, and their clerk, for a discovery of funds not appropriated, over-ruled on the ground of the clerk joining in the demurrer, he having no right to demur.—The clerk of such a company is without the general rule, and may be made a defendant, although he have no interest, and might be examined as a witness.

To this bill, which was filed by the plaintiff, an annuitant, (on behalf of himself, and other annuitants and creditors, &c.)—praying a discovery, and an account of the rates and tolls taken upon the bridge since it had been opened, and the other revenue of the company accruing since the annuities had been granted, and the application thereof—and that the overplus, after defraying the necessary current expences, might be applied in payment of the arrears—and for the appointment of a receiver :

The defendants demurred, as to so much as sought a discovery upon the allegation—that the tolls authorized by the act of parliament, or some other and greater tolls, had been taken and received by the defendants: and that the same amounted to more than sufficient for defraying the necessary current expences for carrying the acts of parliament into execution, and that there was in the hands of the treasurer a large surplus: and upon the allegation of the pretences suggested, and the charges of the contrary, and the account required from the defendant Bayley, the company's clerk,

[492] Shewing—that by the rules of the Court there can be no compulsion to set forth any matter, which may subject the party to penalty or forfeiture—that it appeared by the bill, that if it should appear to the commissioners appointed by the act, that the defendants had not appropriated the tolls, or should have received dividends of more than 10l. per cent. on their shares, any five of the commissioners were required to order the defendants to pay such sums as should be ascertained to have been not appropriated or misappropriated, together with the sum of 500l. as a penalty and forfeiture, to be recovered by action at law ^{*2}—and that inasmuch as the discovery sought would subject defendants, &c. and for divers other causes.

Dancey, Martin, and Wray, in support of the demurrer, contended, that the liability of the defendants to the penalty was a sufficient reason, why they ought not to be compelled to the discovery sought—that the making the clerk a defendant, was merely for the purpose of enabling the plaintiffs to enforce the penalties: and to the interrogatories framed for that purpose alone, the defendants had demurred—that the answer of the clerk could not be read against the company, and he might be examined as a witness, having no interest in the subject-matter.

[493] The Solicitor General, Horne, and Cooper, for the bill, urged that the effect of this demurrer being allowed, would be, to give to the penal clause the operation of protecting the defendants from rendering any account. Here too all the defendants had demurred, whereas all of them were clearly not liable to the penalty: for the clerk was certainly not liable, and could not refuse, on that ground, to answer any question put to him as a witness: nor has he any interest, and therefore ought not to be permitted to demur to a bill for a discovery, to which, justice and the reason of the proceeding, required that he should be made a party.

RICHARDS, Chief Baron. I never knew an instance of a clerk demurring to a bill

^{*1} On the trial of the issue, Mr. J. Bailey laid great stress, in directing the jury, on the evidence of the answer, (observing that it was much stronger than if it had been merely the answer of an individual, and that it was put in at a time when the rector's rights were much more capable of proof,) as being very cogent testimony against the defendants on this issue.

^{*2} The acts had so provided, and the provisions were set out in the bill which charged the defendants with having not appropriated and misappropriated the tolls received by them.

of this sort. Some of the questions put do not lead to a liability to penalties. I have no difficulty in saying, that the demurrer cannot be maintained, for it is clear that a clerk to the defendants cannot demur on the ground that his principals are liable to penalties, and his answer could not be read against them. It has been said, that the clerk ought not to have been made a party, as he has no interest, and might be examined as a witness. But this is the case of a corporation, and therefore from necessity it has been allowed, as an exception to the general rule that one who may be a witness cannot be made a defendant to a bill for discovery^{*1}. As he has, therefore, clearly no [494] right to demur, this demurrer is bad for joining him, and it must on that ground be overruled.

GRAHAM, WOOD, and GARROW, Barons, concurring,
Demurrer over-ruled^{*2}.

[495] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LD. CH. BARON.

JENKINSON v. ROYSTON AND OTHERS. 10th February 1818.—A defence to a bill for tithes, of a district modus, where the defendants do not state on the record, and prove by evidence an occupation therein must fail. —A custom—(to pay) for every foal 1d.—for every milch cow 2d. —and for every heckforth, or heifer, that had had but one calf, 1d., for and in lieu of milk, and all profit arising by such cow or heifer, except the calf,—good; notwithstanding it be not accurately laid, the redundant words at the end being rejectible as surplusage.—Calves, in kind, to be delivered at the will of the owner, after they were three weeks old, and at such time of the year as the owner might think best to spare them, not hindering his breed; the parson, if he delayed the fetching, to pay for the keeping.—Pigs, in their kind, to be delivered at the will of the owner, after they were nine days old; and if the parson delayed to fetch them, to pay for the keeping afterwards, as reason should require, or the parties could agree,—bad, for uncertainty and unreasonableness—being vitiated by the qualification of the delivery at will; and the parson to pay for the keep until delivered.—Lambs, in their kind, to be delivered the 1st day of May; and if under seven, to pay for every lamb a halfpenny; and if seven lambs, and under ten, to pay one lamb, and to be allowed for every lamb that wanted of the ten a halfpenny: and so likewise for any odd number of lambs: and so likewise for calves: but that if any person had under seven calves, or an odd number of calves under seven, and sold any of them to the butcher, he was to pay to the parson the tenth part of the money which they were sold for; and that tithe of lambs was to be paid in kind, as well those that fell after, as those that fell before the 1st of May, respect being always had to the number of lambs, according and pursuant to the above prescription or modus, save that those that fell after May-day were to be kept by the owner until a month old, and if longer, he was to be paid for keeping; and so of lambs that fell within a month before May-day, which were to be kept by the owner until a month old, and if longer, he was to be paid for keeping, bad, because unintelligibly laid, and binding the parson to pay for keeping the tithe animal beyond a month old.—The farmer is, in general, bound to keep it till it be able to live without the mother: but an established custom may controul the rule.—Geese and Pigs, in kind, to be delivered before Midsummer; and if any person should have under seven pigs or geese, he was to pay for every pig or goose a halfpenny; and if he should have seven, and under ten, he was to pay one, and to be allowed for them that wanted of ten a halfpenny a-piece for every one, and so for any odd number of pigs or geese,—good.—Bees: for every stock driven or smothered, whereof profit is taken, 2d.—quere.—Wool: the tenth stone or tenth pound to be paid presently after the sheep were clipped; and if any person should sell sheep after Candlemas, and before clipping, to pay for the wool, for every sheep 1d. if he sold them out of the parish,—good.—Hemp and fumble the tenth sheaf, when it was pulled, withered, and threshed; and that the withering

^{*1} Vide *Hutch v. Meal*, 3 P. Wms. 310. *Le Texier v. Margravine of Aspach*, 15 Ves. 159.

^{*2} Vide *Attorney General v. Duplessis, Parker*, 144.

and threshing of hemp and flemble, was to be considered, deemed, and taken, for and in lieu of the seed, good. Rape-seed, the tenth bushel, ready dressed, the parson allowing for the dressing 1d. the bushel,—bad, for omission of fractional proportions. —For onion-seed the tenth bed, if more than half a pound sown: for less, none,—bad. —For every acre of reed-ground hooken, cropt, or mown in the year, 1d.—good. —Eggs: for every hen or duck two eggs: and for every cock or drake, either of them, three eggs,—bad—deficient consideration, and being ejusdem generis. —The inhabitants to pay the parson yearly, for every acre of fed ground in the parish, for herbage 1d. or the fall, at the parson's election,—bad. —All that follow—bad. —A decree, professing to establish customs of tithing, and modes of payment, some of which being obviously not legal moduses, founded on agreements not ratified by the ordinary and patron, and not on a *bonâ fide* adverse suit to establish the moduses, and pronounced in a cause to which the patron and ordinary were not parties, not conclusive or binding either on the Church or the Court.

The plaintiff filed the present bill, claiming, as rector of Leverington, (Cambridgeshire,) all the great and small tithes in kind, against the defendants (occupiers), for an account of the tithe of hay, artificial grasses, and fodder, taken from the lands [496] in their respective occupations, and of various small tithes therein enumerated.

The defendants admitted the plaintiff's title to the tithes sought, or to certain moduses, compositions, and payments, in lieu thereof.

The answer then stated, that by custom at Easter every householder and inhabitant within the parish was to resort to the church or parsonage-house, and there to reckon and pay the following moduses:—

[497] For grounds mown between the sea-dyke and cattle-dyke, 2d. the acre, and in Flancfield, 1½d. the acre. Item. For all the grounds mown between the high fen-dyke and cattle-dyke, 1d. the acre, for and in lieu of all hay grown and cut within the said places.

Item. For every foal, 1d.—for every milch cow, 2d.—and for every heckforth or heifer that had had but one calf 1d., for and in lieu of milk, and all profit arising by such cow or heifer, except the calf.

Item. Calves, in kind, to be delivered at the will of the owner, after they were three weeks old, and at such time of the year as the owner might think best to spare them, not hindering his breed, the parson, if he delayed the fetching, to pay for the keeping.

Item. Lambs, in their kind, to be delivered the first day of May, and if any person had under seven lambs, to pay for every lamb a halfpenny, and if he had seven lambs and under ten, he was to pay one lamb, and to be allowed for every lamb that wanted of the ten a halfpenny, and so likewise for any odd number of lambs, and so likewise for calves. But that if any person had under seven calves, or an odd number of calves under seven, and sold any of them to the butcher, he was to pay to the parson the tenth part of the money which they were [498] sold for (a): and that tithe of lambs was to be paid in kind, as well those that fell after as those that fell before the first of May, respect being always had to the number of lambs, according and pursuant to the above prescription or modus, save that those that fell after May-day were to be kept by the owner until a month old, and if longer, he was to be paid for keeping; and so of lambs that fell within a month before May-day, which were to be kept by the owner until a month old, and if longer he was to be paid for keeping.

Item. Pigs, in their kind, to be delivered at the will of the owner, after they were nine days old, and if the parson delayed to fetch them, he was to pay for the keeping afterwards, as reason should require, or the parties could agree.

Item. Geese, in their kind, to be delivered before Midsummer, and if any person should have under seven pigs or geese, he was to pay for every pig or goose a halfpenny; and if he should have seven and under ten, he was to pay one, and to be allowed for them that wanted of ten a halfpenny a piece for every one, and so for any odd number of pigs or geese.

(Certain Easter offerings.)

(a) Vide *Leathes v. Newitt*, ante, vol. iv. p. 374; and *Layng v. Farborough*, ib. p. 405-6.

[499] Item. Bees: for every stock driven or smothered, whereof profit is taken, 2d.

Item. Wool: the tenth stone or tenth pound to be paid presently after the sheep were clipped, and if any person should sell sheep after Candlemas, and before clipping, to pay for the wool, for every sheep 1d. if he sold them out of the parish.

Item. Corn: if it be bound the tenth sheaf, and if it be loose the tenth shock, but which custom is done away by act of parliament. Hemp and fembles: the tenth sheaf when it was pulled, withered, and threshed, and that the withering and threshing of hemp and fembles was to be construed, deemed, and taken, for and in lieu of the seed.

Item. Rape-seed: the tenth bushel ready dressed, the parson allowing for the dressing 1d. the bushel.

Item. Wood: the tenth tree when it was felled, of twenty years growth or under, which twenty years, if never felled before, was to be reckoned from the first planting, but if felled before, from the last felling thereof, (but which custom was done away by act of parliament).

For flax: the tenth pottle, when watered and bleached, but which custom defendants waive.

[500] For onion seed: the tenth bed, if more than half a pound sown; for less, none.

Item. For every acre of reed-ground that was hooken, cropt, or mown in the year. 1d.

Item. At Easter tithe eggs: for every hen or duck two eggs, and for every cock or drake, either of them, three eggs.

Item. The inhabitants to pay to the parson yearly, for every acre of fed ground in the parish, (Throckenholt not included), for herbage 1d. or the fall, at the parson's election—for every dove-house 6d.—for every house, having an orchard or chery-ground, so as it was above half an acre of land, 1s.—for every acre of new-improved ground in the marsh or fen, which should be mown, 2d. and for every such acre fed there 1d. or the fall, at the election of the parson. (Grounds sown with clover, and such like seed, for the use and purpose of feeding horses, sheep, or beast, neat or profitable, to be accounted as feeding land, and not otherwise.) And in case the parson should take the fall, then in such year he was not to have the penny the acre herbage, neither in the old grounds or in the new-improved grounds. That tithe of cole seed, mustard-seed, and turnip-seed, upon lands tilled, plowed, or sown, or ordered to that purpose, was to be paid in the same manner and proportion as rape-seed was said to be payable. That madder, being a new improve-ment, was to be paid in kind. That for every mill for the grinding of corn within the said parish, such modus or payment to be paid therefore, as was and had been theretofore paid for the same, due notice to be given to the minister to take his tithes before corn carried off the premises; that by the word "fall" was meant the profit of the particular tithe, which the incumbent might take as above, abating the penny an acre, whether fed with profitable or unprofitable cattle: the clergyman to take either at his choice, but not both. (Other personal dues, to be paid as theretofore.)

Item. Every stranger occupying any feedings, grounds, or pasture, was to pay the same acreage for the grounds, or pasture for herbage, after the custom of the field, as the inhabitants paid for mown ground or the fall, at the parson's choice.

The answer then stated, that the defendants had annexed thereto, by way of schedule, a map or plan, wherein were shewn and distinguished the grounds between the sea-dyke and cattle-dyke—the grounds in Flane-field—the grounds between the high fen-dyke and cattle-dyke—the grounds in Throckenholt, and the new-improved grounds in the marsh and fen therein-before mentioned, with the quantities and boundaries thereof respectively.

To prove these payments set up as moduses, [502] the defendants produced receipts and books of the former rectors, which fully established that part of their case. They also produced a document which they urged as being conclusive of this question in their favour. It was a decree of this Court made in a suit instituted by an occupier, in the year 1695, against the then rector (*Swaine v. P'ern*) (b), for the

(b) 1 Wood's Tithe Decrees, 341; the substance of which is shortly expressed here for convenience.

purpose of establishing a sort of conventional terrier of alleged moduses and customs of tithing throughout the parish, with a view to fixing, by the sanction of the Court, a certain rate or custom of tithing between the rector and the parish, in termination of long-continued disputes between them, founded on former agreements entered into between both parties. The plaintiffs in that suit were the parishioners and inhabitants of the parish, and the rector was defendant. The bill recited the various customs of tithing (as set forth in the present answer, concluding with the modus for eggs), as prevailing in the parish (referring to reckoning books, as they were called, of former parsons), and that about the year 1621, divers differences about such customs had happened, which by the mediation of the Judge of the Isle of Ely, and several Justices, had been accommodated and reduced to writing, and signed—that about 1681, the defendant had endeavoured to overthrow the same, and brought several vexatious suits in the bishop's [503] court, and in this Court, which were accommodated, when the defendant Pern and the parishioners, about the 19th of April, 1688, came to a further agreement of tithing, over and besides the former customs, that the inhabitants were to pay, &c. (the rest of the moduses). That the defendant afterwards sued the plaintiffs several times for the tithes in kind, and therefore the plaintiff, for relief, prayed the aid and assistance of the Court. The defendant put in his answer, and the cause was heard, when it was decreed that the ancient prescriptions or moduses, as mentioned in the agreement of 1621, and the additional agreement of the 19th of April, 1688, should be ratified and confirmed, and for ever established by the authority of the Court, with certain alterations and explanations (which were stated): with which alterations and explanations the said prescription or ancient modus, specified in the writing dated 1621, and the additional agreement of 1688 were thereby ordered to be for ever thereafter observed, kept, and performed, by all the parties interested and concerned therein.

Damney, Martin, and Simpkinson, for the plaintiffs, took an objection, in the first instance, to the bill, that it had referred to a map of the lands for which the modus for hay was claimed, to be payable without setting out the quantities or boundaries in the body of the bill,—that the map itself was defective, in not describing and setting out the situation, and whole extent and [504] boundaries of those lands—and that it had not been proved by depositions.

[But that objection the Lord Chief Baron, for the present, over-ruled, saying, that if it should be necessary to prove the map by depositions, he would still give the defendant leave to exhibit an interrogatory for that purpose.]

They then insisted, that the money payments set up as moduses were for the most part in no respect entitled to be so considered, for that, excepting some of those covering the smaller and more minute articles, there was neither certainty or precision in the pleading of them, nor reason or simplicity in their nature. The moduses for every milch cow and heifer that has yielded but one calf, for and in lieu of milk, they admitted might have been good, but for the qualification added, “and (for and in lieu of) all profit arising by such cow or heifer, except the calf,” which they submitted rendered the modus as laid so confused and unintelligible as to make it impossible to know what titheable matter it was intended to cover, if it could be understood at all. As to the modus for calves, their being stated to be delivered at the will of the owner, was at once destructive of the legality of such a payment, for it would furnish a constant answer to the clergyman who should demand his tithe of calves, and he never could enforce such an arbitrary modus—that the modus for lambs also was [505] manifold and inexplicable, and it was rendered more so by having superadded to it, and mixed up with it, a similar modus for calves, which they submitted had never before been seen, the whole concluding with another custom as to the lambs—and that the payment for pigs was open to the same objection as was destructive of the modus for calves. Against the lesser moduses, also, they urged the arguments afterwards adopted by the Lord Chief Baron in delivering judgment.

As to the decree on which the defendants placed great reliance (and which the Court was at first disposed to consider as an authority of great weight), they contended, that as it was not grounded on a bill to establish a modus, such a proceeding, of so comparatively recent a date, could not make or establish a modus, or give to any previous agreement between the parties the effect of an immemorial contract. And they commented much on the nature of the decree, and the terms of the agreements on which it had been founded, from all which they drew the inference, that the pay-

ments were modern, and not immemorial, even in their origin; and that, if they had not been so, the fact of their having been explained and altered would have been destructive of them as moduses, and that even if it had been a decree on a bill to establish them. They observed that some of the articles prescribed for *eo nomine* were of modern introduction, as clover—that the payments, such as they were, were so badly stated, and so ill laid, that no decree or authority could make them moduses, either in form or effect. And to shew that such agreements, although so ratified by the decree of a court of equity, had been held not to be binding on the successors of the incumbent, they cited the case of *The Attorney General and Blair v. Cholmley and Others* (3 Gw. 914), in 1765, where the then Lord Chancellor had so held.

The Solicitor General and Boteler for the defendants—as to the objection taken to the description of part of the lands, by reference to a map,—cited *Clarke v. Jennings* (4 Gw. 1424), where that objection had been taken and over-ruled, and submitted that it was enough if the defendant made out his case in any way sufficiently intelligible to the Court—*Stawell v. Atkins* (4 Gw. 1434—and 2 Anstr. 164).

To that the Lord Chief Baron assented.

With respect to the moduses, they urged that the decree of the Court of Chancery, in *Swain v. Pern*, was conclusive against any objection which could be taken to them, either in form or substance. They said that it was not intended to set up that document, as having created the modus, but as being a judicial recognition of rights, then ancient, founded on immemorial customs, as the decree recited, and that it was as binding on the parties to the suit, and all persons standing in the same situation, as any other decree in suits instituted in *perpetuum rei testimonium*.

As to the explanations and alterations which had been alluded to, they submitted, that they were merely introduced to render the ancient payments more conformable with the agriculture of later times, which might be done by consent of all parties interested, and with the sanction of a court of equity, and that, they observed would account for any modern expressions used in the decree, and the articles of modern introduction there mentioned, the foundation of which would be still, notwithstanding those objections, the ancient immemorial contract in which the payments had originated.

They endeavoured, from the terms of the decree, which they minutely considered and investigated, to shew that enough might be collected from it to satisfy the Court that the money payments which had been the subject matter of dispute, were in effect legal moduses, and they urged that in all events the authority of the decree was itself conclusive on the Court by which it had been made, for the purpose of setting the doubts for ever at rest.

They finally observed that moduses very similar to those now objected to, had been heretofore established in a suit instituted for that purpose in this Court, as far back as 1731; for in the case of *Brinklow v. Edmunds* (Bunb. 307. 2 Gw. 711), moduses laid in the same way for lambs, pigs, and eggs, had been held to be valid.

Dauncey having replied,

RICHARDS, Lord Chief Baron, delivered judgment.

[Having noticed the admission by the answer of the plaintiff's general right, and stated the several customs of tithing and money payments set up by the defendants as moduses.]

As to the three first (said his Lordship),—the 2d. per acre for grounds mown between the sea-dyke and cattle-dyke, the three halfpence per acre in Flanefield, and the modus of a penny per acre for the grounds mown between the high fen-dyke and cattle-dyke, alleged to be payable in lieu of hay cut within those places, it is impossible that they can be maintained in this suit, even supposing them to be good moduses; because it has not been proved in the cause, nor is it indeed alleged upon the record, that either of the defendants occupy any part of those grounds. But it being admitted, that tithe hay is due in the [509] parish generally, and that those lands only are covered by a modus; and the defendants not having proved that they occupy any part of those lands, there must of course be an account decreed for the tithe of the hay taken there. Whether they may, as occupiers, think it advisable to set up these payments in respect of the same lands as are now alleged to be covered by them as moduses on any other occasion, is another matter. On this record, I must decide against them, whatever respect may be due to the proceedings in the ancient suit, the decree in

which has been so much relied on, on their part, in this cause. Of those proceedings, I shall not say any thing at present, but proceed to examine the legal character of the customs, as if that decree had never existed.

Having disposed of the money payments for the tithe hay, the first of the other moduses insisted upon is the penny for every foal; and to that I do not see any objection, provided it can be proved in point of fact, and therefore there must be an issue upon that if the rector shall think proper to take one.

The next modus is, "for every milch cow twopence," and "for every heifer that has had but one calf, one penny, for and in lieu of milk, and all profits arising by such cow and heifer, except the calf." Now, I certainly see no objection to that, and though a great deal of observation has been made upon the addition of those last words, (the profits arising from the cow and the heifer), [510] I confess I do not perceive the difficulty said to arise from the introduction of those words, for they may be all rejected as surplusage, and therefore they afford no solid ground of objection.

The next prescription is the custom with respect to calves [His Lordship read that custom, p. 497.] So that the calf is to be kept till it is three weeks old, and also until such time of the year as the owner thinks best to spare it. Now, the law in general fixes the time when the animal is enabled to live without the mother, as that at which it is to be rendered as tithe: but that rule may certainly be governed by the various local customs, which may obtain in different places. This particular custom, however, seems to me to be bad, on the statement of it: for it is uncertain and altogether unreasonable, because if the delivery of the calf be to be subject to the will of the owner, that will may be determined perhaps the moment after the three weeks have expired, or not till the end of half a year, and yet the person is obliged to pay for the keeping, if he delay the fetching, although the farmer, if he choose, may keep it for an indefinite time. I am, therefore, of opinion, there must be an account taken of the tithe of calf.

[His Lordship then stated at length the custom with respect to the lambs (pages 497-8), and also that united with it for calves, observing, in the progress of his statement, at the appropriate passages, that thus there were in terms two customs [511] stated for calves: and that if the lamb should not be fit to be delivered at a month old, the farmer was to be paid for keeping it beyond that time, although he is bound by law to keep it till it shall be fit for delivering.]

Now really (continued his Lordship) I cannot perceive the sense or reason of this allegation of such a payment set up as a modus, and therefore, not understanding it myself, nor seeing how it is possible to be made intelligible, I must treat it as incomprehensible and unreasonable, and pronounce it therefore a bad custom.

The next is pigs, in their kind, to be delivered at the will of the owner, &c. [His Lordship having read it (page 498).] That custom, stating that the titheable article is to be delivered at the will of the owner, is liable to the same objection as the custom for calves, already disposed of; and as it seems to me to be a decisive objection, that therefore must also be considered invalid, and there must be an account for the tithes in kind.

To the next custom, for geese and pigs [stating it, as in page 498], I do not know that there can be any reasonable objection, and therefore there must be an issue directed to try that modus, if the rector should require it.

As to the modus for bees, there has been no evidence offered: probably the quantity was not worth notice.

[512] To the modus for wool, as stated, I do not see any objection.

For corn there must be an account.

The next is the custom respecting rape seed, "the tenth bushel ready dressed, the parson allowing for the dressing 1d. the bushel."

The objection to that is, that if there be not ten bushels, or if there be any smaller quantity than ten bushels beyond the first ten, or any intermediate number less than ten, nothing is said as to what is to be paid for such intermediate quantities. That modus, therefore, is improperly laid: it should be stated much more accurately and distinctly than it is stated here, to be of any avail; there must therefore be an account taken of rape seed.

As to the tithe of wood, it does not appear by evidence that any had been cut by the occupiers: that therefore is out of the question.

There was a custom of tithing onion seed stated: but that was admitted to be bad

The custom "for every acre of reed ground that is hooken, cropped, or mown, in the year, 1d." does not appear to be objectionable.

But the tithe of eggs, which is laid thus "for every hen or duck, two eggs," (to cover any whatever quantity, if there were five hundred), [513] "and for every cock or drake, either of them three eggs," that certainly cannot be good.

The next custom (as stated) is, that the inhabitants are to pay to the parson yearly for every acre of fed ground in the said parish (Throckenholt not included) for herbage, 1d. or the fall, at the parson's election. (What that means I do not know.) That, however, cannot stand, for Throckenholt is not distinguished from the rest of the parish by any sort of description, and therefore the objection applying to the three first moduses applies here, and destroys that custom in the present case.

As to the other moduses (for dove-house—for houses having an orchard or cherry-ground—for every acre of new-improved grounds in the marsh or fen, which shall be mown, and for every such acre fed, or the fall, at the election of the parson, and all the succeeding moduses, and their qualifications, pages 500-1), his Lordship observed collectively, that (always bearing in mind throughout this case, that these grounds were part of the Bedford Level,) all those statements of customs, and the accompanying observations, could only be considered in the light of matter of interpretation on doubts, which probably arose, from time to time, in consequence of the constant improvements and changes which took place in that particularly uncultivated spot, and that they were nothing like customs recorded or established, even if they had not been so alto-[514]gether unintelligible as they were: and that as far as they could be understood, they had none of the characteristics of legal moduses, and could not therefore be so considered.

Then, (said his Lordship) the defendants' counsel have relied much, and with reason, on the decree made in this Court in the year 1695: and it is, in truth, the great muniment on which their case depends for support. But if I am right in the opinion which I have given, that with respect to some of these payments, they are not such as can be regarded as moduses in point of law, I should consider it a very great hardship on the plaintiff if I were obliged, of necessity, to hold myself bound by that decree, as it is called. If, indeed, it had been really a decree, properly so termed, judicially establishing, as moduses, the payments which were the object of the suit, I should have had great difficulty in disengaging myself from it, however unjust I might consider it; but it is no such thing. The first objection to it is that persons, who were proper and necessary parties to that suit, (the ordinary patron) were not before the Court: and the result furnishes a strong proof of the wisdom of courts of equity, in requiring all proper parties to be present before a decree can be made. I will venture to say, that if the ordinary and the patron had been defendants in that suit, and had done their duty, that decree never could have passed in these terms. It was, in truth, nothing more than a decree, to establish an agreement between the parties, entered into among [515] themselves, and that too a modern agreement. There are mixed up in the decree some payments, which were probably ancient, but they are blended with the others, which are clearly not so, and I have now no means of distinguishing them from the rest. The answer of the defendant in that suit has been read in this cause, and I have since read it over myself with great care. It exhibits a very striking picture of the miseries of persons in the situation of rector at that time, when they were completely in the power of their parishioners, and were tossed to and fro at their will and pleasure. No wonder then that the clergy of that day frequently entered into such agreements before they became rectors, in order to obtain something like ease and quiet, when they were placed in that situation. When, therefore, I see what is called a decree, affecting to establish money payments as moduses: but which ought not to be treated as a decree, (because it was made in a suit, which was suffered to proceed, although necessary parties were not in Court, and which, even if they had been there, can only be considered in the light of a decree founded on what was put upon the record without opposition, and by consent of the parties, and not as being the effect of a hearing on the merits in an adverse suit to establish such moduses)—I cannot but regard it as a decree, not pronounced on any fact authenticated by evidence, but, on the contrary, on mere statements of what are obviously not facts. How then can I consider it binding, or, at least, such as cannot possibly be resisted. It is clear, that [516] some of the payments mentioned in that decree were, in fact, considered by the Court as

not being moduses, although the usual and proper parties were not there to contest their validity, and press the existing objections. Then other payments, which might, perhaps, have been properly considered as ancient payments, are not distinguished in this instrument, nor can they now be so, and I cannot see any reason to hold myself bound by a decree where I find that among the moduses there established, there are some which are not sanctioned by law. If I am right in that opinion, there can be nothing in such a decree to prevent my expressing that opinion, and acting upon it accordingly. I therefore think myself not only at liberty, but that I am compelled to decide this cause as I have intimated my intention of doing.

In addition to all this, we cannot but take into consideration the state of this part of the country, at the remote period whence legal moduses take their rise. These grounds belong to the Bedford Level, which must have been at that time nearly all under water, or at best in such a state, as that the greater part of it could have produced but little titheable matter. Looking retrospectively to time beyond legal memory, (beyond the reign of Richard I.) can we reasonably conceive that any agreement for most of such of the compositions, as are stated in this decree, could have been then made between persons in the situation of these parties. At that time there could [517] have been no prospect of the improvements which have, in very modern days, taken place in that part of the country, and which are entirely owing to causes which could not have been foreseen or expected, even so short a time back as twenty years before they commenced. The great improvements made of late years in the Bedford Level, to which I have alluded, are even now but just beginning to have any visible effect.

On the whole, therefore, it appears to me, that we cannot rationally or justly consider the payments which that decree contemplates to be good moduses as against the parson, who, it appears, from all the circumstances in evidence in this cause, was wholly incompetent to act for himself at the time when the decree was made, and that it was certainly made in the absence of those, who are the natural and legal protectors of the revenues and the rights of the Church.

Under these circumstances, I think myself bound to direct an account of all the titheable matters which the defendants have taken from these lands, except such as are covered by the moduses which I have determined ought to be tried.

Decree accordingly.

[518] SIR WATKIN LEWES v. MORGAN AND LEWIS. Wednesday, 11th February 1818. —Where a receiver of rents and profits is enjoined from further receiving, &c. the Court will extend the injunction to his agent, (an attorney in this case) and commit him also for a breach of the order, although he living at a distance in the country, have not been regularly served with the injunction, if sufficient circumstances can be shewn, to afford fair and satisfactory evidence that such agent knew of the order—as if his principal have published the opinion delivered by the dissentient judge only, and a statement of the judgment of the Court has appeared at the same time in the provincial papers. —Wood, Baron, dissentiente, considering the notice insufficient in this case, at least as to the agent. —The application should be for a rule to shew cause. —One of the Court dissenting from an order for an injunction, and notice of an appeal from the decision having been given, are no excuse for disobeying the order.

Jervis now shewed cause against an order which had been obtained for committing the defendant Morgan, and his agent, the other defendant, an attorney residing in Carmarthenshire, for a contempt in disobeying an order of the Court, of the 16th November last *, enjoining Morgan from receiving any part of the rents and profits arising from the plaintiff's estates, and in the publication by Morgan of a printed document, purporting to be a report of the judgment of one of the Barons †: and also that Lewis should be ordered to pay into Court 300*l.* the money so received by him since the order had been pronounced.

[On making the motion, a question arose whether such an order, if granted, should

* Vide ante, p. 150.

† Vide *Read v. Hugginson*, 2 Atk. 469, and *Baker v. Hard*, 3 ib. 512.

be absolute in the first instance, or to shew cause; and the Court ruled that it ought to be the latter.]

The affidavit on which the rule was granted, stated the facts noticed in the order—that the tenants had been served with notice of the in-[519]-junction—and that Lewis had acknowledged having seen that notice. On the other hand, the affidavit of Lewis stated that the order for an injunction had not been served on Morgan or Lewis, till after the latter had received the 300*l.* from the tenants—that he was merely the agent of Morgan—and that he had not received any of the rents and profits since he was served with notice.

It was therefore submitted by Jervis, that in a case like the present, where the Court had not been unanimous in making the order of the 18th November, and where notice of appeal had been given, connected with the facts, that Lewis was merely an agent, and resided in the country, and that he had not received any thing after service of the order—the defendants had not been guilty of a contempt, and more particularly Lewis, who could in no respect be considered as bound by the injunction, of which he had had no notice.

In support of the rule, it was urged by the Solicitor General and Blake, that Morgan having been in Court when the judgment was about to be pronounced—and his having himself published the judgment of one of the Court—a correct account being at the time inserted in all the London papers, and the *Cardmarthen Herald*—and both defendants being practising attorneys, this case was in all respects much stronger than those (a) in [520] which it had been decided that a party having knowledge by any means of an injunction, was enough to bring him into contempt for breach of it, although the order had not been served.

GRAHAM, Baron, declared his opinion to be, that the rule ought to be made absolute; for that under the circumstances of this case, and particularly where the parties were professional persons, there could be no pretence for disobeying the order of the Court, either on the ground of want of knowledge of its having issued, or of ignorance of the legal consequences—and that the parties' means of notice was amply sufficient to bind them.

WOOD, Baron, (admitting that if legal notice could be brought home to the parties, it would be sufficient to bring them into contempt, and that one Judge dissenting from the order pronounced, and notice of appeal having been given, was no excuse for disobedience of it), was yet of opinion, that in the present case the want of regular service of the notice was not supplied as to Lewis, for the utmost length that any case had hitherto gone, was where the party enjoined had been actually in Court. I agree (said his Lordship) that in a case like that of *Osborne v. Tennant*, there might be a breach of the injunction, but this will be the first instance of a person in the situation of Lewis having been held to be guilty of a contempt: and notwithstanding it is of high importance to the administration of [521] justice, that obedience to the orders of Courts should be rigorously enforced, it is of equal importance that the subject, if punished, should be first clearly shewn to be deserving of it. A newspaper account is not such a notice of the proceedings of a Court as should bring a party into contempt.

GARROW, Baron, concurred with GRAHAM, Baron, in the opinion that a sufficient knowledge had been proved to have reached the parties, to bring them into contempt, or otherwise the orders of the Court might easily be eluded, and persons enjoined might procure a breach of an injunction to be committed with impunity, if such shallow pretences as these could be set up against similar applications to the present.

Order absolute, with the Costs of this application.

[522] MACMURDO v. BIRCH, MACKAY, AND LAUGHTON. RADCLIFFE AND ANOTHER v. SAME. Thursday, 12th February 1818.—A plaintiff having arrested two of the partners on a *quo minus*, and proceeded against an absent third by *ven. fac. ad. resp.* under which issues, and increased issues, had been levied on the partnership goods—the Court refused, on cause shewn against a rule for that purpose, to set

(a) *Skip v. Harwood*, 3 Atk. 565, *Osborne v. Tennant*, 14 Ves. 136, and *Kimpton v. Eve*, 2 Ves. & Bea. 349.

aside the proceedings, and order the money levied to be restored, and the effects to be delivered up, although it was sworn, on the part of the absent defendant, that he was absent on his business of mariner, and not for the purpose of avoiding proceedings.—N.—Such a rule discharged with costs.

Dauncey and Littledale now shewed cause against two orders, which had been obtained on a former day, for setting aside the writs of venire facias ad respondendum which had been issued in these causes, and all the proceedings had thereon, for irregularity, with costs—and for restoration to the defendants of possession of goods distrained, and money levied, &c.

The affidavits of Birch and Mackay, two of the defendants, (who were all partners in trade at Liverpool,) on which the rule was founded, stated in substance, that the deponent being arrested in these actions *¹, had put in special bail—that the defendant Laughton being at that time on a voyage at sea, writs of venire facias and distringases thereon were issued against Laughton, and executed on the joint goods of the defendants; and that the deponent had paid the common issues, but the sheriff was in possession of the partnership property, under the subsequent distringases for increased issues †¹.

[523] The affidavit also stated, that Laughton was master of a merchant vessel belonging to the port of Liverpool, and was absent in his business, and not for the purpose of avoiding this action, or any legal proceedings—that he was a resident housekeeper in Liverpool—that his vessel had been advertized to sail for several weeks before she proceeded on her voyage—and that he left the entire management of the partnership business to the deponents.

The affidavits filed in opposition to the rule stated, that the defendant Laughton had been regularly served with the usual warrant or summons on the writs, by delivering copies to the defendants, Birch and Mackay, at the counting-house, (Laughton being then out of the realm,)—and that for default of his appearance, distringases had been issued, and common and increased issues levied, in the usual course.

For the defendants it was contended, that the facts disclosed in their affidavit shewed, that this was not a case wherein a distringas was authorized, in consequence of the absence of the defendant Laughton—that the necessary allegation (that [524] the defendant kept out of the way to avoid process) could not be truly made ²—and that the service was not sufficient.

On the other hand it was insisted, that as this was a case of partnership, where two of the partners had been duly proceeded against, and had appeared, the proceeding against the absent partner had been strictly regular.

The Court adopting that distinction,
Discharged the rule, with Costs ‡².

The end of Hilary Term.

[525] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, EASTER TERM, 58 GEO. III.

GUPPY v. BRITTLEBANK AND POTTER. Monday, 13th April 1818. A person of decent repute, while attending a fair at a town in which he was a stranger, in the way of his business as a horse dealer, having unknowingly uttered a forged note,

¹ Those defendants were proceeded against by quo minus.

†¹ The first action was brought to recover 346l. 4s. and on that issues were levied specially, after the common issues, to the amount (on the alias) of 100l. and on the pluries 190l. 18s. 10d.

The second action was for 176l. 10s. 1d. After levying the common issues, an alias distringas was obtained for 50l. and a pluries for 124l. 19s. 1d., which were levied on the partnership goods.

The amount of those levies are particularly stated, because, as they are discretionary in the Court, such instances afford criteria for regulating similar applications.

*² *Cawlin v. Sir R. Lushy*, ante, vol. ii. p. 12.

‡² Vide *Nicholson and Another v. Bownass and Hall*, ante, vol. iii. p. 263.

for which he is afterwards apprehended by private persons, without warrant, on his way home, and carried before a magistrate for examination, by whom he is immediately discharged, cannot maintain an action for false imprisonment against those who so apprehended him under such circumstances. And those circumstances may be pleaded in justification, and, if proved, will entitle the defendant to a verdict: at least, the Court will not grant a new trial where the jury have been so directed, although the defendant had also pleaded the general issue.

Copley, Serjt. moved for a rule to shew cause why there should not be a new trial in this case, which was an action of trespass for an assault and false imprisonment.

It appeared in evidence, that the plaintiff [526] (who was a man of character), was a horsedealer residing in the county of Somerset. Being at Ashborne (Derby) fair, in the way of his business, he paid a person of the name of Mellor a 11. note, amongst others, in purchase of a colt. Mellor took it to the defendant Brittlebank's banking-house, where, being discovered to be a forgery, it was returned to him, and he took it again to the plaintiff, and received from him another in exchange for it. The defendant Brittlebank then sent the defendant Potter, and another person, (neither of whom were constables), in pursuit of the plaintiff, who overtook him about four miles from Ashborne, returning home with the colts which he had purchased at the fair. They told him that they apprehended him, (having no warrant or other authority from a magistrate) on a charge of uttering forged notes, and brought him back to the town of Ashborne, where he was taken before a magistrate, by whom he was discharged, after having been put to very considerable inconvenience and expence.

The defendant Brittlebank pleaded the general issue, and a justification, "that before and at, &c. a certain fair was holden at Ashborne, and divers false, forged, and counterfeit notes, purporting, &c. had been there tendered and offered in payment—and that afterwards, &c. the plaintiff did utter and pay to one Thomas Mellor, a certain false, forged, and counterfeit note, purporting, &c. wherefore said Brittlebank had good and [527] probable cause to suspect, and did suspect, plaintiff to have feloniously, and against the form, &c. uttered the said note, well knowing the same at the time to be false, forged, and counterfeit: and thereupon, having such probable cause and ground of suspicion, in order to arrest the plaintiff, and for the purpose of carrying him before a magistrate, he did, &c. (admitting the facts charged in the declaration)."—Averment, "that on searching the plaintiff, a certain other forged note was found on him." Replication to second plea, "that defendant, of his own wrong, and without such cause, &c. committed the said trespasses."

The other defendant had suffered judgment by default.

The case being proved, Mr. Baron Garrow directed the jury, that although the plaintiff was a man of character, yet where there was well founded suspicion, every man was a constable, and might act as the defendant had done, if *bonâ fide*—and that if the jury thought that he had so acted, they would acquit the defendant on the record, and give the smallest damages against the other. The jury gave their verdict accordingly.

It was now submitted by the counsel for the plaintiff, that although the facts stated in the justification were true, excepting the guilty knowledge: yet as there had been no information laid before a magistrate, and no warrant obtained to authorize the apprehension of the plaintiff,—and [528] as the evidence which had been given in support of the justification was not, without proof of the scienter, sufficient to establish a charge of felony, the plea of justification had failed, admitting the other facts to have been proved. And it was contended, that the broad distinction of the cases wherein a man might apprehend another without warrant, from those wherein he could not, was, that a felony must have been committed: whereas, in the present case, there was no pretence for imputing to the plaintiff that he knew the note to be forged, and the consequence was, that he was immediately discharged: but

The Court were of opinion, that, considering all the circumstances alleged in the justification under which the apprehension and detention took place, there had been, in the present instance, sufficient matter of presumption of the plaintiff's guilt, to authorize the defendant to assume, for the purpose of apprehending the plaintiff, the authority of constable: and that therefore the arrest, although without warrant, had been so far justified, as that they ought not to disturb the verdict.

Per Curiam. Rule refused.

[529] IN THE EXCHEQUER CHAMBER. (IN ERROR.)

JAMES v. EMERY AND CLUDDE. Wednesday, 15th April 1818.—The criterion by which the propriety of the joinder, or non-joinder of parties to a covenant, in an action for breaches is to be ascertained, is the nature of the interest of the covenantees.—If the interest be several, the action may be several, if joint, it must be joint, and the terms, or language of the covenant, do not controul that principle.—Interest allowed on affirming judgment in an action on breach of covenant, for non-payment of an instalment of the purchase-money, although there be an express engagement that interest shall be paid only on one instalment.

The defendants (plaintiffs below) had brought an action for a breach of covenant against the plaintiff in error, on certain articles of agreement entered into between one Rowley, and Emery and Cludde the defendants in error, of the one part, and James (plaintiff in error) and Stubbs (since deceased) of the other part.

The declaration stated that, by the agreement, [after reciting that the said Rowley, Emery, and Cludde, together with one Sarah Dunning, were entitled to the entirety of the premises, &c. in the following proportions—Benjamin Rowley to five undivided parts thereof, and one moiety of another twelfth part, Emery and Cludde in the same proportions, and Sarah Dunning to the remaining twelfth part: subject to the payment to Rowley, Emery, and Cludde, of 400*l.* (a moiety to Rowley, and a moiety to Emery and Cludde,)] the said Rowley, Emery, and Cludde, did thereby for themselves severally, and not jointly, and for their several, respective and not joint heirs, executors [530] and administrators, covenant with said James and Stubbs, and each of them, their, and each of their executors, &c. that they, the said Benjamin Rowley, Emery, and Cludde, should and would, within the space of two calendar months from the date thereof, make out and deliver to the said James and Stubbs an abstract of the title of them, the said Rowley, Emery, and Cludde, to eleven undivided twelfth parts of and in, &c. and within three months, in conjunction with all other parties in anywise interested therein, would grant, release, and convey, &c. unto and to the use of James and Stubbs, as tenants in common, the said eleven parts, &c. and all, &c. &c. And that it should be lawful for the said James and Stubbs to enter forthwith for making erections, alterations, &c. without being considered by, or being amenable to the said Benjamin Rowley, Emery, and Cludde, as trespassers for so doing. In consideration whereof the said James and Stubbs did thereby for themselves, and their respective heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said Benjamin Rowley, Emery, and Cludde, and each of them, their, and each, &c. that they, &c. would pay (in the proportions of one moiety to Rowley, his executors, &c. and the other to Emery and Cludde, their executors, &c.) the sum of 14,000*l.* by the following instalments—2000*l.* 25th December 1813, with interest to be computed from the 25th December then last—2000*l.* on the 25th December then next, and 2000*l.* on every succeeding 25th December, until the whole, &c. &c. should be [531] paid, but without demanding or requiring any interest for any, or either of such payments, to be made after the said 25th December 1813; and should make and execute to the said Rowley, Emery, and Cludde, and their heirs, &c. such a security upon the said estate, &c. by way of mortgage, for payment of the said several instalments, as they Rowley, Emery, and Cludde, or their counsel, should direct; and, as a collateral security, should make and give the joint and separate bond of them the said James and Stubbs, in a proper penalty: the expense of making title to be borne by Rowley, Emery, and Cludde, according to their several estates and interest in, &c. Averment of performance, and readiness to perform the agreement on the part of the plaintiffs, (below) and that defendants took possession. Breach refusal to accept conveyance, and to pay such part of the purchase money as had become due.

The defendant pleaded *actio non*; for that the said Benjamin Rowley was still living.

General demurrer and joinder. Judgment for plaintiffs (below) for 3100*l.* and 38*l.* costs. General errors assigned.

Gaselee, in support of the assignment of errors, submitted, that the questions raised by the pleadings were, whether the covenant of Rowley and the two defendants

in error, with the plaintiff, was not a joint covenant—and whether Benjamin Rowley ought not to have been made a party to this action. And he contended that the covenant was joint, [532] and that Rowley should have been a party to the suit. Anticipating that it would be urged, that the interest of the vendors was separate, he insisted that the covenant, as to the purchasers at least, was joint: they covenanted to pay the purchase-money by instalments—they also covenanted to execute a mortgage—and to give a bond for securing the purchase-money: therefore if the covenants should be held to be separate, the plaintiff in error would be liable to separate actions, at the suit of each of the defendants, for not paying the money—for not executing the mortgage—and for not giving the bond: the legal interest in which three several branches of the covenant was joint in the covenantees: That in this case the distinction of joint and separate covenants more particularly applied, because the difference was carefully observed in the framing of the covenants: for where the covenant was meant to be joint, and where several, it was expressly made so by the terms of the agreement: That the covenant by James and Stubbs was clearly joint, being made to and with the three persons, the two defendants in error, and the other person, which latter ought therefore to have been a party to this suit: and that there was nothing in the words, “and with each of them,” that could make that a separate covenant, which was, in effect, substantially joint. That it was so decided in *Anderson v. Martinale* (1 East, 497), and the cases there cited, where it was held, that the plaintiff alone could not maintain an action on a joint and several covenant, where another had a legal [533] interest in the performance of it, notwithstanding the covenant, was “cum quolibet et quolibet eorum.” That this case was still stronger, because two of the things to be performed are, in their nature, joint—the mortgage to be executed on the premises sold, and the bond to be given to the three parties interested—and that in the case of *Southcott, Executors, &c., v. Houre* (3 Taunt. 87), the same doctrine was recognized and acted upon in a very strong instance, for there the covenant was so far not joint, as that the party said to be necessarily required to be joined with the plaintiff, was not named with him in the covenant, but was a separate party.

Puller, who was to have sustained the pleadings on the record, was stopped by

GIBBS, C. J. who (having stated the case and the question) observed: The principle on which this case must be determined is perfectly well known and established. Wherever the interest of parties is separate, the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint: and where the interest is joint, the action must be joint, although the covenant in language purport to be joint and several.

In this case the interest is most clearly several. [His Lordship read the appropriate passages of the covenants.] The plaintiffs below, who brought [534] this action, were entitled to undivided proportions of the property said, and of the purchase-money, which was the consideration, and that independently of the interest of Rowley: and the covenant must follow the interest of the covenantees. If the whole deed be read, it amounts, in effect, to this, that one party sells one moiety of the property, and the other another, and one-half of the purchase-money is accordingly to be paid to one of the vendors, and the other half to the other, and that was the plain understanding of the parties.

But it is said that there are other covenants which are expressly joint, and therefore the action founded on those should be joint too: but I do not think that that by any means follows, for the covenants must be construed according to their legal effect.

As to the cases which have been cited, there is this plain distinction to be noticed, which takes them out of the operation of the rule, and leaves this case within it. In none of those cases had the person who, it was contended, was a necessary party any beneficial interest whatever. In some of them they who framed the deeds had provided that one of the covenantees should have a sort of guardian over him in the person of the other, and there could not be any separation of the interest in such a case as that, so that it became absolutely necessary that such third person should join in any action on the covenant, for he could only have been made a party for that purpose.

[535] The true test is, whether the interest be joint or several: for in whatever terms the covenant be framed, it must follow the nature of the interest, and in this case I think the interest was several. Therefore we pronounce the

Judgment affirmed.

Puller then applied, that interest might be added, from the time of the allowance, on the whole sum recovered, although it was larger than that on which interest had been agreed to be paid: but

Gaselee submitted, that the agreement being express, the defendants in error were only entitled to interest on the first instalment, which was the stipulation between the parties, in terms: and he compared this bargain to that of goods sold to be paid for at a particular day which had been long past.

GIBBS, C. J. If there have been any case in this Court ruling otherwise, we will attend to it. On principle we have no difficulty. If the instalment had been paid at the appointed time, there would have been no interest recoverable.

Interest allowed on the sum recovered from the day of judgment.

[536] IN THE EXCHEQUER CHAMBER. (IN ERROR.)

IKIN v. BRADLEY. Wednesday, 15th April 1818.—On a judgment recovered against bankers, for a balance due from them, of money deposited in their bank by a customer, the Court will, on affirmance, order the interest to be added to the damages, where the custom of the bank is to allow it.—But they will make the order for interest, after the same rate only at which it was the usage of the bank to allow it to their customers.

Littledale moved for interest, on the affirmance of this judgment, on an affidavit, stating that the action was commenced for the recovery of the balance due to the defendant in error, on account of money deposited in a bank, of the firm of which, the plaintiff in error was surviving partner, *Hammel v. Abel* (4 Taunt. 298); and that it was the usage of the bank to allow their customers interest on money so deposited with them. *Gwynn v. Godby* (4 Taunt. 346).

It being the custom of the bank to allow such interest after the rate of 4l. per cent per annum, the Court ordered the interest to be calculated at that rate.

[537] COFTON v. HORNER. 17th April 1818.—The plaintiff and defendant (partners) having agreed to dissolve partnership, and that defendant, on payment of half the value of the effects, should take the whole—the defendant took possession of the improved property, but failed to make payment, and had begun to pull down part of the buildings—held that it was not waste: and an injunction to restrain him from so doing refused.

Dauncey and Hone moved for an injunction on the filing of this bill, which was supported by the usual affidavit of the truth of the allegations.

The bill stated that the plaintiff and defendant became and continued to be co-partners until the 3d of July 1817, when the partnership was dissolved by mutual consent, and notice thereof, signed by them respectively, inserted in the *London Gazette*—that on entering into partnership, they had agreed that a piece of ground belonging to the plaintiff, and on which he had built, should form part of the partnership property—that the partnership accounts had not been closed—that on the treaty for the dissolution, and at the time of signing the notice for advertisement, it was agreed between the plaintiff and defendant that the accounts should be forthwith settled, and that the defendant should immediately afterwards pay to the plaintiff half the value of the co-partnership stock, property and effects, and that upon such payment being made, the whole thereof should become the property of the defendant—that, confiding in such agreement, the plaintiff consented to the dissolution—that the plaintiff had since applied to the defendant for a settlement of the accounts, and payment of half the value [538] of the effects, according to the agreement, which he had refused—that the defendant had taken possession of the ground and buildings, and all other the partnership property, with the books of account, and was carrying on the trade, for his own private account, with the plaintiff's moiety of the stock, and had begun to pull down part of the buildings. The bill therefore prayed an account of the partnership transactions, and payment by the defendant to the plaintiff of a moiety of the value of the stock, premises, debts, property, and effects, and that the plaintiff might be declared

to have a lien upon the whole of the partnership property for such moiety, and that until payment thereof, the defendant might be restrained from collecting the debts, and particularly from pulling down the buildings, and converting the materials to his use, or committing waste upon the co-partnership premises.

Per Curiam. The plaintiff has not by his bill made out a case of waste, whatever he may do hereafter, if the defendant by his answer admit his equity. The defendant may have failed to perform the agreement on his part, but that is not sufficient to entitle the plaintiff to the remedy he seeks for by the present motion; for it was agreed, that on payment by the defendant of the value of his share in the partnership effects, the whole of the property should belong to him. The [539] plaintiff can only have an account of the partnership dealings for the purpose of ascertaining what is due to him under the agreement for a dissolution.

It is a great mistake, and one very commonly made, to imagine that all the numerous cases, wherein very much inconvenience, and even loss may be suffered by consequence of the acts sought to be restrained, are therefore in the nature of waste.

Injunction refused.

[540] *GADD v. BENNETT.* 17th April 1818.—The declaration in an action for maliciously causing a writ to be sued out, whereon plaintiff was imprisoned, stating the process with the *ac etiam* clause, as sued out for 50*l.* (instead of 30*l.* according to the fact, and an endorsement for 15*l.* the warrant being for 30*l.* it is a fatal variance.—An averment, that the defendant had voluntarily permitted his bill to be discontinued, for want of prosecution thereof, with a conclusion to the record, is not proved by shewing that there had been actually a rule to discontinue, regularly taken out: the record having been averred, it must be proved.—Had the allegation of the discontinuance been general, it would have been sufficiently proved by the rule to discontinue, and evidence of the payment of costs.

This was an action for a malicious arrest and imprisonment.

The declaration stated that the defendant sued out a bill of Middlesex against the plaintiff, whereby the sheriff was commanded to take the plaintiff, &c. to answer the defendant of a plea of trespass, and also to a bill of the said defendant against the said plaintiff, for 50*l.* upon promises, according, &c. averring that said defendant, contriving, &c. falsely and maliciously caused the said writ to be endorsed for bail for 15*l.* and upwards, and thereupon caused the plaintiff to be arrested, and imprisoned, and detained, &c. for seventeen days, and that defendant had no probable cause of action to the amount of 15*l.*; that proceedings were thereupon had in the suit; and that afterwards, &c. the defendant did not prosecute his said bill against the said plaintiff with effect, but voluntarily permitted his said bill to be discontinued for want of prosecution thereof: and thereupon it was then and there considered by the said Court that the said defendant should take nothing by his bill, as by the record and proceeding thereon, still remaining, &c. appeared, whereupon and whereby the said suit then and there became and was wholly ended and determined.

[541] The cause was tried before the Lord Chief Baron, at the Sittings in Easter Term last, when a verdict was found for the plaintiff. Two objections were made in the course of the trial, 1st, that the declaration was not supported by the evidence, as it had, in setting forth the *ac etiam* part of the bill of Middlesex, shewn that it was for 50*l.* upon promises, whereas, in fact, it was for 30*l.* and the warrant was accordingly made out for 30*l.* And 2dly, that the averment of the discontinuance of the suit was also not borne out by the evidence, as it had been only proved that there had been a rule to discontinue, on payment of costs, but the record was not produced to shew that the suit had been actually discontinued. It was ordered that the cause should proceed, with liberty to move.

A rule was afterwards obtained by the defendant to shew cause why the verdict should not be set aside, and a nonsuit entered on the above grounds.

Richards, Lord Chief Baron, having reported,

Dauncey, and Sir William Owen, now shewed cause, contending, as to the first ground of objection, that the variance in respect of the sum for which the process was stated to have been sued out, and the endorsement on the warrant, was merely an obvious clerical misprision in an immaterial part of the averment, (*Peppin v. So-* [542]-*lomons* (5 T. R. 496)), and did not affect the real merits, and that as the complaint

was supported by the previous allegations in the declaration, which were clearly proved, all that related to setting forth and reciting the *ac etiam* part of the writ might be rejected as surplusage, and then the gravamen of the plaintiff's cause of action would have been fully supported by the evidence.

On the second point, they contended, that as the discontinuance was in fact proved, and the payment of the costs, the averment was supported, *Bristol v. Haywood* (4 Campb. N. P. 214), and that in that averment also, all that followed the statement of the fact, and referred to the record, might be rejected as surplusage, for that that likewise was immaterial, inasmuch as it was not necessary to this action, that the discontinuance should have been recorded, provided it was made out, by any evidence, to the satisfaction of the jury, as it was a mere matter of fact, relating to a voluntary act on the part of the defendant; *Walker v. Walker* (1 Doug. 1), *Wigley v. Jones* (5 East, 440).

[The Court remarked, that in those cases the reference had been to a record which could not exist, and suggested, that here there might or ought to have been a record.]

It was then put that the determination of the [543] suit was not in practice required to be shewn, as appeared by the precedents, (referring to *Chitty*, 2 vol. p. 245, and the authorities there mentioned,) but

[Wood, Baron, denied that.]

Then advertng more particularly to the terms of the declaration, with reference to the nature of the action, and the proofs necessary to support it, they insisted that the formal objections now taken were not founded either on principle or authority.

Clarke, in support of the rule, relied, as to both objections, on the axiom of law *allegata probanda* applying to all material averments. The first averment he submitted was material, because it is the *ac etiam* part of the process which gives the Court jurisdiction. Variances less material have been held fatal, as in *Green v. Rennett* (1 T. R. 656), and it had been urged strongly in that case also that the variance did not go to the gist of the action. So also in *Wigill v. Shepherd* (1 H. Bl. 162).

In support of the second objection, he contended, that although perhaps in the averment they need not have concluded to the record, yet having done so, they were bound to produce it, and to have shewn, as they had alleged, that judgment had been in fact signed for want of [544] prosecution. Two of the cases cited on the point of rejecting that conclusion as surplusage, having been already distinguished by the Court from this case, he produced the declaration in the case of *Bristol v. Haywood*, which averred only that "The suit was ended and determined." He denied that it had been proved that the costs had been paid, (and that was sanctioned by the Lord Chief Baron from his Lordship's notes,) and therefore he submitted that the rule ought to be made absolute.

RICHARDS, Chief Baron, (having stated the first objection). It was certainly necessary to state the writ, and therefore it was not matter of surplusage, and the plaintiff in stating it was bound to state it accurately. He has clearly not done so, (advertng to the record). There is therefore a material variance, and one of too great importance to be got over.

As to the other objection of the averment of the discontinuance not having been proved as laid, that I think is also well founded. It is averred that the defendant discontinued, and then the averment goes on in the same sentence to state in what manner, shewing that it was by judgment of the Court. No other mode of discontinuance is averred but that, and that has certainly not been proved. It was said, that evidence to shew that the suit had been discontinued generally would be sufficient, but I think that the particular form of this averment precludes [545] them; and as to the fact of the payment of costs having been proved, I see no evidence of that on my notes. It was clearly necessary on this record to shew that judgment had been entered, for it is not stated as having been merely the act of the party, but of the Court. I therefore think that we should make this rule absolute.

GRAHAM, Baron. I had inclined to the opinion that the first objection of the variance in the process might have been got over, but I concur with my Lord Chief Baron.

The other objection cannot be got rid of, for it was important to shew that the defendant, having sued out a writ, had discontinued the suit; and if the allegation of that fact had been general, I should have considered that the evidence of an actual discontinuance, followed by payment of costs, would have been sufficient; but when so much more is particularly stated on the record, as here, it is made essential to

the plaintiff's title, and cannot be rejected as surplusage. The averment is all one inseparable sentence, and we have no authority to mutilate it, or separate the *quo modo*, the whereupon, &c. from the preceding part.

Another insurmountable difficulty is, that the payment of costs was not proved, and if they had been really paid, the jury were not possessed of that fact.

[546] WOOD, Baron. I am of opinion, that both the objections taken to this declaration are fatal. It was necessary to set out the writ, although not perhaps with so much particularity as has been done; but they have done so, and therefore were bound by it. There is no doubt a very material variance, and therefore the plaintiff has failed.

Then as to the other point of the discontinuance not having proved as laid. Had the allegation been general, it would have been sufficient to have produced the rule, and proved payment of the costs, but he refers to the record, and there there is no judgment which there might have been: or a *nolle prosequi* might have been entered, which would have made the averment conformable.

GARROW, Baron, concurred on both points, and for the same reasons (which his Lordship stated)—adding that there was nothing conclusive in the mere rule to discontinue, which might have been merely conditional, and might never have been acted on; and that there was no evidence of the costs having been paid.

Per Curiam. Make the rule absolute.

[547] THOMAS v. PEARSE, ESQ. Saturday, 18th April 1818.—Competency of witness. —In an action against a sheriff for a false return of *nulla bona*, after he has taken goods in execution, which have been forcibly taken out of his possession, and carried away by a person claiming property in them—such person is admissible to prove that they were not the property of the debtor, against whom the execution had issued—because the sheriff cannot maintain an action against him (the witness) for the rescue, after having made such a return—and as to all other persons claiming the goods, the verdict would be *res inter alios acta*, and therefore could not be used to affect their rights in any proceeding against the witness.

This was an action against the sheriff of Essex, for a false return of *nulla bona* to a writ of *fieri facias* on a judgment obtained by the plaintiff against John Hulbert, in an action of debt for 600*l*.

It was tried at the sittings for Middlesex, in Michaelmas Term last, before the Lord Chief Baron and a special jury, who found a verdict for the plaintiff, damages 586*l*. 10*s*.

It was in evidence (though dubiously and under much confusion and contradiction) on the trial, that a person of the name of Hudson had taken a malting-house and premises of Mr. Blyth, as his tenant, at a rent of 200*l*. a-year: but Hudson owing at that time a debt to the Crown for duties, entered the premises at the Exchequer in the name of Hulbert, a person connected in a very vague manner with him in the business, and (as he stated) for the express purpose of protecting the property from the claim of the Crown. Hudson becoming indebted to Blyth for rent and in other respects, and a debt having become due to the Crown for duties, and an extent being expected momentarily, he, to secure Blyth, gave him an authority to take possession of the malt, &c. then on the premises. In the mean time, an officer of the sheriff of Essex seized the malt, and other effects, on an extent against Hulbert. [548] Afterwards the same officer received a warrant from the sheriff, under an execution at the suit of the plaintiff against Hulbert, in consequence of which Blyth gave notice to the officer, that the goods were not the property of Hulbert. The officer, however, took possession of them notwithstanding, under the extent, and also under the execution at the suit of the present plaintiff. Blyth however ultimately regained the possession, by taking them from the sheriff's officer by force, and sent them on board a vessel to London. The sheriff at first returned a rescue, but on being indemnified by other creditors of Hudson, amended his return to that of *nulla bona*, on which this action was brought.

The question in the cause, therefore, was, whether the goods were in fact the property of Hulbert or Hudson. And to prove certain facts within Blyth's knowledge, tending to shew that they were the goods of Hudson, the defendant's counsel proposed to call Blyth, who was objected to by the other side, on the ground of having an

interest in the result, and his evidence was on that ground rejected by the Lord Chief Baron.

28th November.—Campbell obtained a rule nisi for a new trial on the ground that Blyth's evidence was improperly rejected, inasmuch as he had no interest in the verdict : for if the false return were made out against the sheriff, he could bring no action against Blyth, as he himself must have been proved to be a wrong-doer, which would preclude [549] him. That, he submitted, was established by the case of *Pitcher v. Bailey* (8 East, 171) : and he contended, besides, that the sheriff would be estopped by his own return of nulla bona. If, on the other hand, the verdict had been in favour of the defendant (the sheriff) the plaintiff might still have sued Blyth, because in that case the verdict could not be used in the witness's favour.

Jervis, Taunton, and Chitty, shewed cause. They contended that Blyth was inadmissible as a witness, because he was directly interested in the event of the action ; as the sheriff, in case of a verdict against him, would have an action against Blyth for taking away the goods while in his custody under process, although the return might have been false : for (they submitted) if the sheriff had acted under a mistake in permitting a person claiming a property in the goods, to take them out of his possession, he would undoubtedly have a right, on discovering that he had been imposed on, to bring an action against such person, to recover any damages which should be obtained against himself : and that, notwithstanding such a return as this, which, though false, might be made innocently, and without intention to do wrong. A sheriff cannot be considered as so estopped by his return as not to be afterwards permitted to give evidence of the truth, and avail himself of it in a court of law. And the record of the verdict in [550] an action against him for the false return, would be evidence as to the quantum of the damages sustained by him, in consequence of the deceit practised on him by the party, though not to prove the fact of the deception. Nor would it be necessary for the sheriff, in such an action, to shew that these were the goods of Hulbert, for having taken them by virtue of the writ, he would have such a qualified property in them as would enable him to maintain trespass or trover in his own name, against any person who should take them from him, as was determined in *Willbraham v. Snow* (2 Saund. 47), and that without shewing any better right.

The question whether the verdict could be used in any other action wherein the witness should be a party, (they insisted) was not the only criterion of his admissibility, for although that should not be so, yet if the witness had a direct interest in the result of the suit, it would be a sufficient ground for rejecting his testimony. In the case of *Eland v. Ansley* (2 N. R. 331), which was an action of trespass against the sheriff for taking the goods of the plaintiff, under an execution against a third person, that third person was held not to be a competent witness for the defendant, to prove that he had not sold the goods to the plaintiff, and that they were his property, though in that case the record could not have been used in evidence. So, in the case of an issue directed to try the fact of [551] an act of bankruptcy, it is an inflexible rule of law, that the bankrupt himself cannot be examined. In *Keightley v. Birch* (3 Camp. N. P. 523), a landlord to whom a sheriff had paid money for rent in arrear, was held, by Lord Ellenborough, not to be admissible to prove that the rent was in arrear. On that occasion, Lord Ellenborough observed, "sheriffs are often placed in very difficult circumstances, and must act at their peril." In this case Blyth had a direct interest to prove the property to be in Hudson, and justify the sheriff's return : for if the present verdict should stand, the sheriff will have an action against Blyth, in consequence of the goods having been rescued ; whereas, if they were not Hulbert's goods, the sheriff would have no cause of action against Blyth.

In the case of *Green v. The New River Company* (4 T. R. 589), it was held that a servant could not be called as a witness in an action brought against his master, for the consequence of his own negligence, because the verdict, in that case, might be afterwards used in evidence against the servant, in an action brought by the master. So, in this case, the verdict might be used in an action against Blyth, for that verdict would be the foundation of the sheriff's action against him, and might be used, as there, to shew the quantum of damages recovered : and that is a case directly in point with the present. Even [552] where a witness does not stand indifferently between two parties, and is liable to both, if he be more extensively liable to one than the other, that is sufficient to render him an incompetent witness for the former. *Jones v. Brooke* (4 Taunt. 464). And where a verdict might be used to influence a jury in a

civil case, it has been held to render a witness incompetent to give evidence which would conduce to such a verdict on a criminal prosecution. *Rex v. Whiting* (1 Salk. 283).

Dauncey and Campbell, in support of the rule, contended, that the principle of all the cases of incompetency of witnesses was, that their legal situation must be altered by the verdict: they must either be shewn to acquire some right, or incur some liability which did not exist before. The verdict in this action, if the goods were found not to be the property of Hulbert, would not conclude him, or any other person whose property they might be: for the owner, whoever he were, might maintain an action against Blyth, the next day, for the recovery of these goods, whosever property they might have been found to be by the verdict in this action, which, as to all the world besides, would be *res inter alios acta*, and therefore not evidence, as between any other plaintiff and the witness. As to the objection of the verdict being used to prejudice the jury on any other action, that went merely to [553] his credit, not to his competency, the distinction between which had not been sufficiently attended to in argument, the case of *The King v. Whiting* having been long over-ruled, in *The King v. Bray* (Ca. Temp. Hardw. 358).

Then the question is, whether the sheriff might have maintained any action against Blyth. Most clearly he could not: for he was estopped—not in the technical meaning of that word—but by his wrongful act in making a false return. The jury having found that these were the goods of Hulbert, and having given a verdict for the plaintiff, the sheriff has forfeited his right of action against Blyth by his false return, because it would be making Blyth amenable for his own offence. Although it is true that a sheriff may bring trover or trespass against a tort-feazor, where he is interrupted in his duty, yet he loses an otherwise just right of action by a breach of his duty (*Pitcher v. Bailey*). If, on the other hand, these were not the goods of Hulbert, the sheriff could have no right to them, nor to the possession under the writ, and therefore could not support any action against the person taking them. They cited the case in Vernon, of *Underwood v. Mordant* (2 Vern. 237), where it was held, that in an action against the sheriff for a false return of nulla bona, if the plaintiff recover damages against him, the verdict does not, as in the com-[554]-mon case of trover, vest the property of the goods in the sheriff, but they remain in the party, and are liable to any other execution. The sheriff, therefore, could have no right in such a case, to bring an action to recover the goods against the person in possession of them. And he could not recover damages in an action founded on his own wrong, for there would be no one to whom he would be to pay them over, and it would be absurd that he should put the amount into his own pocket.

As to the case of *Green v. The New River Company*, there is a privity between master and servant, which does not exist in this case between the sheriff and Blyth, and that distinguishes the cases. There the allegation in the master's declaration would require the production of the record, but here there could be no allegation framed which would entitle the sheriff to use this verdict.

RICHARDS, Chief Baron, (stopping further argument on the part of the defendant.) The sheriff has returned nulla bona, after having seized these goods, which the plaintiff in the present action insists were the goods of Hulbert. If they were, it is a false return, and being his own wrongful act so to return the writ, what remedy can he have against the taker of those goods? He had no interest in them after that return, whereby he declares that he never had rightful possession. [555] And the only question is, whether, under the circumstances of this case, he can maintain an action against Blyth for the rescue, for it was a rescue beyond all doubt, and he might have returned a rescue, but he chooses to return nulla bona. Can he then proceed against Blyth after that, and say, I returned what was not true in favour of Blyth, conducting myself improperly as a public officer, and therefore he is liable to pay me damages? There is no instance of such an action, and therefore there is no pretence for saying that this verdict could serve the sheriff in an action against Blyth, and as to all the world besides, it would be out of the question. I therefore think that the evidence ought to have been received.

GRAHAM, Baron. I have been much perplexed throughout this argument as to the opinion I should give; but I concur, at length, with my Lord Chief Baron. I certainly thought, at first, that Blyth had a direct interest in supporting the sheriff: but it is clearly not so, and unless he would be liable in an action by the sheriff, he is

undoubtedly a competent witness: and it has been made quite manifest to my mind, that the sheriff could not maintain any action against him. The sheriff might have summoned a jury to ascertain in whom the property was, or he might have returned a rescue, or brought trespass or trover, but in fact he returns nulla bona, on the suggestion of Blyth, and on his own au-[556]-thority he ventures to ratify Blyth's claim. The case is quite distinguishable from *Green v. The New River Company*. Blyth, when in Court, would be free from any apprehension of an action by the sheriff, and with respect to any other claimant of the goods, the verdict would not make any difference to Blyth, who would, after any verdict, be still precisely in the same situation. Whatever objection, therefore, there might be to his credibility, he is, I think, clearly admissible.

WOOD, Baron. I have, I confess, been for some time hesitating and doubting on this case; but I am now clearly of opinion that the witness was competent. The rule of law has been properly laid down, that the judgment must affect the witness in some way, to render him inadmissible; but whichever way it had been found in this instance, he could not have been affected by it. The main question is, whether he could have prevented the sheriff from maintaining any action against him. Before the sheriff had made his return of nulla bona, he might have had an action against Blyth for taking the goods, but he precluded himself by that return. How could he maintain trover contrary to that return, or trespass? He had thereby disclaimed all interest in the goods, and therefore it was impossible for him to maintain any action against the taker.

GARROW, Baron, concurred. The witness [557] ought to have been received; for in the situation in which he was placed, if the sheriff had no right of action against him, he was rather giving a right to all other persons, than depriving them of it. And with respect to the sheriff, there is no form of action, in which he could have sued Blyth, under the circumstances of this case. I have felt all the difficulty of this very nice question, and certainly did not at first see the minute distinctions which have been pointed out between this case and the authorities which have been cited. There is certainly no privity between the defendant and the witness in this suit, nor could there be any action brought in which this record could be used, and that consideration removes the difficulty thrown in my way by the case of *Green v. The New River Company*. I therefore think there ought to be a new trial.

Per Curiam. Rule absolute.

[558] *HOPKINS v. PEACOCK AND ANOTHER.* Tuesday, 21st April 1818.—Where bail have been put in by a defendant, and not perfected, the sheriff's officer may put in and justify bail for his own indemnity.—It is no objection in this Court, that bail is put in by a different clerk in Court, without an order first obtained for leave to change the clerk in Court; or notice given of the change to the plaintiff, or his attorney.—As to the change of the attorney, (not being one of the four attorneys of this Court,) semble, the Court does not take notice of the immediate attorney in the cause the proceedings being carried on in the Exchequer, wholly in the names of the clerks in Court.

Sir William Owen opposed the justification of the defendant's bail in this case, on the ground of their having been put in at the instance of the sheriff's officer, who had arrested the defendant; that bail had been put in before, on the part of the defendant, but had not justified; that the attorney and clerk in Court had been since charged without order of the Court, or notice to the plaintiff's attorney or clerk in Court, (in support of which point of objection, he referred to Manning's Practice, vol. i. p. 113, and the cases there cited (a)),—and that the costs of the attendance to oppose the former justification had not been deposited according to the practice.

The costs being deposited, and the other objections answered, by stating that the sheriff had put in bail for his own protection, and that the dictum in Manning's Practice was not founded on any decision of this Court, the cases there referred to being cases of a change of attorneys in the other Courts, and therefore not applicable to the clerks in Court of the Exchequer.

The Court decided that the bail being put in by the sheriff, (for his own protection) was no [559] objection: but on the contrary, a natural and proper proceeding, and

(a) *Kaye v. De Matlos*, 2 Bl. 1323. —and *Macpherson v. Rioson*, 1 Doug. 217.

would alone have authorized a change of the attorney and clerk in Court, if in case of a defendant putting in other bail on his own behalf, such an objection were valid *; but, with respect to that point they held it to be unfounded in practice in this Court, and in the reason of the thing; inasmuch as if unobjectionable bail were perfected, it was to the advantage of the defendants, whatever attorney should put them in: and they said, that in this Court the change of the clerk in Court by the party required neither order nor notice, where it did not affect the proceedings.

[The officer, (being referred to) certified that it was not the practice in this Court that an order must be obtained for changing the clerk in Court in the cause.]

The bail were therefore permitted to justify.

[560] METCALF v. BROWN AND OTHERS. Assignees of Wilson, a Bankrupt. Demurrer. Tuesday, 21st April 1818.—A bill, praying repayment of money paid, in consideration of an assignment of a lease, with a clause, that the vendor may be at liberty to re-purchase within a given time, by paying a larger sum, which would amount to much more than the legal interest of the money paid for the intermediate time: or that in default thereof the vendor might be barred and foreclosed of such right to re purchase —and stating the above facts not demurrable, on the ground of usury, apparent on the face of the bill.—A general demurrer to a part of a bill is bad pleading.

The bill stated that Wilson, a builder, having occasion to borrow money, agreed with one Bromley, an auctioneer, to assign a certain lease, and carcasses of houses thereon, to secure the repayment—that Bromley refused to lend, but agreed to purchase for 800l., for the purpose of selling the premises by auction, for the sake of the auctioneer's profits—that Wilson then (15th April 1811) assigned, &c.—that Wilson afterwards proposed to the plaintiff to purchase the premises for 1300l., out of which Bromley was to be paid the 800l. and 80l., in lieu of the profits which Bromley as auctioneer would have made on an actual sale, to which the plaintiff acceded, and Bromley was privy to such agreement—that in pursuance thereof, the plaintiff paid to Wilson 150l., as a deposit in part of the said 1300l.—that Wilson, at that time, conceiving the said carcasses of houses would be worth much more when finished, stipulated that he might be at liberty to re-purchase, proposing, in order to indemnify the plaintiff from any loss which he might sustain, on account of the then state of the houses, to pay him 1400l. for such re-purchase before the following 29th September, in consideration of which, the plaintiff agreed to permit Wilson so to [561] re-purchase, &c. in case he should in the mean time be able to get more money by the sale—that a memorandum of agreement was accordingly made and signed between them to such effect on the 8th June 1811—that on the 18th June, Wilson assigned said premises by indenture to plaintiff on the above conditions—that Wilson afterwards put up the premises twice for sale by public auction, and that each time they were bought in—that some time before Christmas 1811, plaintiff entered into possession of the premises, and the tenants attorned, and plaintiff received the rents and profits up to stated a time—that Wilson became bankrupt in April 1814, and defendants were appointed his assignees—that in Hilary 1815, they brought an ejectment against plaintiff in the King's Bench, to recover possession of said premises, on the ground of usury in the transaction, and 160l. for mesne profits, and recovered judgment, on which they obtained possession, and threatened to take out execution, unless, &c.—that the plaintiff had since recovered a verdict against the defendants, notwithstanding the defence of usury was attempted to be established—and that the plaintiff had offered to let the defendants redeem, on payment of the said 1400l. and interest, and costs. Praying decree that that sum and all interest from the 29th September, and all his costs, might be paid to the plaintiff: and in default thereof, that the defendants might be utterly barred and foreclosed of

* As far as respects the attorney in the cause, (not being one of the four attorneys of the Exchequer,) it has been decided, that all notices given in this Court must be subscribed by, and addressed to clerks in Court—*Culvert v. Bowater*, ante, vol. i. p. 385. And in *Fisher v. Fichling*, ante, vol. i. p. 384, (a note to *Allison v. Novarre*;) the Court, on a question of privilege, considered that attorneys generally (not of this Court) were not necessarily recognized by the Court in proceedings on the plea side.

and from all right, title, and equity, to re-purchase or otherwise redeem the premises, and that plaintiff might be [562] quieted in the possession &c.—a release of the defendants' right and interest,—and for an injunction.

To that bill the defendants put in a demurrer: for that it appeared by plaintiff's own shewing, that the agreement to purchase for 1300*l.* was in fact a contract for the taking indirectly for the loan, &c. above 5*l.* per cent. per annum, contrary, &c.—and that the indenture of the 18th June 1811 was void by the 12th Anne—and that the plaintiff had not by his bill made a case to entitle him to relief. Whereupon, and for divers errors, &c. defendant demurred, and demanded judgment whether he ought to be compelled to make any further or other answer thereto, or to any part thereof.

Dauncey and Sidebottom, for the demurrer, having submitted that there was a manifest discrepancy between the statements and the prayer of the bill, contended, that the plaintiff was not in any way or in either character entitled to relief in equity on this bill: for that if he filed it as mortgagee, his mortgage treaty was palpably usurious. If on the other hand he were really a purchaser, he could obtain no relief as mortgagee: and they insisted that the pretended sale was merely colourable.

Martin and Raithby, contra, contended, that as neither loan, forbearance, security, or reciprocity of obligation appeared in the agreements, or [563] on the face of the bill, there was no ground for the present demurrer. To sustain a demurrer by the rules of pleading, it should be quite obvious that there was a loan, and that its repayment was secured: and that the contract should be binding on both parties, and not optional on either side, and most especially that a transaction suggested to be colourable should be manifestly so, nothing of all which appears here.

They then objected that in point of form this demurrer was untenable. It was a general demurrer, to a particular portion of the bill, admitting at the conclusion that the bill is entitled to some answer.

[Richards, Chief Baron. If you can shew that any part of the bill must be answered, then there is an end of the general demurrer.]

A demurrer is a proceeding subject to the utmost strictness, and cannot be sustained where the facts on which it is founded do not appear on the face of the bill. *Edsall v. Buchanan* (4 Br. Ch. Ca. 255).

Per Curiam. We have been considering of this demurrer during the argument, and we think that under all the circumstances disclosed, it ought to be over-ruled.

[564] A general demurrer cannot be put in on a particular part of the case.
Demurrer over-ruled.

KIDSON v. DILWORTH AND WELCH. Tuesday, 21st April 1818.—Equity (affecting a bill of exchange).—Where a solicitor—acting in getting in debts due to the estate of an intestate, under the authority of and as local agent to the administrator, another person being the immediate and general agent of the administrator, under whose directions the solicitor acts—has received money in the course of his agency, which it is his duty, according to his instructions, to remit to the general agent: if, in order to effect the object of remittance more conveniently, he procure a banker's bill for that purpose, which is accidentally drawn in his favour, so that it becomes necessary that he should indorse it, and he does so, a court of equity will restrain an action commenced against him on such indorsement, whether brought by the indorsee (the principal agent), or by a banker with whom the bill has been deposited, for the purposes of being presented for acceptance and payment by the drawee, although the banker may have given credit for the amount, if the latter can be shewn to have had any knowledge or information of the circumstances attending the transaction, and of the relative situation of the parties.—A further supplemental answer may be used to correct or explain an obvious mistake or ambiguity in the original answer, but not where the former is clear and intelligible without, or with a view to strengthen the defendant's case.

The plaintiff had obtained an injunction on a bill filed for relief, and for restraining the defendant Dilworth from proceeding in an action which he had, as holder, commenced against the plaintiff as indorser, of a bill of exchange, drawn by a banking house in the country on the house of Bruce and Co. in London, under the following circumstances, detailed in the bill and answer.

The bill stated that the plaintiff was in the habit of receiving sums of money, due

to the estate of a gentleman, who had died intestate, formerly [565] living at Sunderland, from persons residing in the neighbourhood of that place, in capacity of agent to the defendant Welch, and he (Welch) was himself the immediate agent and correspondent of Robert Walker, who was the administrator of the intestate, both of whom resided at or near Lancaster: and that such sums so received by the plaintiff were constantly remitted by him to Welch.

In the course of that agency, the plaintiff received proposals from certain persons who were indebted to the estate, to whom he had applied for payment of a sum of 600*l.* due on their bond, to pay 300*l.* in part, and to give a bill at two months for the remainder.—The plaintiff communicated those proposals to Welch by letter, dated in June, 1816, (after some other letters had, in the mean time, passed between them on the subject, containing other proposals), in which he said, “Smith will pay the money in a banker’s draft or notes, which is the same thing; and in that case a banker’s bill must be got for them to remit, which will be at forty days, and that, together with his bill for the residue, payable in London, will be remitted to you, and the bond can be retained till those bills are paid:” and the letter concluded with recommending him (Welch) to accept the proposals. To that letter he received no answer.

The debtor afterwards paid 314*l.* to plaintiff in notes of the bank of Messrs. Cooke and [566] Co. bankers, in Sunderland, and delivered the bill at two months for the remaining 300*l.* The plaintiff concluding (Welch not answering his letter) that he had no objection to the mode proposed of remitting the money, took the cash received to the banking-house of Messrs. Cooke and Co. and exchanged it for their bill, for the amount drawn on Messrs. Bruce and Co. bankers, in London, payable at forty days, a mode frequently adopted by him before, to which no objection had been made.—“But (the bill stated) the said bill of exchange was, by mistake or inadvertence, made payable to the order of the plaintiff, and therefore he was obliged to and did, in order to enable the said defendant to receive the benefit of the same, and without consideration, or any intention or reason to make himself liable to the payment thereof, indorse the same.”

The bill also stated, that shortly after the bill of exchange had been so remitted, Cooke and Co. became bankrupts: but that when it was procured their responsibility was in good repute: and that they were the only bankers in or near Sunderland; that the plaintiff had requested Dilworth to desist from prosecuting the said action, and had explained to him the circumstances under which the bill of exchange had been indorsed by the plaintiff,—that Dilworth had never taken any steps against Welch on his indorsement of the bill; and that Welch had not paid the amount or any part of the bill to the administrators.

[567] The defendants put in their joint and several answer, in which Welch stated, (and Dilworth swore that he believed it to be true) that Robert Walker, who was the administrator of the estate of the intestate, had appointed defendant Welch to correspond for him, with persons concerned in the affairs of the intestate’s estate; and that he (Walker) had also appointed the plaintiff, who was a solicitor, residing and practising at Sunderland, his agent, for getting in the outstanding personal estate in that neighbourhood, under a power of attorney from Walker: and that he received a remuneration for his trouble. That defendant Welch did not answer the letter mentioned in the plaintiff’s bill, because he considered the proposals contained in it, more objectionable than other proposals previously made by the obligors through the plaintiff, in answer to a former letter, requesting him to get the bond satisfied, and that therefore Welch did not answer that letter.

The answer then, after adverting to and recognizing the statement of the transaction as set out in the bill, went on to state that the house of Cooke and Co. were not then in good credit: that they were unable to set forth (except from the information of the bill which they deemed highly improbable) whether the bill of exchange being made payable to the order of plaintiff, was in consequence of mistake or inadvertence, except that they believed that the plaintiff had good reason to believe, that defendant Welch [568] would not be satisfied to take the bill, without the plaintiff’s indorsement on the sole responsibility of Messrs. Cooke and Co. and their correspondents in London; but they denied it to be true, that the plaintiff was obliged to indorse it under the circumstances charged, or that it was indorsed by him without consideration, insisting that his receipt of the money on behalf of Walker, and applying

it to his own use, or to any use not in pursuance of the object of the power of attorney, was a sufficient consideration for his indorsing the said bill of exchange: that shortly after the procuring and remitting the said bill of exchange, Messrs. Cooke and Co. became bankrupts, and the bill not being otherwise discountable for the benefit of the personal representative of the intestate, defendant Welch indorsed it on the 2d July, 1816, and paid it on his own account (which was then in arrear) into the banking house of the defendant Dilworth, at Lancaster, where he had kept an account for many years, in order that it might be presented for acceptance, and afterwards for payment; that it was sent to London, on the 3d of July, for acceptance, but Messrs. Bruce and Co. had then stopped payment, and afterwards became bankrupts; and that the bill being then duly noted, the present action was brought.

The defendant Dilworth submitted, in his answer, that he was a *bonâ fide* holder of the bill for a valuable consideration, as he had suffered the defendant Welch to draw upon him to a larger [569] amount than the money secured by the said bill of exchange, and had given him credit in his account, on paying in the bill, for the amount. And he denied notice of the circumstances attending the indorsement of the draft by plaintiff, except as previously set forth in the answer.

In a further answer, defendant Dilworth had stated that he never was acquainted with any of the alleged circumstances under which the bill of exchange was said to be indorsed, save and except until a few days after the 16th of August, 1816, when they were stated in a letter written to him by the plaintiff, and being induced thereby to enquire respecting the matter of Welch, he then first learnt the facts detailed in the correspondence, and stated in the former answer.

The usual rule nisi for dissolving the injunction, which had been obtained for want of Dilworth's answer, having been made on the coming in of the answer.

Dauncey and Meggison now shewed cause, submitting, that, as from the facts disclosed by the bill and answer, it was clear that the plaintiff had received the money merely as agent to Welch, which he was entitled to consider himself authorized to do, on Welch's silence after the proposal made by him on the subject, and had, in that character alone, indorsed the bill of exchange, by means of which it had been re [570]-mitted to Welch the immediate agent of his principal, without having received any consideration for that indorsement—it was contrary to good faith to sue him on the bill; at least, rather than Welch; and that he was, under the circumstances, entitled to the protection of the Court, and therefore the injunction ought to be continued.

Martin and Gardier for the defendants, contended, that the plaintiff had not affected Dilworth at least, by having shewn any equity entitling him to call on the Court to restrain Dilworth the *bonâ fide* holder of the bill of exchange for valuable consideration without notice, from proceeding against the plaintiff, as indorser; for if there was any equity as between the plaintiff and Welch, it could not reach Dilworth's claim, who could not have necessarily had any knowledge of the transaction, or the relative character of the parties, and who was not shewn to have had any notice of the circumstances attending the negotiation of the bill, which he only heard from Welch, and as stated in his further answer, not till the 16th of August, 1816, long after the bill had come to his hands.

And they pressed strongly the fact of Kidson being the agent, not of Welch, but of Walker, and his being appointed by the latter by power of attorney.

[571] RICHARDS, Chief Baron. This injunction clearly ought not to be dissolved. Walker, as it appears, employed Welch as his general agent, and he also employed the plaintiff as his agent and attorney to get in these particular debts. It is quite clear that the plaintiff received his instructions from Welch, and that he was to remit the money, when received, to him. The plaintiff and Welch were therefore both agents of the same principal. There was a correspondence set on foot respecting the sum of money due to the intestate's estate, not between Walker and the plaintiff, but between Welch and the plaintiff. One of the plaintiff's propositions met with Welch's approbation, and afterwards another was made to him, which he says did not. He however gives no answer to it, and now contents himself with explaining the cause of his silence, by saying that as he considered the proposals last made to be more objectionable than those contained in the former letters of the plaintiff, and that having consulted with certain other persons interested, who were of opinion that it was not necessary to return an answer, because the plaintiff had had previous instructions, on which he ought to have acted, he did not therefore answer the letter. Whilst the corre-

spondence was going on, the plaintiff, having received part of the money and a bill for the remainder, went to the house of Cooke and Co. and got their bill on Bruce and Co. for the amount of the money received by him, which he forwarded with the other bill to Welch. It would be quite idle [572] to affect ignorance in this Court of the state of those two houses at that time, which it is well known were in a falling condition; but that might not have been known to these parties, or if it were, could not materially affect this transaction. (His Lordship having adverted to the case made by the bill.) The plaintiff says, that the draft was drawn in his favor through inadvertence, and that is certainly exceedingly probable, as he was only the agent of Walker in this business for the purpose of receiving the money and forwarding it. He necessarily indorsed the bill therefore before he sent it to Welch, who, though he does not state when he received it, must be taken to have got it in due course of the post. Welch now says he was dissatisfied with the remittances in that mode, but he made no objection to it at the time, and that is tantamount to an assent. Shall he then, under these circumstances, be permitted to proceed through the medium of another person, against a mere agent, merely because that agent has imprudently put his name on the instrument to satisfy a formality made necessary by this mode of drawing it? It is impossible.

Then does Dilworth stand in a different situation? He is a banker, and was also a mere agent to receive the produce of this paper for the accommodation of Welch.

Now, independently of the question of whether there was notice of these facts to affect Dilworth, we are bound to look into the nature of the transaction. Can the transfer of a bill to a [573] banker as a mere depositary for presentation for acceptance and payment, make a party answerable who otherwise would not be so? No such thing; and is Welch to say he dealt with the property which, as it had come to his hands under the circumstances of this case, was received for the benefit of the intestate's estate, as if it were his own, and to pay his own debts? Certainly not. And if there were nothing else in this case, it is sufficient reason for continuing the injunction against Dilworth, that he is in the same situation as Welch. Whether, indeed, Dilworth then knew all the circumstances respecting this bill, which he now knows is another thing. He knew quite enough to fix him with its equities. And that is clear from the admissions in the answer, in which he joins; for how do these persons deny notice? [His Lordship read that part of the answer.] Such a notion of want of notice is almost as extraordinary, as the notion afterwards expressed of a valuable consideration having been given for the bill; they have before acknowledged having been acquainted with the correspondence, and it is impossible not to see that Dilworth had the notice which those letters furnish.

It is said that both the original and supplemental answers must be taken together in explanation and aid of each other. Sometimes, as where either would not be intelligible without the other, you certainly may so unite them; but if one of the answers be distinct and clear, that is sufficient, although the Court sometimes allows [574] a supplemental answer to explain any apparent mistake under which it is obvious that the party has answered. Now in the present case, the defendant Dilworth in his further answer states, that he never did become acquainted with the circumstances, his belief of which he swears to in the former answer, until the 16th of August, that is however an admission that he then became possessed of a knowledge of the circumstances, and is of itself such a distinct admission of notice as is quite sufficient to sustain this bill. And no allusion is even made in the second answer to the first having been put in under any mistake on the part of Dilworth.

Therefore as Dilworth clearly ought not to be suffered to proceed in this action against the plaintiff, unless Welch might have done so, and he most certainly cannot be permitted to proceed in it; I think this injunction ought to be continued.

GRAHAM, Baron, expressed his entire concurrence. The case lies in a very narrow compass (stating the leading facts). The plaintiff's letter was acquiesced in, and acted on, and this bill was sent in consequence, and it was a natural mode of remittance. It was also natural that the draft should have been made payable to the plaintiff; but still it was merely as an agent to Welch, and it was indorsed by him in that character. Welch afterwards, instead of applying the bill as he ought to have done on account of Walker, [575] uses it as his own, which he had clearly no right to do: and it would be going very far to say in a court of equity that therefore he made the plaintiff liable, although he would not otherwise have been so. Then the defendant Dilworth

must have known these circumstances; indeed he does not effectively deny that he had knowledge; he merely says he had no knowledge except as stated in the answer, &c.

Under all the circumstances it is impossible that a court of equity can allow such bills instruments as these to be thus made use of to the prejudice of innocent persons, contrary to their original and proper purposes of application.

WOOD, Baron. I fully concur. [Having stated many of the circumstances.] This bill was clearly made payable to the plaintiff in his character of agent, and it was therefore necessary that he should indorse it *pro forma*. Having done so merely for the accommodation of the defendant, a court of equity ought not to suffer him to turn round on the agent and fix him with liability on such an indorsement. Had he indorsed the bill to guarantee the payment, it would have been a very different case; but here it is clear that nothing of that kind was meant, nor was there any consideration for his doing so. The nature of the transaction is very plain.

Then under any circumstances Dilworth would be in precisely the same situation as Welch, but [576] here besides, his right is clearly affected by knowledge of the whole transaction. He appears to have had the same knowledge as Welch himself had, and consequently the bill is in his (Dilworth's) hands, subject to the same equities as would have attended it in the hands of Welch. This injunction therefore ought not to be dissolved.

GARROW, Baron, of the same opinion.

Per Curiam. Rule nisi discharged.

THE KING v. RANDELL. Wednesday, 22d April 1818.—Where a rule is made absolute on payment by the applicant of the costs of the application affidavits made in opposition not read, nor entered in the minutes, nor noticed in the order, will not be allowed on taxation.—The Court will admit a party claiming goods seized by the sheriff, under a writ of *capias utlagatum*, to enter his claim, and traverse the inquisition, after the time for so doing has expired, and a *venditioni exponas* executed, where the claimant's attorney has mistaken his course, (having brought an action against the sheriff, instead of having claimed and traversed), on payment of costs.

Gaselee now opposed a motion made by Nolan, on the part of the prosecutors of this outlawry, that the Deputy Remembrancer should allow, on taxation of their costs (allowed on making absolute an order of the 29th January last,) the costs and expences of several affidavits made and filed on the occasion of opposing that order. The original application was for a rule to [577] shew cause why a claimant of goods and chattels seized by the sheriff of Hants, under the writ of *capias utlagatum* against the defendant, should not be allowed to enter his claim of property thereto, and traverse the inquisition.

It appeared that the claimant's solicitor had mistaken his course in bringing an action against the sheriff, instead of entering a claim and traversing the inquisition, and therefore the Court, on being applied to, granted the above order, which they afterwards made absolute, on payment of all the costs of the prosecutors of the outlawry by the applicant.

The question was, whether the costs of the affidavits made, which had never been read, nor entered on the minutes, nor noticed in the rule, (eleven in number), and which therefore the Deputy Remembrancer had disallowed, ought to be paid by the claimant, under the terms on which the Court had made his rule absolute.

The Court were of opinion, that the Deputy Remembrancer had done right, observing that it was a case where the affidavits could not be necessary, as it lay entirely on the applicant to make out a satisfactory case, and therefore he ought not to be burthened with the costs of such unnecessary matters; and they

Refused the motion.

[578] THOMAS v. PEARSE, Esq. Thursday, 23d April 1818. —If a deputy sheriff, being in possession of goods seized under an immediate extent, and having received a subsequent *fieri facias*, at the suit of a subject contract with the judgment creditor to deliver him, in satisfaction of his execution a certain quantity

of the goods seized, on his paying into the sheriff's hands the debt due to the Crown, which is accordingly paid to him:—and if afterwards, whilst his officer is in the act of delivering and measuring the quantity specified to the plaintiff's agent, to whom he had given up the key, the goods are rescued—the sheriff is liable to the judgment creditor, who may maintain a special assumpsit on the contract, (whether the sheriff be authorized so to contract or not,) or on a common count for goods sold and delivered—or for money had and received.—In the case of an under sheriff in the country employing an acknowledged town agent, such an engagement made by the latter is legal, and binding on the sheriff—who must seek his remedy over.—A beginning to measure and deliver is not such a delivery as will satisfy even this special contract.

The present action was brought against the sheriff of Essex (17th May, 1816), to recover 562l. 0s. 8d. under the following circumstances:—

The declaration (assumpsit) consisted of five special counts: and stated in substance, that an extent had been prosecuted against John Hulbert for that sum, claimed to be due to the Crown for duties on malt made by him—that the sheriff had, by virtue of that proceeding, seized malt to the value of that amount—that the plaintiff had before, &c., recovered judgment against Hulbert for a certain debt of 600l. and 80s. damages, on which he had sued out a writ of fieri facias, which was delivered to the said sheriff (12th February, 1816)—that the sheriff, by virtue thereof, seized and took in execution (21st March) a certain other quantity of malt, of less value than the money indorsed to be levied. And thereupon, in consideration that the plaintiff would pay to defendant the said sum of 562l. 0s. 8d. the amount, [579] &c., defendant undertook, &c. to suffer and permit plaintiff to have the sale of the said malt so seized and taken, under the said writs of extent and fieri facias, and to apply and retain the proceeds thereof towards satisfaction of the 562l. 0s. 8d. so to be paid by plaintiff to defendant, and of the debt and damages so recovered, and directed to be levied by the fieri facias: and that defendant, as such sheriff as aforesaid, would take due and proper care of said malt so seized, &c., until plaintiff should have received the same into his possession for the purpose of sale. Averment that plaintiff did pay the money, &c. Breach, that defendant did not, &c. but on the contrary thereof, by himself and his servants, so carelessly, &c. in that behalf, that through such improper conduct said malt was taken away by divers other persons, and wholly lost, and never was delivered to plaintiff, by means whereof, &c.

Second count, that for same consideration defendant promised that plaintiff should receive an adequate quantity of the said malt, and until, &c. should have the benefit of the security of the said writ of extent for the said sum.

The fifth count stated, that defendant being possessed of two hundred and fifty quarters of malt, value 562l. 0s. 8d. in consideration of that sum undertook to deliver the same, &c.—concluding with the common counts.

The defendant pleaded the general issue.

[580] On the trial before the Lord Chief Baron, at the sittings in Michaelmas Term, the plaintiff recovered a verdict.

Dauncey obtained a rule in Hilary Term, to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial granted on the following grounds:—1st. That it was a verdict against evidence, as far as regarded the delivery of the malt. 2dly. That the promise had not been proved to have been authorized or adopted by the defendant. 3dly. That it was an engagement into which the sheriff had no legal right to enter under the circumstances in evidence in the cause.

It appeared by the report of the Lord Chief Baron, that in February 1816, the sheriff, under the writ of extent against Hulbert, seized and took possession of certain malt (upwards of four hundred quarters), and other effects, to the value of 1000l. and upwards. In March following, the sheriff also seized the above-mentioned effects, which were ostensibly the property of John Hulbert, under the fieri facias mentioned in the declaration, endorsed to levy 600l. That the plaintiff entered into an arrangement with the town agent of the under sheriff, on the 18th of March, whereby he was to have possession of the malt, on paying him the money directed to be levied under the extent, which he paid him, and took a receipt for it in writing, as for so much money directed to be levied under the ex-[581]tent. The under sheriff's agent, in consequence, delivered the plaintiff an order, addressed to the bailiff in possession,

directing him to quit possession under the extent, and deliver to the plaintiff the malt so seized under the extent and fieri facias, which he at first refused; but after the order had been repeated, agreed to deliver two hundred and fifty quarters. He had begun the delivery, by measuring out a few bushels, on the 21st March, when Blyth, the landlord of premises, laid claim to the goods which had been so seized under the fieri facias and extent, having previously given notice in writing to the sheriff's officer, that they were not the property of Hulbert: but the sheriff's bailiff, disregarding that notice, he (Blyth) rescued the goods out of the sheriff's custody, just after the officer had admitted Rees (who attended for the plaintiff, to receive the malt) into the malt-house, for the purpose of giving him possession of it, and had delivered him the key—and the remainder of the malt was never delivered by the officer to the plaintiff.

Jervis and Taunton now shewed cause, submitting that the proof of the promise was a matter of fact, and, as such, had been properly left to the jury. On the question of whether there had been a legal delivery, they insisted that the evidence, when applied to the law on that point, as determined by a series of decisions, had clearly shewn that no delivery had taken place, which they contended ought to have been completely [582] and satisfactorily made out; and that on that also the jury had decided. In point of law there can be no delivery of a specific quantity completed till it is measured out, and as here the goods were still in bulk, therefore, though they had been begun to be measured, it was within the cases which have determined, that while the article is in bulk, and measurement, or any other operation is to precede the delivery, there is no delivery till that shall have been done, and the property meanwhile remains in the seller. *Rugg v. Minett* (11 East, 210). *Wallace v. Breeds* (13 East, 522).

The true question then they represented to be, whether the sheriff, the present defendant, was bound by the engagement, and the conduct of the town agent of his under-sheriff. It has been urged, (said they) that even if the engagement were binding on the agent, there was no consideration, and it was therefore nudum pactum as to him. The answer is, that the sheriff had a duty to perform, and that he was enabled to do, in a more convenient and less hazardous way, by the arrangement made between him and the plaintiff. It was also put that the sheriff had no right legally to do what he undertook—that he could not deliver over these goods, which in his possession were in custodia legis, and could not be transferred but by due course of law. If that were so, it would not be compete to a sheriff to allow a party to redeem his own property so taken, by [583] satisfying the demand in respect of which the seizure had been made, which could not be contended even in argument. Any mode by which the exigency of the writ is satisfied, would be within the scope of the sheriff's authority: and from the very terms of the writ of extent, a discretion is to be inferred as to the Crown being satisfied, the sheriff being commanded to keep possession "until the Crown be fully satisfied." There can be no doubt that the town agent of the under-sheriff is the servant of the sheriff, and renders his principal civilly responsible for his official engagements. *Saunderson v. Baker* (2 Bla. Rep. 832), *Ackworth v. Kempe* (Doug. 40), *Laycock's case* (Litch, 187), *Woodgate v. Knatchbull* (2 T. R. 148). In this case too the sheriff, having returned the extent satisfied, is bound by that return, as having adopted and sanctioned the transaction.

They ultimately put the case on the fifth count of the declaration, as being in all respects proved: or that in any event they would be entitled to their verdict on the count for money had and received, on failure of the consideration on which it was paid.

Dauncey and Campbell, in support of the rule, insisted, that if the promise should be held to have been proved, there was also strong evidence that that promise had been performed; for the [584] malt was in point of fact in the possession of the plaintiff, by the delivery of the officer, at the time when Blyth and his assistants took it forcibly away, and the plaintiff's agents were in the act of measuring and removing the quantity agreed to be delivered to them—or that if it did not amount to a delivery in law in the ordinary case of vendor and purchaser, it was still such a delivery as would satisfy this special undertaking.

They then contended that the sub-agent of the sheriff could not bind him to the performance of a promise which he was not legally authorized to make—and such a promise this was; for his duty was to have kept possession till sale by venditioni

exponas, or till an amoveas manus, and he had no right to judge whether the Crown's demand would have been satisfied by the receipt of the sum paid by the plaintiff—for the case of an extent is in that and many other respects distinguishable from the common process of fieri facias. And they relied much on the fact of the town agent of the under-sheriff being not (as the latter confessedly is) an acknowledged minister of the sheriff's appointment, and therefore his acts do not involve the sheriff's responsibility.

The sheriff, (they next insisted) never had such a possession of these goods as to warrant his delivering them to the plaintiff. His was a special possession only, the goods being in fact in the custody of the law. And yet the fifth count, [585] which had been much relied on was in the common form, as if the plaintiff were a brewer, and the defendant a maltster. In this case, the agent of the under-sheriff, as such, clearly could not act for the defendant, as a factor for his principal; as well might it be contended, that he might have so bound the defendant, as that an action might have been maintained against him on his warranty of the quality of the malt. So far from the sub-agent being within the scope of his duty in this transaction, he was acting in violation of it, for he had no authority, which it is necessary he should have, to part with the possession of these goods. The mandatory part of the writ of extent commands that the sheriff do cause the goods, &c. to be appraised and extended, "and to be taken and seized into our hands, until you receive our further command;" and there is a proviso at the conclusion of every writ, that the goods seized. "You shall not sell, or cause to be sold, till we shall otherwise command you," which is very different from the authority given by the fieri facias.

They denied that the sheriff, by having returned the extent satisfied, had approved and adopted all that had been done in his name under this special contract; but still, even then, they repeated, he would have had no authority to release the goods without the formal sanction of an amoveas manus regularly obtained from this Court. The cases [586] which had been cited they distinguished as being all cases of tort, as trespass, or extortion, whereas the present action was founded on contract.

As to the proposition, that this action might be supported on the count for money had and received, it was answered, that if even this were money had and received by the defendant, it was for the use of the King's writ; but in point of fact, it never was received by the defendant, (the sheriff) however that count might have availed the plaintiff, if this action had been brought against the party who had actually received it, that is, the person who was the town agent of the defendant's under-sheriff.

On the whole, they contended that the present action could not in any point of view be maintained against the present defendant.

RICHARDS, Chief Baron. The Court are of opinion, that this verdict ought to stand. My reasons are founded on the special circumstances of this case. [His Lordship stated the facts.] The action is certainly bottomed on a contract, and the main question is, whether the sheriff is bound. Now the sheriff left the affair to the discretion of the town agent, who was certainly as much the agent of the sheriff as the under-sheriff himself was, and it would be a deplorable doctrine in its general consequences if he were not; for thus a sheriff might easily rid himself of [587] all responsibility by requiring his deputy to appoint in all cases a sub-agent, for the purpose of discharging himself.

The case is one of an extraordinary nature undoubtedly, and I do not remember ever to have met with this species of action being brought under such circumstances. We must therefore be governed by principle. [His Lordship, adverting to the circumstances, observed that it was material to be considered that the plaintiff, by his execution, had the next right after the Crown.] How far the town agent of the sheriff was justified in so contracting with the plaintiff is another matter. He did in fact contract, and he received the money agreed to be paid to him by the plaintiff, and it would be too much to say that he was entitled to put it into his own pocket without performing the consideration, on the faith of which it had been paid to him. He is at least bound to put the plaintiff in the same situation as he was before the contract was made. He certainly contracted to deliver the malt, and he as certainly did not do so.

Then the question is, whether the agent of the under-sheriff, the person who actually made the contract, was such a representative of the sheriff, as that his acts bound him. I am of opinion, that it cannot be contended, even in argument, that

the sheriff would not be liable for the official acts of such a person. Whether the sheriff had any right to make such a contract, and part with the [588] goods, I do not decide. His having engaged to do so is sufficient to sustain this action.

For the defendant it has been contended, that he had, in fact, so far delivered possession, as would satisfy this contract. (Adverting to the evidence.) Such a delivery as this however was not sufficient. There was a specific quantity of this malt, which was in bulk, to be meted, and until that was done, a delivery could not be effected. In that respect this case is not distinguishable from that of the oil, (*Wallace v. Broods*). The malt was not even put into a state to be carried away, and the plaintiff's agent being present, assisting the sheriff to measure the quantity, does not make the supposed delivery less inchoate.

Then the case stands thus. The plaintiff engaged with the sheriff's agent to pay so much money, in consideration of his doing that which he has not done: and the agent by that contract bound the defendant, who may have his remedy over, and I cannot help stating that the sheriff has, in that one respect, the advantage of the plaintiff. Then, by his return of the writ, that the debt had been satisfied, he adopts and acknowledges the act of the under-sheriff's agent, and that, although he did not know so much of the matter as we do now. For these reasons, I think that this rule should be discharged.

GRAHAM, Baron. The first question is, whether the act of the under-sheriff's agent is the act [589] of the sheriff, and I think it clearly within the rule *qui facit per alium facit per se*: and if such agent should mistake his course, the sheriff is responsible, for he is also benefited by the acts of the same person. [His Lordship stated the circumstances.] The sheriff, by performing his contract, would have superseded all collateral claims.

Much stress was laid in argument on the position, that by parting with the goods which had been seized, according to the contract on the part of the defendant's agent, without an *amoveas manus*, the sheriff would be made to act in violation of his duty. Now we all know, that it is every day's practice, when goods have been seized by a sheriff, so to arrange the affair, for the purpose of avoiding the disgrace and discredit of suffering it to be made public. But be that as it may, the agent takes upon himself so to act, and he is clearly identified with the sheriff, who is responsible, and should be indemnified, as he most usually is.

Then the agent having undertaken to deliver the goods seized, the question is whether he has done so, in performance of his promise, according to good faith, and I am clearly of opinion that he has not. Whether the sheriff had a right to part with the goods in this way is another question, not necessarily arising here, and perhaps he may have such a right. He has, however, in point of fact, engaged to do so, and has received the consideration-money, and therefore it does not lie in [590] his mouth to say, that he had no right to do that which he had so engaged to perform: and if he had no right so to undertake, he would then have received so much money to the plaintiff's use.

WOOD, Baron. I do not see any grounds for disturbing this verdict. Two questions have been made: 1st, That the sheriff has not performed the contract made by him with the plaintiff; and, 2dly, That the agent of the under-sheriff could not make the defendant (the sheriff) responsible for the performance of it. It is admitted, that if the defendant had made the contract, he would have been bound by it. Then the first point is, whether the under-sheriff is answerable for his agent, and the sheriff for both: and I am of opinion that he is, for the acts of the latter are the acts of the former, and each has his remedy over against the other.

A question was made, whether this was a legal contract, (stating the circumstances). The very form of the writ expresses the purpose and object of it to be, to raise and satisfy the Crown's debt. The plaintiff had an execution executed for another debt, and in order to render his execution available, he agrees to pay the debt due to the Crown, when he is to receive two hundred and fifty quarters of the malt seized. The plaintiff, in fact, accordingly pays the money in satisfaction of the Crown's debt, and that is so returned. Now what is there illegal in all that? There is no fraud either on the Crown or the plaintiff, whose execution was next to be preferred, or on [591] any body. There was therefore no illegality in the transaction.

The next question is, whether the sheriff's agent, in fact, performed what he had engaged to do, and there can be no doubt on the evidence that he did not.

I am therefore of opinion, that the plaintiff is entitled to recover in this action, either on the fifth count, or the count for money had and received. The fifth count (which his Lordship stated) is precisely proved. Not so the defence. There was clearly no delivery of the two hundred and fifty quarters of malt; for, although the key had been given to the plaintiff, the quantity to be delivered had not then been separated from the bulk. Had that been done, it might have been a delivery, but before the officer could do so, the goods were carried away by a third person. There was, therefore, no delivery, and so the jury have by this verdict very properly found.

GARROW, Baron, of the same opinion. The mischief, as my Lord Chief Baron has well observed, would be enormous, if responsibilities were thus allowed to be shifted. [Having remarked on the relative situation of all the different parties, and the notoriety of there being an acknowledged permanent agent in London for the county of Essex, as there is also for Middlesex, his Lordship said, that he considered this case completely within that of *Woodgate v. Knatchbull*, and that [592] the sheriff was fixed by the act of the sub-agent.] As to the delivery, said his Lordship, the cases are numerous, which deny that what passed at the malt-house was a delivery. One quarter only had been delivered, in point of law, and two hundred and forty-nine were not: and the pretence of the key having been given over makes no difference in such a case: for it would be a mockery to say, that, if the vendor should tell the purchaser, "there is the key—go take your goods," that would be a delivery for any purpose. I therefore think this verdict quite right, and if it had been the other way, I should, most willingly, have concurred in ordering a new trial.

Per Curiam. Rule discharged.

BENEDICT v. THACKERAY. Saturday, 25th April 1818.—When the plaintiff has obtained an order to amend, the defendant having submitted to exceptions, the Court will, on motion, order, as of course, if he do not amend within a given time (a week in this instance) the former order to be discharged.

Beames moved, pursuant to notice (two days) that the order made in this cause,—“that the plaintiff might be at liberty to amend his bills without costs,” (the defendant having submitted to exceptions,) “and that the defendant might answer the amendments and exceptions at the [593] same time,”—might be discharged, unless the plaintiff amend his bill within a week, citing 1 Fowler, 109.

The officer certified the motion to be of course.

Ordered.

BIRDWOOD, Assignee of Hart, a Bankrupt, v. RAPHAEL. Monday, 27th April 1818.—

Goods pledged (expressly) to secure, by the produce of the sale, acceptors who have taken up and paid bills drawn on them by the owner, are released from further charge as to other bills so taken up and paid subsequently, if the amount of the original sum paid on account of the owner, have been repaid to them without resorting to a sale.—And if while the goods remain in the possession of the acceptors, the owner become insolvent, and has committed acts of bankruptcy before the original pledge be entirely redeemed by re-payment of the money secured by it, other advances be then made to him by them, it is not a case of mutual credit within the 5 Geo. II. c. 30, s. 28, and the assignees of the bankrupt may recover the goods in trover.—But the assignees, under such circumstances, having elected to bring trover, cannot afterwards sue the defendant to recover back the original sum for which the goods had been in the first instance pledged, although paid to them after the depositor had become bankrupt.

The special case on which this determination was founded, stated in substance the following facts:

Hart, the bankrupt, previous to the month of August, 1812, carried on business in partnership with one Joseph, at Plymouth, and they had also a house of trade at Gibraltar, superintended by the bankrupt's son. The defendant and another person who were partners in business in London, were the holders of two bills of exchange, accepted by Hart and Joseph, value [594] 1523l. 8s., which became due on the 4th and 5th August, 1812. About that time Hart and Joseph stopped payment. Hart being then in London, wrote on the 5th of August to his son at Gibraltar, stating that

the partnership between him and Joseph was dissolved, and requesting him to deliver to the house of the defendant and his partner at Gibraltar, goods to the amount of 2000*l.* to secure to them the amount of the two bills for 1532*l.* 8*s.* which had been taken up by them. On the 4th September following, the defendant and Joseph gave a receipt for the goods so delivered in these words, "Received 4th September 1812, of Messrs. Levi and Hart, thirty three bales of British piece goods, as per account rendered, being for two bills accepted by Messrs. Joseph and Hart, of Plymouth, and paid by Messrs. Raphael and Joseph, of London, the same (value 2019*l.* 10*s.* 8*d.*) to be kept as pledged until further orders."

After the dissolution of partnership between Hart and Joseph, a meeting of the joint creditors was held, when it was resolved that Hart should carry on the business, and a deed was executed by Joseph, assigning his interest in the partnership effects to the bankrupt, and a letter of licence was executed by the creditors, (and among them by the defendant and his partner,) to enable the bankrupt to carry on the business on his separate account for one year, under the inspection of the defendant's partner, and two other persons appointed by the creditors, to whom [595] the bankrupt was to pay all monies received by him from the house of Hart and Joseph, at Gibraltar, for the benefit of the creditors. The bankrupt carried on the business under the licence till February, 1813. In the latter end of October, 1812, and in January, 1813, he had committed acts of bankruptcy.

On the 26th April, 1813, (there having been another meeting of creditors in the preceding February,) a deed of composition was executed by the defendant for himself and partner, for 1523*l.* 8*s.* to which Joseph was made a party, for the purpose of assigning his share of the partnership effects to Hart. That deed contained a provision that 15*s.* in the pound, on the partnership debts, should be paid by Hart, and the creditors released them conditionally on the payment of that composition.

Between the 31st January, and 10th August, 1813, the defendant and his partner received of the bankrupt the full sum of 1523*l.* 8*s.* with interest.

After the execution of the last-mentioned deed, the defendant and his partner accepted two bills, drawn by the bankrupt, for 1000*l.* each at two months, and sold the goods which had been so deposited with them, through their house of Joseph and Raphael, at Gibraltar, who afterwards sent the bankrupts an account of the sales, ac-[596]companied by the following letter, addressed to him, dated September 15th, 1813:—

"We have the pleasure to inclose an account of sales transmitted by our Messrs. Joseph and Raphael, at Gibraltar, and the remainder of your goods; and you will now find the whole is accounted for, and hope to your satisfaction."

"On the other side, we have made out your account, and you will find a balance yet due to us of 190*l.* 5*s.* 11*d.* which we make no doubt you will find correct; and in order to close the same, we hope you will send us the account as soon as possible, as you are aware that we are in advance to that amount."

"Mr. Hart, in Account with Raphael and Joseph, Debtors."

"1813.

June 28th.	To our acceptance for	£1000
		500
		500
		— £2000

1813.

July 14th.	By account sales rendered by Joseph and Raphael	£612 11 8
	By do. do.	619 18 3
Sept. 15th.	By do. do.	577 4 2
	Balance due to R. and J.	190 5 11
		£2000 0 0"

[597] A bill was drawn for the balance, and accepted by Hart, but not paid, and a second and third were afterwards drawn, which Hart did not accept. A fourth bill was drawn and accepted by Hart, but at its maturity it was dishonored, and it was not until some time afterwards that the account was paid.

The commission of bankruptcy bore date on the 15th of December, 1815, and the present action (trover) was commenced in Trinity Term, 1816, for the recovery of the value of the goods which had been delivered to the house of Raphael and Joseph, in consequence of the directions contained in the letter of the 5th of August, 1812. On the trial it appeared that another action had been commenced by the present plaintiff, as assignee of Samuel Hart, the bankrupt, against the present defendant, and a particular of demand in such an action was given in evidence, in which particular, it was stated, that the plaintiff claimed the sum of 1523l. 8s. for so much money paid or satisfied by or on account of the said bankrupt, to the defendant after the month of July, 1812, and before the issuing of the commission against the said Samuel Hart, under circumstances which the plaintiff as assignee as aforesaid, contended entitled him to recover back the same for the benefit of the creditors at large, of the said bankrupt, and which particular was dated the 17th day of July, 1816.

[598] The learned Judge, (Abbott, J.) who tried the cause, was of opinion that, as the produce of the goods was not applied in payment of the 1523l. 8s. but to discharge the 2000l. advanced after the act of bankruptcy; and as the sale of those goods was not for the purpose for which they were originally deposited, but for a subsequent and different demand, the plaintiff was entitled to recover, and he therefore directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move.

Lawes, E. for the plaintiff, contended, that he was entitled to retain his verdict on the following grounds. That the goods were *specifically* pledged for a sum certain, due on a particular transaction—that that money being afterwards paid without resorting to the goods pledged, the pledge was discharged, and could not be charged again by the bankrupt *after* his bankruptcy—and that the 2000l. having been advanced by the defendant after the bankruptcy, with full notice of the bankrupt's insolvency at the time when the credit was given. And for the same reasons he contended that these transactions did not constitute, as between the defendant and the bankrupt, a case of mutual credit under the 5 Geo. II. c. 30.

Selwyn, for the defendant, submitted that the original pledge, and the object of it, were created *before* the bankruptcy, and that the transactions amounted merely to the common case of an ad-[599]-vance of money on one hand, and a deposit of goods by way of security on the other. Then that pledge not having been redeemed, there subsisted a mutual credit at the time of the bankruptcy, and continued to subsist, notwithstanding those acts of bankruptcy, which had been committed so long ago. And he contended that the meeting of the bankrupt's creditors, and what had taken place on that occasion, (the development of the embarrassed state of the insolvent's affairs, and the execution of the deed of composition by the defendant,) did not fix the defendant with notice of the acts of bankruptcy.

He then submitted that the defendant was not precluded, by his execution of the composition deed, from resorting to his original lien on the goods pledged; and he cited a case then recently determined, at the Sittings for Westminster, in the Court of King's Bench (*a*), not then reported. Lord Ellenborough had held, that a deed of composition, executed by creditors after the act of bankruptcy of the debtor, was a nullity, and did not release the debt, or preclude them from petitioning. Payment of composition money, under such a deed, would be bad, and might be recovered back. So, generally speaking, might any money paid after an act of bankruptcy; and thus the defendant might be compelled to pay back to the assignee of the bankrupt the original debt paid since the act of bankruptcy, in the action which had been commenced for that purpose, after he [600] had succeeded in recovering, on the present action, the value of the goods pledged; and in that case the lien would remain, and the defendant would be remitted to his original right. The whole of the transactions, (he contended) as they appear on the case, go to constitute a general account between the bankrupt and the defendant, in which mutual credit was given; and that account should have been first finally settled, and a balance struck; for that balance alone could be claimed on either side.

[Curia. That balance should, in such a case, be settled by the commissioners; but this is an action of trover; and the difficulty is how you can introduce a set-off against a tort.]

(a) *Doe dem. Pitcher v. Anderson*, Stark. N. P. 262.

To that it was answered, that it was not intended to put the defence on the footing of a set-off; and the case of *Smith v. Hudson* (4 T. R. 217) was cited; in which Lord Kenyon said, that in the mutual credit cases, (*Ex parte Doeze*, and *French and Fenn*;) "whether *trover* or *assumpsit* had been brought, the *whole account* ought to have been settled in the way in which it was, because the situation of the parties was not altered, with a view to the bankruptcy," having before observed, that "in both those cases *the goods had got into the hands of the respective parties prior to the bankruptcy, and without any view of defrauding the rest of the creditors.*" The same circumstances of distinction surround this case, and the [601] situation of the parties has not been altered. In *Green v. Farmer* (4 Bur. 2214), Lord Mansfield is reported to have answered a similar difficulty which had been suggested, by saying, that "If it can be set off in a Court of Equity, it may be set off in *trover*, because it is a lien;" and that opinion received the sanction of the assent of Mr. Justice Yates. Here also the defendant had a lien; and by analogy with the case of a factor, which this much resembles, the defendant had a lien on these goods committed to his custody for the purpose of securing, by the produce of their sale, the balance of the general account.

Lawes, about to reply, was stopped by

GRAHAM, Baron. This case at first presented very much difficulty; but after having been ingeniously argued on the part of the defendant I think, (notwithstanding my opinion has been shaken by strong doubts,) that it is clear that this verdict ought to stand. (Having stated the circumstances of the case, and particularly such parts as are here distinguished by italics.) There can be no doubt that the original pledge was specific for the security of the debt arising from taking up the two first bills; and the only circumstance in these transactions which can be said to constitute a mutuality of dealings, and consequently of credit, is their acceptance of those bills. But on that account alone it was [602] that the goods were pledged with the defendant, to indemnify him from risk as to that particular debt. If there be any thing continuing the pledge in the words "*till further orders*," at the conclusion of the receipt, it must necessarily be confined to the orders of persons who should be competent to give any respecting them. Hart, after the act of bankruptcy committed by him, had no longer any such authority. He had become bankrupt before the deed of composition was entered into; his affairs were publicly known; and that he himself was in an insolvent state. Before the execution of the deed, the defendant had begun to receive the money for which the goods had been pledged; and it does not appear that he stated to the creditors, as he was bound to have done, that fact, or that he then possessed the goods which had been pledged with him. Then after unequivocal acts of bankruptcy had been committed by Hart, the defendant continues to advance him money, notwithstanding his ruined circumstances, and a balance is in consequence ultimately due to him. Now the statute giving the debtor the right of set-off, on the ground of mutual credit, applies only to cases where the debtor has no notice of the bankrupt's insolvency; but here he had actually executed a deed of composition, which cannot be said not to be sufficient notice; and having run the risk with his eyes open, he must take the consequence. The question of mutual credit cannot arise where the credit is created after the act of bankruptcy.

[603] Then we were pressed with a difficulty arising out of the form of this action; and it was urged that a recovery by the plaintiff in this action would not preclude him from suing the defendant for the money which has been paid him, in respect of which those goods were originally delivered to him in pledge. I think, however, that it is quite clear that the assignee cannot succeed in such an action, after having brought *trover* for the goods which had been so redeemed by the defendant. The judgment in this action might be pleaded in bar to any suit adopted for recovery of the money, by the payment of which the assignee alone acquired a right to sue this defendant in *trover*; and he might aver the ratification of the purposes of the pledge by the election made to proceed against him in the action of *trover*.

We have also had some difficulty as to the point made of the commissioners being bound to take the general account fairly and fully between the bankrupt and the defendant, the balance of which alone would be all that the plaintiff would be entitled to recover; and that proposition certainly appears to have received the sanction of Lord Kenyon, even where the form of action should be *trover*; but I cannot readily conceive that Lord Kenyon had in his mind the distinct idea of a set off, as applicable to such a form of action, whatever it might be in a case where assignees bring an

action for the value of the goods. As to the opinion said to be expressed by Lord Mansfield, I should be unwilling to say any thing [604] derogatory to his high legal reputation, but I cannot but consider that his Lordship too much mixed up the question of law with his then familiar notions of the practice of the Courts of Equity. But admitting that in a case so circumstanced as that of *Green v. Farmer*, a plea of set-off might be pleaded to an action of *trover*, this is certainly nothing like the case of a factor holding goods for the purpose of sale. There was a specific purpose for which these goods had been delivered in pledge, and that pledge was to be rendered effectual by their sale. That purpose was answered by other means. Then all mutuality was at an end. After the bankruptcy, it could not arise again. The bankrupt was then no longer *sui juris*, and the parties were bound by his bankruptcy. At the time of the second advance of money to the bankrupt, he was not capable of pledging the goods again; and whatever was done by him after the act of bankruptcy could not affect the goods pledged, for from that period, the property in them resulted to the assignees.

WOOD, Baron. I fully concur in opinion with my Brother (Graham, who has so fully gone into the question that I need say but little. (Having stated the circumstances.) When the sum was paid for which these goods had been specifically pledged, there was an end of that transaction, and the pledge was *functus officio*. The property in the goods then immediately reverted to the [605] bankrupt, and on his bankruptcy, in his assignees, discharged of any lien which the defendant might have had on them.

It was argued that the money which had been paid in redemption of the goods being so paid after the act of bankruptcy, might be recovered back, and that in that case the original pledge would be revived. But that cannot be done by the assignees of the bankrupt, because in bringing this action of *trover*, they must proceed on the ground that the pledge was originally good, and that the property in the goods had become vested in them by reason of the payment of the money by which they were redeemed.

After that redemption nothing appears to have been done in this case, by which the defendant could acquire any further lien. The subsequent bills were accepted by the defendant after the known insolvency of the bankrupt, and the defendant was well aware of that. He therefore acted at his peril, and has no right to retain these goods against the assignees.

It was intimated, that the defendant's situation was somewhat in the nature of that of a factor; but there is no sort of analogy between them. If the defendant had been in the situation of a factor, he would perhaps have still had a lien on the goods; but he was nothing like it. And as to his claim on the ground of the pledge, the owner had become bankrupt, when the defendant [606] made himself a second time his creditor, and he could not therefore at that time have any property in the goods, enabling him to pledge or charge them.

GARROW, Baron, of the same opinion. The goods were pledged specifically, not generally. If a second pledge had been created *before* the bankruptcy, it would have bound the property, but there was no such thing.

As to the goods having been put into the defendant's possession as a floating security on dealings of mutual credit, nothing of that sort appears: but the specific nature of the pledge operates to restrain the transaction, and to exclude that notion. Whatever was done after the bankruptcy by Hart, was done without authority. There is no pretence, therefore, for putting this as a case of mutual credit.

I had at first much doubt on the question of the defendant's liability to refund the money paid to him, notwithstanding the plaintiff's recovering in this action, although I could have no doubt that a court of equity would have restrained him from proceeding in such a suit; but my Brothers have quite satisfied my mind on that point.

Postea to the plaintiff.

[607] MEMORANDUM. Monday, 27th April 1818.—Exceptions standing in the paper for argument can only be heard at the sitting of the Court.

On its being proposed to the Court to take for argument exceptions which had been filed to an answer, they refused to hear them: intimating a desire that their rule,—that exceptions must be heard at the sitting of the Court before the motions,

—should receive publicity, on account of its convenience to the bar and the suitors, and preserving order in the routine of the ordinary business of the day.

IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LD. CH. BARON.

WRIGHT v. SOUTHWOOD AND OTHERS. Wednesday, 29th April, 16th, 20th, 22d, 1818.—Semble—Moduses introduced by stating that they “are payable by the occupiers, in lieu of the tithes within and throughout the parish, (except the occupiers of several other farms and lands,) not otherwise described than by their respective names,” are ill laid for uncertainty.—Where the defendants had described their farms by so many acres, and an objection was taken at the hearing of a want of sufficient description of the local situation, the Court permitted the cause to proceed, suggesting that if the objection were insisted on, leave would be given to the defendants to file interrogatories for the purpose of enlarging the description.

A defence of prescriptive payments, in lieu of many of the tithes sought to be recovered, was set up to this bill for an account of the tithe-[608]-able matters taken by them on their farms, against the defendants, who were occupiers, all of which were insisted on, as good moduses. They were put on the record, by the answer, with the following introduction: “That from time, &c. hitherto there have been, and now are, payable yearly, and every year, to the vicar of the said parish of Pitminster for the time being, his lessee or farmer, since the endowment or creation of the said vicarage, and to the rector, or other person entitled to the tithes, &c. before the endowment or creation of the said vicarage, at Easter in each year, or as soon after as demanded, by each and every occupier of houses, gardens, farms, and lands, within and throughout the said parish, or the titheable places thereof (except the occupiers of the lands there called the glebe lands, a certain farm and lands called Higher Poundisford, or the Barton of Higher Poundisford, &c. &c. [describing several other farms by name only] for and in respect of the same farms and lands, and of which the defendant's respective farms and lands are no part) divers moduses or customary payments, for and in lieu and satisfaction of the tithes of divers matters and things yearly arising, &c.” The answer then proceeded to enumerate them.

Objections were taken early in the cause, of a want of sufficiency and certainty in the description of the defendant's lands to which the moduses were said to apply, as they had in the schedule to their answer described their respective occupations as “a messuage and several closes, [609] pieces and parcels of arable, meadow, pasture, orchard, and other land, containing, &c.” and it was submitted, that the local situation of the land should be more particularly set forth. But the Lord Chief Baron ruled, that the defendants had so far sufficiently described their farms as to entitle them to go into their defence, and intimated that if the objection were insisted on, he would allow them, even in that stage of the cause, to file interrogatories, for the purpose of furnishing a fuller description of the locality of their farms.

The hearing having proceeded,

Duncey, Martin, and Dowdeswell, the counsel for the plaintiff, took an objection (which had been previously noticed by the Lord Chief Baron) to the terms in which the modus was introduced, as being rendered uncertain by the large exception of so many farms, which might extend, for any thing that appeared, over three-fourths of the parish—that it was to be collected from the record, that the defendants meant to rely on farm moduses, whereas the introductory matter was destructive of all accuracy or certainty as to their nature, character, or extent, and which were, as a consequence of the exception, not laid as being either farm, district, or parochial payments—and that that uncertainty was the greater because the defendants had not described either the lands alleged to be covered by the moduses, or the excepted lands by metes and bounds, or by their extent.

[610] Horne, Shadwell and Wray, contra, contended, that the moduses were sufficiently laid, and were not vitiated by the exception. And in support of that, they cited the case of *Gill v. Horner* (3 Gw. 862), where this precise objection was overruled.

In opposition to that authority, on the other hand, the plaintiff's counsel put the subsequent case of *Vyse v. Dautze* (3 Gw. 1124).

RICHARDS, Lord Chief Baron. I have been labouring under the difficulty imposed by this objection throughout this cause. I cannot consider this mode of laying the customs as sufficient.

The cause, however, stood over; and this day the Lord Chief Baron decreed against the defendants, with costs.

ANONYMOUS. Wednesday, 29th April 1818.—Application that a plaintiff should give security for costs, must be made before issue joined, although the issue was joined in the preceding vacation.

Campbell shewed cause against a rule nisi, obtained by Parke, that the plaintiff should give security for the costs before proceeding in this action—that the defendant had applied too [611] late, as he might have made the application in Michaelmas or Hilary term, whereas he did not do so till the present term, and after issue joined; and he cited *Walters v. Frythall* (5 East, 338), and *Muller v. Gernon* (3 Taunt. 272).

Parke, in support of the rule, relied on the case of *Baker v. Hargreaves* (6 T. R. 597), and distinguished the conflicting case in East, by the ground taken by the Court there, who put their determination on the reason, that, otherwise, they would be obliging the attorney to pay the costs. In this case issue was not joined till after Hilary term. From a case in the Common Pleas (*Lucadelli v. Powell* (1 Marsh. 376)), he submitted, it was to be collected, that the Court would have granted such an application after an interlocutory judgment should have been set aside; and in the note made to that case, it is stated from authority, that if a demand of security for costs be first made to the plaintiff's attorney, the Court of King's Bench will make such an order, after notice of trial has been given. And he urged that it was altogether in the discretion of the Court to grant or refuse this sort of motion at any time.

The Court, saying that the cases were not in opposition, because the determination in *Baker v. Hargreaves* had been unequivocally overruled, held that in all cases an application of this [612] sort ought to be made in the very earliest stage of the proceedings, and certainly ought not to be granted after issue joined in any case.

Per Curiam. Rule discharged, with costs.

BOTTOMLEY v IKIN. Wednesday, 29th April 1818.—Where a rule nisi has been obtained, for changing the venue from London to Yorkshire, in Easter Term, as of course, on the common affidavit, (not stating that defendant's witnesses resided there,) the Court will not retain it, on cause shewn that the plaintiff would be materially delayed without any other advantage to the defendant, by analogy, with the established rule that the venue cannot be changed into the northern counties, previous to a Spring Assizes.

Cause was shewn by Manning against a rule nisi [obtained by Richards on a former day (on the common affidavit), for changing the venue from London to the county of York,] on an affidavit made by the attorney for the plaintiff, stating that the action was brought to recover from the defendant, who was surviving partner of an insolvent banking-house, the amount lodged by him in their bank—that the venue had been laid in London for dispatch—that the deponent believed, and was convinced that the venue was sought to be changed, solely for the purpose of delay, and to harass the plaintiff—and that if it should be changed, the plaintiff would be seriously delayed thereby, as he would be unable [613] to obtain judgment till the next Michaelmas Term.

On that affidavit the plaintiff endeavoured to retain the venue, on the ground of there being on the part of the defendant (as he had not stated in his affidavit that any material witnesses resided in Yorkshire) no sort of inconvenience even suggested, whereas it had been shewn to be of material consequence to the plaintiff's interest, that the venue should be retained. And it was submitted, that as it was the established rule in all the courts that the venue cannot be changed into the northern counties in the spring, without consent (a), on the principle of avoiding delay to the plaintiff, the

* Vide *Chevalier v. Finnes*, Brod. & Bing. 278; conclusion of the first sentence of the judgment.

(a) Tidd's Pr. 636, 6th ed. and the cases there cited.

Court would probably consider this a case where they would, on the same principle, refuse to interfere, by granting the defendant's application, at least where, as here, it is made on the common affidavit only.

Richards, for the defendant, relied on the practice.

Per Curiam. The cause shewn is not sufficient to preclude the defendant from the right to avail himself of the acknowledged course of practice.

Rule absolute.

[614] THE KING (IN AID OF KEAST) v. FRANKLIN AND ANOTHER. Friday, 1st May 1818.—In an inquisition on an extent in aid, it is sufficient that the prosecutor of the extent be found to be indebted to the Crown (generally) at the time of taking the inquisition, without stating the amount of the debt, or the time and manner of its accrual.—And therefore if an inquisition find the Crown debtor indebted in a sum certain for duties, &c. due between two given periods: and on the trial of a traverse of the Crown's debt, *modo et forma*, it be proved that the debtor was indebted, at the time of the inquisition, in a different sum for duties accruing for a different period, it is not a fatal variance: because the allegation of the amount of the debt, and of the period for which it was due, is not of the substance of the issue, and may be rejected as surplusage. It is enough, if there be any debt, in fact, due to the Crown, at the time of taking the inquisition, to sustain the proceedings, for the being indebted to the Crown is the basis of the extent.

Dauncey and West now shewed cause against a rule to enter a verdict for the defendants, which had been obtained by Jervis, on a point arising out of the pleadings, and reserved by the Lord Chief Baron on the trial at the sittings after last Hilary Term.

An extent had issued against the defendants (brewers), at the instance of the prosecutor, who was a maltster. The inquisition taken thereon recited, that it had been found by an inquisition (taken 28th April, 1817), that Keast was then justly and truly indebted to the king in the sum of 100*l.* 11*s.* 4*d.* charged on him, Keast, between the 3d day of June, 1816, and the 3d of September following, for duties on malt: and it then found, that the defendants were indebted to Keast in 95*8l.* upon their acceptance of three bills of exchange.

The defendants pleaded, that Keast was not then, nor was on the day of taking the said inquisition (28th April) indebted to the king in the sum of 100*l.* 11*s.* 4*d.* or any part thereof, [615] in manner and form as in the said inquisition alleged.

Replication, protesting the insufficiency of the plea, and taking issue.

The Lord Chief Baron read his report, and it appeared that in point of fact there had been a mistake in the finding of the inquisition, as the debt should have been 107*l.* 11*s.* 4*d.* and the period for which the duties were charged should have been stated to have been between the 10th day of October, 1816, and the 5th of January, 1817, and not between the 3d of June and the 3d September, 1816, for which latter period the duties had been paid. But it was proved that Keast was indebted to the Crown at the time of the taking the inquisition in the latter sum, and for duties accruing during the latter period. On that variance between the debt and period of its accrual, as found by the inquisition, and as proved on the trial, the rule had been granted.

It was now, on shewing cause, contended that the variance was not fatal, for that the amount of the debt, and the time for which it was due, were not material on this issue—that it was matter of form, and not of substance, the only substantial subject of inquiry on this issue being, whether Keast was a debtor of the Crown in any sum, no matter to what amount, and whether he were so at the taking of the inquisition. Both those facts had been found in the affirmative, and therefore [616] the issue was substantially proved. If the jury had returned a special verdict, finding the facts reported to have been proved, and had prayed the opinion of the Court, judgment must have been given for the Crown.

The variance, they submitted, was not more matter of substance than that put by Littleton (*a*), of a count on an alienation in fee, and a verdict finding an alienation in tail, upon an issue on a plea that the defendant did not alien in manner as the demandant had declared, which is there not to be matter of objection. They also adverted

(*a*) Of Release, lib. 3, cap. 8, sect. 483, and ib. sect. 485, and the commentaries.

to the notes on sections 483 and 485, to shew the distinction there taken as to when the words *modo et formâ* in pleading are matter of form, as where the issue goes to the point of the action: or are matter of substance, as where a collateral point is traversed, which is material,—and to support the position, that where the words *modo et formâ* are not the substance of the allegation, the traverse ought to go further, and put the true question in issue.

Jervis, in support of the rule, insisted that the variance on which the objection was founded was material—that it arose on a material fact, and was indeed in a certain degree of the substance of the issue, and therefore fatal to the inquisition and the subsequent proceedings—that [617] the time and amount of the debt, even if they were otherwise so far immaterial as to render averments of such incidental matter unnecessary, yet having been once averred, they must be proved, and could not be rejected as surplusage. He submitted that, though the traverse *modo et formâ* was on a collateral issue in this case, it was yet essential, and was rather to be compared to the traverse *modo et formâ* of a feoffment, (as put by Lord Coke in his Commentary on the same section (483)), alleged by two, and it is found the feoffment of one, there *modo et formâ* is material: so also where it is pleaded by deed, and traversed *absque hoc quod feoffavit modo et formâ*: for if there were no deed, the jury could not find the feoffment. Co. Litt. Com. on sect. 483. In this case the jury could not on this issue find a debt due to the Crown, without finding the amount, and the period during which it had accrued, or it would have been a collateral issue.

He also observed, that it might happen that a defendant (as was the fact in this case) who should not intend to deny a being indebted to the Crown generally, might yet deny a given debt charged *modo et formâ*—and submitted that one indebted to the Crown for duties in a sum certain, might nevertheless traverse a debt alleged to be due on a bill of exchange—that the duties of excise on malt being collected for eight divisions of the year, called quarters, and the trader not being suffered to be in arrear for more than three of those at once, the denial of [618] a debt of 100l. 11s. 4d. for duties due between June and September, is perfectly consistent with there being in fact duties payable to another amount for another quarter; and Keast being at all times indebted and in arrear to the Crown, by the daily course of his business, for duties, the defendant could not traverse generally his being indebted to the Crown. They might certainly have proceeded on a general owing of money to the Crown, and it might then have been sufficient to have proved any sum due; but if a special sum is found, it must be proved, or a traverser could not be prepared to meet the allegation by proof, if he might thus be thrown off his guard by being so misled by the finding: and it would preclude the plea of tender, or set-off, or other matter of defence; and therefore he submitted that this rule ought to be made absolute.

RICHARDS, Chief Baron. We think this rule ought to be discharged. The real and substantial averment is, that at the time of the inquisition, there was a debt due to the Crown. That was the only question which was necessary to be tried on this issue, and on the evidence given, there certainly could be no doubt that there was a debt due to the Crown from the prosecutor of this extent at that time.

GRAHAM, Baron. I am confident, in the opinion that the substance of this issue was, whether any debt was due to the Crown, and that having been found by the jury in the affirmative, [619] is sufficient to sustain the verdict for the Crown. There is no principle in this Court more clear, than that the Crown is not bound by any blunder or absurdity on the part of a sheriff, on any of its officers, and on that ground also this proceeding may be sustained. On this inquisition, all that the sheriff had to do was to echo back his instructions, that the prosecutor was indebted to the Crown at the time of the taking the inquisition: but his having chosen to state the particulars as to the amount and the period, certainly does not bind the Crown. That finding of the debt, or rather of the particular circumstances of it, which have been so foolishly introduced, is thus traversed, because it was thought that the sheriff had placed the prosecutor in a dilemma, of which an advantage might be taken in pleading; but it is quite clear that the right of the Crown cannot be affected by the introduction of the impertinent matter. The jury did not however confine or qualify the issue, which was substantially and materially, whether the prosecutor was at all, in any manner and amount, indebted to the Crown, and the verdict of the jury has corrected the defects of the inquisition, by finding a different debt due to the Crown, and negating the existence of the first. That debt being recorded, the period to which

it was applicable is of no kind of importance, provided the Court are enabled to see that there is a clear debt established by the verdict, and found to have been due when the extent issued. Nor does it make any difference that this is an extent in aid, for such extents are, for all the purposes [620] of their application, on a footing with extents in chief, and have been always so considered in this Court on all legal questions arising on them.

WOOD, Baron, absent.

GARROW, Baron, of the same opinion. The substantial question was, whether any debt was due from the prosecutor of this extent to the Crown at the time of the inquisition, so as to authorize the prerogative writ and the subsequent proceedings against the defendants. Had the sheriff been assisted by an assessor, he would have been told that he was misleading the jury, in directing them to find the particulars of the debt already found to be due. It has never been the usage so to find debts, and it would be inconvenient, and lead to absurdity, to introduce such a practice. The traverse, though extending to "in manner and form," &c. could only be available by bringing into question the existence of an actual debt: and it has been well put, that if a special verdict had been found in the terms of the report, there must have been judgment given for the Crown. Suppose it to have been found, that the debt mentioned in the inquisition had been discharged, but that on a subsequent day, he became indebted to the Crown again in another sum, for duties incurred since, and that he was so indebted on the day of taking the inquisition, concluding with the usual reference to the Court, whether on the whole matter, the affirmative of the issue were proved—could we have done other [621]-wise than have given judgment for the Crown? I fully concur in the opinion, that the subject-matter of the present objection is mere matter of form, and immaterial, and that therefore this verdict ought to stand.

Per Curiam. Rule discharged.

THE KING v. WADE, (Claiming under a Writ of *Diem Clausit Extremum* (10th April 1817), against Green). Demurrer. Friday, 1st May 1818. —Proceedings by prerogative process, are not within the 1th Anne, ch. 16, notwithstanding the 24th sect. —Plea by an executor of money paid for expences of his testator's funeral, and for proving the will, amounting to 70*l.* and no assets, except, &c. which were not sufficient to pay and satisfy said expences, —held bad, as against the Crown, on a writ of *diem clausit extremum* against the estate of the deceased Crown debtor, on general demurrer — such a plea not being perfect, either as a plea of retainer, or plene administravit: or issuable in that form, and wanting necessary averments, as that the sum laid out as alledged was reasonable, and that the executor had retained his own debt.

The inquisition taken 23d June, 1817, found that Green (the Crown debtor) died on the 30th January, 1816, at Twyford, (Southampton,) and that he was on the 23d of that month possessed as of his own proper goods and chattels, &c. (referring to an inventory,) of the value of 439*l.* 8*s.* 6*d.* and of money in the navy 5 per cents. produced by the sale of other goods, and standing in the books of the Bank, in the names of certain persons who were the trustees of Green, [622] under his will, and that he was also on the 30th of January, seised and possessed of and in several articles of silver plate, which the jurors appraised at 60*l.* the same had been since converted into money, and the produce of the sale thereof amounting to the sum of 60*l.* had been paid into the hands of one of the said trustees, and by him paid over to the defendant.

The defendant pleaded as to the goods, &c. (valued at 439*l.* 8*s.* 6*d.*) a judgment recovered against Green in his lifetime on a debt of 2000*l.* and that before the issuing of the said writ of *diem clausit extremum*, to wit, on the 22d of January aforesaid, she sued out a writ of *fieri facias* indorsed to levy 1000*l.* and 1*l.* 5*s.* costs, which writ was delivered to the sheriff of Southampton, and that by virtue thereof, he seised and took in execution the said goods and chattels mentioned in the said inquisition, &c. and which were then and there upon a just and true appraisement appraised and valued at the said sum of 439*l.* 8*s.* 6*d.* mentioned in the said inquisition, and that on the 29th of January the said sheriff assigned and delivered possession to her of the said goods and chattels by means of which said several premises she the said defendant then and there became and was possessed of the same as of her own

proper goods and chattels, and that a part of the same were afterwards and before &c. to wit, on the same day and year last aforesaid, sold and converted into money, and produced the said sum of 262l. 10s. 7½d. in the said inquisition mentioned, [623] which said last-mentioned sum of money was paid to the persons named as trustees in the will of Green, as the agents for the said defendant, and with which money the said persons, as such agents, purchased the said sum of money in the navy 5 per cents. in the said inquisition mentioned, and which was then standing in their names in the books of the governor and company of the bank of England, for the use and benefit of the said defendant.

And as to the said several articles of plate mentioned in the said inquisition to be of the value of 60l. and the produce thereof the defendant alleged that Green in his life-time, to wit, on the 8th of January, 1816, by his will constituted and appointed the defendant and the said trustees, his executrix and executors, and that after his death, and before, &c., to wit, on the 26th July, in the year last aforesaid, the defendant alone duly proved the said will, and took upon herself the burthen and execution thereof—and that after the death of the said Green, and before the issuing the said writ of diem clausit extremum, to wit, on the 1st of April, 1817, she the said defendant had paid, laid out, and expended, for the funeral of Green, and in and about the proving of the said will, divers sums of money amounting to the sum of 70l.—and that no goods or chattels, which were of the said Green at the time of his death, had ever come to, or been in the hands of the said defendant as executrix, as aforesaid, to be administered, except the said articles of plate, and [624] which were not sufficient to pay and satisfy the monies so by her paid, laid out, and expended.

Replication—That the said judgment was obtained by the fraud and covin of the said Green and the defendant, and with intent to defraud his majesty of his said debt, and after traversing the debt from Green to defendant, and the delivery of the goods to her by the sheriff, and her possession thereof before or at the time of the death of Green, averred that Green was possessed at the time of his death :

Demurrer, as to so much of the said plea as related to the said articles of plate.

Rejoinder, traversing the fraud and the averments of the replication—and Joinder in demurrer.

Nolan, in support of the demurrer, objected to the plea, that the sum alleged to be laid out by the defendant, as executrix, was excessive, and more than what was allowed for such purposes, and that the plea did not aver retainer in part discharge in the usual manner, or that the money so laid out was reasonable and necessary ; nor sufficiently deny the possession of assets : and he submitted, that if such a plea were allowed, it would go to cover any sum of money so alleged to be laid out, and no precise issue could be taken on it so as to bring it to an enquiry.

Littledale for the plea contended, that the [625] averments were sufficient, for that the Crown might have replied to them the excess, and traversed the right to retain, and the fact of deficiency of assets, which course those averments had rendered necessary : for they shewed that some money must have been expended as alleged, and some part of it must have been reasonable and necessary, so that they covered at least some part of the sum claimed—and that it was not necessary to aver that she had retained, &c. because as she had stated the insufficiency of assets the retainer might be given in evidence without pleading the special matter, for that (as was determined in the case of *Woodward v. Lord Darcy* (Plowden, 185)), the executor's right to retain a debt, arises by the sole operation of law, and therefore the property of goods in the hands of an executor, as far as the amount of his debt, is at once altered, and becomes vested in him, and he has them of his own proper goods, and not as executor.

He then submitted, that in this case the Attorney-General should have demurred specially, for he contended that the 24th section of the 4th Anne, ch. 16, had expressly extended the several provisions of that act to the cases wherein the king might be the party suing : and he contended that this proceeding was within that statute, for that it was in effect a suit for the recovery of a debt immediately due to the king, and that it was such a one as might be pleaded to [626] by the party, and would be ultimately to be tried (the Crown's debt being traversed) by a jury in the usual way, and therefore, the Crown was bound by the express words of the act.

Nolan in reply insisted that the Crown was not bound by the statute of Anne, —and he observed as to the 24th section, (his attention being particularly called to it

by the Court,) that the distinction is that proceedings by writ of extent are not suits for the recovery of debts within the meaning of that clause, for they are executions for the satisfaction of debts of record, and if the objections now made to the plea would be fatal on special demurrer, and if that clause does not bind the Crown, then in the case of an extent this general demurrer which goes to the foundation of the plea, may be maintained for the insufficiency. And he cited the case of *The Attorney-General v. Allgood (b)*, where it was held, that the statute of Anne did not apply to suits by the Crown, further than to extend to such suits, the provisions of the statute of jeofails.

He then submitted (admitting the principle of the case of *Woodward v. Lord Darcy*;) that whether this plea was meant to be retainer, or plene administravit, it was badly pleaded. If it was more like one than the other, it was perhaps nearer a plea of retainer, and therefore not pleaded [627] issuably as such: and if it were not a plea of plene administravit, the want of averring positively a retainer, was not cured by the effect of a defendant's right to give the retainer in evidence in support of such a plea when there was no such plea on the record. He contended therefore, that the plea was insufficient, and that on this general demurrer there ought to be judgment for the Crown.

RICHARDS, Chief Baron. This is a proceeding on the part of the Crown, which does not come within the general purview of the statute of Anne, nor within the particular sections of that statute. Chief Baron Parker held that opinion, and he has given the true reason, and I believe that that is the universal opinion of Westminster Hall. If then a special demurrer was not necessary in this case, the question will now be whether the plea is good. The defendant's claim as a creditor before the writ issued is not now before us.

She states by her plea that the value of the plate was not equal to the expences incurred by her, &c. (stating that part of the plea): no doubt funeral expences are to be preferred, even to a debt due to the Crown, but we ought to know from the plea what those expences were, and to be able to judge whether they were reasonable and necessary. This is certainly not a plea of plene administravit, and as it is pleaded, I do not see how any replication could bring the precise subject-matter at once fairly into issue. If [628] more particularity were not observed, such a plea might cover any sum alleged to have been expended by an administrator, and therefore I think it insufficient, and that the demurrer ought to be allowed.

GRAHAM, Baron. I do not think that this plea could be sustained on special demurrer; and unless a plea state a sufficient bar, a plaintiff is not called on to reply. It should have averred, that the expenditure was reasonable, and such as the law allows on account of the special matter stated in the plea, which is, in circumstances like the present, a very small sum, and therefore the probability on the face of the plea is against the truth of it.

It was put that this demurrer ought to have been special, and I confess I was much struck with the words of the twenty-fourth section of the statute of Anne, but I think, on full consideration, that that act was only meant to extend to the Crown, in cases analogous with suits between subject and subject, as in scire facias on bonds, &c. Now certainly writs of extent and diem clausit extremum have always been treated as executions, with this difference only, that the Crown does not immediately proceed to sell, and that both are traversable: and accordingly such proceedings are not amongst those enumerated in the 1st sect. of the statute. I am of opinion, therefore, that the general demurrer is proper, and that this plea is incomplete and bad.

[629] GARROW, Baron. The most important question raised by this demurrer is, whether the Crown is bound by the twenty fourth section of the statute of the 4th of Anne, and on that I think the authority and reasons of Lord Chief Baron Parker decisive. This is certainly not a suit by the Crown for recovery of any debt immediately owing. It is an execution, and the contest arising on it is between the Crown and some third person, claiming in fact against the Crown, who is therefore quasi plaintiff in the suit. There are many other obvious distinctions to be collected from the terms of the act.

The question then is, whether the plea which has been put on the record is good. The case which has been cited from Plowden will not do much for it. In that case the

(b) Parker, 14; and see the case of *The King v. Cullwell*, Forest's Rep. 57.

plea was complete and full, here it is defective and argumentative, and therefore I think there ought to be judgment for the Crown.

Per Curiam. Judgment for the Crown*.

[630] *ANDERSON v. HODGSON*. Saturday, 2d May 1818.—An action for goods sold and delivered, not supported by proof of an order by defendant to send the goods to a certain quay, to be left till called for, without shewing a reception and acceptance on the part of the vendee of the goods so sent, where the defendant had not named the particular carrier by whom the goods were to have been conveyed: at least under the circumstances in evidence in the present case a nonsuit for want of proof of a delivery, was refused to be set aside.

The Lord Chief Baron had nonsuited the plaintiff in this action, for goods sold and delivered, for want of proof of a delivery according to the contract of the parties.

[631] Raine obtained a rule to shew cause why that nonsuit should not be set aside, and a new trial granted, on the ground that there had been a sufficient delivery given in evidence.

It was reported to have been proved, that the defendant, who was a flour-dealer, living at Eccles, near Manchester, gave an order to the plaintiff, a merchant at Liverpool, through the plaintiff's broker, living at Manchester, to send him fifty barrels of flour, at 59s. to be left at the Old Quay, in Manchester, till called for. The defendant was to pay the carriage. The flour was sent by water, and arrived at Manchester, but the defendant never sent for it.

Duncey and Starkie now shewed cause, insisting that there had been no delivery in this case, because there had been no acceptance proved, or that the goods had ever been received by the defendant, who must be taken to have repudiated the contracts in transitu, as he was entitled to have done, or even after the arrival at the quay at Manchester, before acceptance of the goods.

They also submitted, that the contract itself was imperfect, and that this case was within the statute of Frauds, because no contract was produced, and it could not be by parol. In *Kent v. Huskinson* (3 Bos. & Pul. 233), the refusal to keep them, even

* It may be worth while to notice, as applicable to the two points made in this case, that of *The Attorney General v. Arnold* (7 Vin. Abr. 104, tit. Cred. & Bank. (Z.) 1). The defendant there pleaded, that G. Newell, (to whom he had been found to be indebted,) between the teste of the extent, and the caption of the inquisition, became bankrupt, and that thereupon a commission of bankruptcy issued, and that proceedings were had thereupon, according to the several statutes made concerning bankrupts, and that he was found a bankrupt: and that thereupon the commissioners assigned over his estate and effects to one Taylor, so that he, the defendant, was not indebted to the said G. Newell, but to the assignees of the commission of bankruptcy.

To that plea the Attorney General demurred, and shewed for cause, 1st. That it was not set forth what act of bankruptcy the said G. Newell had committed; and 2dly. That he had not set forth the commission, and that the commissioners had adjudged and declared G. Newell to be a bankrupt, and that the plea amounted to the general issue.

Ward, Chief Baron, and Lovell, Baron, were of opinion, that the plea was bad, 1st. Because the defendant had not set out what act of bankruptcy G. Newell had committed: for being the case of the Crown, it was not sufficient to say only that such a day G. Newell manifestly became a bankrupt, although that sort of pleading might be good to bar a subject, a plea to a common intent being good, but in case of the Crown it must be certain; and 2dly. Because he had not set forth, that the commissioners had found him a bankrupt: for the commissioners should proceed upon the statutes, and they ought to bring the party within the extent of the acts.—Barons Price and Bury held the plea good.

Thus, on the one hand, it appears, that two of the Barons in that case took a distinction between pleas pleaded in bar of the Crown, holding that a greater degree of certainty and particularity were necessary in such cases, than in pleas between subject and subject. On the other it is observable, that the Attorney General demurred specially, for the want of sufficient particularity in the plea.

after the goods had been received, was held not to be a sufficient acceptance or receipt to take the case out of the statute of Frauds.

They also cited the case of *Fale v. Bayle* (Cowp. 294), to shew that, as the defendant in this case had named no particular carrier, the goods were sent at the risk of the vendor, which risk continued, they submitted, till they should have been actually received by the vendee. Delivery generally to a carrier, is not a delivery to a consignee, unless under special circumstances, as in *Davies v. Peck* (8 T. R. 330); and where the contract is clear, particularly not such a delivery as shall fix a consignee, and here the contract being completed is the sole question. As to the carriage being to be paid by the defendant, that cannot alter the rights of the parties, or oblige a vendee to accept goods sent to him which he did not approve.

Raine and Parke, in support of the rule, submitted, that the contract between the parties was not, that the goods were to be delivered, but sent, and that that contract was performed on the part of the plaintiff—that a delivery to any carrier, under such a contract was a delivery to the vendee, (citing *Dutton v. Solomonson* (3 Bos. & Pul. 584), where Lord Alvanley so held, and *Snee and Another v. Prescott and Others* (1 Atk. 248)); and that such a delivery not expressly repudiated is an acceptance.

[To a question put by the Court, it was answered, that the quay at Liverpool and that at Manchester were one and the same concern, and that there was no other carrier than the one by whom these goods were sent: and the Court observed, that those facts would have made a most material difference if they had been stated in the report, but not having been noticed there, the Court could not receive arguments founded on those circumstances.]

As to the argument founded on the statute of Frauds, they observed, that all that had been attempted to be proved by parol, was the agency of the carrier, for the purpose of establishing the receipt of the goods sent.

GRAHAM, Baron. I have certainly very considerable doubt on this case; but I think the plaintiff has not established his claim by evidence, or I should have had a difficulty in seeing the distinction, in point of law, between a delivery and an acceptance, with reference to this action. Much more has been said on the argument, of the case being within the statute of Frauds, than the facts warrant; for the question here is, what shall be considered to be a delivery according to the contract between the parties, and whether a delivery at the Old Quay at Liverpool, was a compliance with the order to send the goods in question to the Old Quay at Manchester. The cases are abundant to prove that a delivery to a carrier is a delivery to the consignee; but the difficulty in this case is, that [634] there is no evidence to fix the defendant with knowledge of the course of conveyance, or an adoption of the course which had been pursued, although that difficulty, it is said, is in a great measure got over by the defendant's agreement to pay for the carriage, and therefore, on this delivery, the goods would have been carried at the risk of the defendant; but that is very doubtful. On the defect of evidence in the plaintiff's case, therefore, I think the nonsuit was right, for there is nothing proved in the plaintiff's favour, except the defendant's liability to pay the carriage of the goods, which can hardly be sufficient of itself to fix him with the contract. Where the delivery to a carrier has been held to be a delivery to the vendee, it is in cases in which the vendee has pointed out expressly the mode of conveyance, and the person by whom the goods are to be conveyed. The plaintiffs give too much generality to Lord Alvanley's position, in *Dutton v. Solomonson*; for it could not have been meant to apply to every case of delivery to a common carrier. Under all the circumstances of this case, whatever doubts I may have on the point of law which has been raised, I think the rule ought to be discharged, particularly where it is considered that this is only the case of a nonsuit.

GARROW, Baron. This question, with regard to its consequences in the commercial world, is of very great importance. I think too much [635] stress has been laid on the objection of this being within the statute of Frauds, for the delivery, such as it was, is sufficient to take this case out of that statute, which certainly was not intended to destroy all parol contracts.

As to this delivery, I have certainly always understood that a delivery, by the party's order, to a particular stage coach, to be sent direct, or left till called for, was a delivery to the party, but in the view which I have taken of this case, my opinion, which is founded entirely on the facts reported, is that there was not such a delivery

proved as will support this action. Had it been in evidence, that the carrier was of the defendant's nomination, or that there had been no other, it might have altered my opinion, which is, however, under the circumstances of this case, reconcileable with the decisions which have been cited.

In *Kent v. Huskinson*, the sponge was actually sent back again, and in that case the delivery was not the question. Here the delivery was not completed by any subsequent act on the part of any person. And if Lord Alvanley, in the case of *Dutton v. Solomonson*, can be supposed to have determined that a delivery generally to a common carrier would have been sufficient to have sustained this action, I should dissent from that opinion, but I do not think that his Lordship's decision in that case can be so far extended.

[636] As to the defendant being to pay the carriage, that was merely a part of the consideration and price of the goods.

Per Curiam. Rule discharged.

SNOOK AND OTHERS, Executors, &c. v. MEARS. Saturday, 4th May 1818.—Where it was proved that a defendant had, after having denied the existence of a debt demanded of him, replied, to an assertion by the plaintiff, that he had documents in his possession which would prove it, that "It is of no use for me to look at them, for I have no money to pay it now," the Court held that a nonsuit, which had been directed on such a case made and relied on by the plaintiff, was right.—The legal effect of such conversations, as to how far they are to be considered as admitting debts to be due, or amounting to promises to pay them, is a question rather for the determination of the Court than the jury.

Abbott, J. had nonsuited the plaintiffs, on the trial in this cause, at the last Hants Assizes, with liberty to move, &c. It was an action of assumpsit by executors, the declaration consisting of the common money counts, and an insimul computassent with the plaintiff, after, &c. as executor, &c. Pleas, general issue, and non assumpsit infra sex annos.

Casberd obtained a rule for setting aside the nonsuit, and entering a verdict for the defendant.

The report being read, stated that the conversation between the parties, given in evidence, as amounting to an acknowledgment of the debt, [637] did not, in the opinion of the learned judge, prove such an admission as would support the count on an account stated. The plaintiff's witness swore that the plaintiff had said to the defendant, on the occasion of a settlement of some other matter, "On looking over Mrs. Mears's (the testatrix) accounts, I find that there is a debt due from you of 14l. or 15l."—that the defendant then said, "I do not owe Mrs. Mears a farthing"—and that the plaintiff having repeated the assertion, and added, that he would convince the defendant that he owed her the money, by shewing him some papers and receipts which he had in his possession: the defendant replied, "It is of no use for me to look at them; I have no money to pay it now."

Moore, who now shewed cause, contended that the words proved could in no sense be considered sufficient to imply an acknowledgment of the debt, and still less a promise to pay. On the contrary, there was an express denial that any thing was due; and, having cited *Roucroft v. Lomas* (4 M. & S. 457), and *Coltman v. Marsh* (3 Taunt. 380), he submitted that the nonsuit was right, and ought not to be set aside.

Casberd, in support of the rule, observed, that one of the grounds stated by the learned judge, on directing the nonsuit, had been, that the defendant could not avail himself of the evidence [638] given on the trial, under the count on an insimul computassent; because that count did not disclose the foundation of the debt: whereas it was determined, in *Knowles and Others v. Michel* (13 East, 248), that a plaintiff might recover on that count, where there had been an acknowledgment of any debt by the defendant. And he contended, that whatever might be the effect of the words, they ought to be weighed by the jury, and should have been submitted to their consideration.

To shew the extent to which the courts have gone in giving effect to admissions of defendants in course of conversation, both as to the acknowledgment of the existence of debts demanded, and the revival of such as had been barred by the statute of

Limitations, and what slight admissions have been held to be sufficient, he cited the case of *Bryan v. Horseman* (4 East, 599), and the authorities there referred to^{*1}.

But the Court (GRAHAM, and GARROW Barons) held, that the question of the operation and effect of words spoken under such circumstances, was one of law rather than of fact, and therefore more proper for the determination of the Court than of the jury. And having expressed their opinion, that the legal effect of such a conversation as had been proved to have been had [639] between these parties, had been already decided on in the case of *Howcroft v. Lomas*, and that the authority of the case of *Bryan v. Horseman*, had been shaken: they held the nonsuit to have been rightly directed, and therefore pronounced the

Rule discharged.

LAMBE v. THE EARL OF BLESSINGTON. Saturday, 4th May 1818.—The common issues, 40s. having been levied under a first distringas on a venire, the Court increased the issues on an application for a second distringas to 100l. the amount of the debt being 690l. due on a bond for that sum, and interest.

Price moved for an alias distringas, with increase of issues to the amount of the debt, on the venire fac. ad resp. in this case, on an affidavit, stating that there had been a distringas issued, under which 40s. (the common issues) had been levied, and that the debt, for recovery of which the process had been sued out, was due on a bond for 690l. and interest:—on which

The Court (after some consideration) ordered a second distringas to levy 100l.^{*2}: but they re-[640]-fused, on this application, (being the first not of course) to order issues to be levied to the amount of the debt, which had been applied for in consideration of the high nature of the security.

The sheriff having returned on that second distringas that he had levied to the amount of 100l. the Court was again moved to increase the issues, when they ordered a third distringas to levy 300l. under which the sheriff made a third seizure of certain articles, and made his return accordingly.

The Court was then moved for a rule that the sheriff might sell the issues, which was granted: under which the sheriff advertised the articles seized to be sold by auction at the sheriff's office.

[641] ELLIOTT v. NICKLIN. Monday, 4th May 1818.—It is sufficient notice of a plaintiff's intention to appear before the sheriff by counsel, on the execution of a writ of inquiry that the plaintiff's attorney inform the attorney for the defendant of such intention.—Had there been no intimation of such an intention, the defendant should have applied to the sheriff to put off the execution of the writ of inquiry.—Evidence may be given on such an occasion, (where the action is for seduction) that the defendant visited at the plaintiff's house for the purpose of paying his addresses to the daughter, with an intention of marriage.—In such a case the Court refused to set aside the inquisition, on the ground of the damages being excessive, a 1000l. having been awarded by the jury to the plaintiff, although the parties

^{*1} But see *Mucklow v. St. George*, 4 Taunt. 614.

^{*2} There is no criterion by which the amount of issues applied for on successive distringas may be fixed, or regulated in practice. It is wholly in the discretion of the Court †, directed by the different circumstances of each particular case. In *West v. Dalton* (a), the Court increased the issues to 4l. on the second distringas, and 6l. on the third: but that case having been reported on account of another point, it does not appear what was the amount of the debt: nor are any of the circumstances of the case stated as to that part of the motion. It therefore serves but little as a guide on such an application.

† By rule of Court, T. 1753, it is ordered, "That where issues shall be obtained upon any writ of distringas to be issued out of this Court, the plaintiff in such writ may, immediately after the return thereof, apply by motion to the Court for increasing issues upon further process to be issued between the parties: which said issues shall be increased from time to time, at the discretion of the Court."

(a) *Forest*, 29. And vide *Macmurdo v. Birch*, ante, p. 522.

were in a moderate sphere of life.—On a motion to set aside the inquisition on the ground of inadmissible evidence having been received, and allowed to go to the jury, the Court considered themselves bound by the sheriff's minutes (verified by his affidavit) of the evidence which had been offered.

Dauncey and Clarke now shewed cause against this rule, for setting aside the inquisition of damages taken before the sheriff of the county of Stafford, on a judgment by default suffered by the defendant, in an action of trespass on the case, for the seduction of the plaintiff's daughter.

Gaselee obtained the rule, on the grounds, that the defendant had been taken by surprise: (the plaintiff having been assisted by counsel on the execution of the writ of inquiry, without notice given to the defendant)—that the sheriff had improperly received evidence of a promise of marriage having been made by the defendant to the plaintiff's daughter—and that the damages, in respect of the condition of life of the several parties, were grossly excessive.

It was stated, on the part of the defendant, in the affidavits on which the rule was moved for, that the jury had awarded 1000*l.* damages to the plaintiff—that no notice had been given to the defendant of the plaintiff's intention to appear by counsel—that evidence of a pre [642]-vious promise of marriage having been given on the part of the defendant (*a*), had been admitted by the sheriff, and laid before the jury by him in his summing up—and that the defendant was a minor, and in no way of business, having no property of his own, and living at home with his father, who was a publican, and had six other children.

On the other hand, it was sworn, that although it was not stated in the written notice of executing the writ of inquiry, that the plaintiff would attend by counsel, the defendant's attorney was informed by the attorney for the plaintiff, that counsel would attend on behalf of the plaintiff: and that the defendant's attorney had said, that he would also procure the attendance of counsel. The affidavit then proceeded to state, as circumstances of aggravation, that the daughter of the plaintiff and the defendant were near neighbours, and had been acquainted from children, and that the parents of both had encouraged their courtship, which was matter of notoriety in the neighbourhood—that the plaintiff's daughter having become pregnant, had suffered a difficult and dangerous labour: and that the defendant had subsequently conducted himself towards the young woman with insolence. It was also sworn, that the defendant's father was a man of considerable property.

[643] An affidavit was also filed, stating that the under-sheriff had been applied to for a copy of the minutes of the evidence given before him, which was set out; and it was verified by the affidavit of the under-sheriff. It did not appear from those minutes, that evidence had been given, of a promise of marriage having been made use of on the part of the defendant.

It was submitted on the behalf of the plaintiff, that the damages were not excessive in a case of this nature—that the defendant had had sufficient notice of the plaintiff's intention to appear by counsel, although no written notice had been given—and that the evidence which had been adduced before the sheriff, had been no more than was necessary to shew the footing on which the defendant had been received into the plaintiff's family: and that similar evidence had been received by Lord Ellenborough for the same purpose, in the case of *Dodd v. Norris* (3 Campb. 519). And they submitted that, in this sort of action, if justice should appear to have been done, the Court should not set aside the proceedings, on the ground of excess of damages; still less on any formal objection. *Edmondson v. Machell* (2 T. R. 4).

Copley, Serjt. and Gaselee, attempted to support the rule on the grounds on which it had been obtained.

[644] RICHARDS, Chief Baron. The ground of surprise in this case is certainly not supported: for the information, sworn to have been given by the plaintiff's attorney to the attorney for the defendant, was quite sufficient to apprise him of the plaintiff's intention to appear by counsel; and if there had been in fact no notice given, the defendant's course was to have applied to the sheriff to postpone the execution of the writ, till he also should have provided himself with the assistance of counsel.

(a) *Dodd v. Norris*, 3 Campb. N. P. 519.

Had such a request been made and refused, there might have been something in that ground of objection.

On the point of inadmissible evidence having been received, it does not appear by the sheriff's minutes that that was the case. As to how far evidence of a promise of marriage might be used in any such case, it is not therefore now necessary to discuss. I concur with Lord Ellenborough in the opinion that a plaintiff may shew that the defendant was addressing his daughter in an honorable way. In judging of the propriety of admitting evidence, we are bound to have regard to the nature of the case.

It appears by the minutes of the evidence given, and which are furnished by the under-sheriff, that it was merely proved that the defendant was considered as so paying his addresses to the plaintiff's daughter. It does not appear that any proof was given of the defendant having used [645] the influence of any direct promise of marriage: and where, as in this case, the under-sheriff is a professional man of intelligence, we are as much bound by his report of the evidence given in such a case as this, as if it were the report of a judge on a motion for a new trial.

The ground of the damages being excessive is not satisfactorily shewn. This is one of certain cases wherein it is difficult to draw any line as to quantum of damages. One cannot trust one's feelings in matters of this nature, particularly where circumstances of aggravation are brought forward, and most of all such circumstances as levity and insolence. I am not therefore at liberty to say, that on the case before them, the jury have given too much damages. As to their being too large for the defendant's means, that is liable to the same answer. If he is unable to pay them he must suffer in person. I think therefore that this rule ought to be discharged.

GRAHAM, Baron, of the same opinion.

[On the objection of the excess of damages, his Lordship observed, that if there was any case in which great latitude might be allowed to juries, it was in this species of action.]

The affidavits, (continued his Lordship) which would shew that the defendant was taken by [646] surprize in the attendance of counsel for the plaintiff, are sufficiently answered in point of fact, for they shew that he not only had notice, but that his attorney had endeavoured to procure the assistance of counsel on his behalf also on this occasion.

As to the objection of inadmissible evidence having been received, that would in all probability have vitiated the verdict, if that had been so, and if, bowing to the authority of the case of *Dodd v. Norris*, we should hold that questions, as to any promise of marriage having been made by the defendant to the plaintiff's daughter, ought not to have been asked in such a case as this; but it appears, by the sheriff's minutes, that no such evidence as that a promise of marriage had been made by the defendant, was taken down by him, and we are bound by the sheriff's minutes of the evidence when verified by his affidavit.

I do not think, therefore, that on either of the grounds of objection which have been raised, this Court can interfere.

WOOD, Baron, was absent.

GARROW, Baron, fully concurred. Although I disclaim the principle which would hold that civil actions should be considered as media of punishment where they are founded on moral offences, I cannot, however, regret when they [647] are made to operate as a lesson to the invader of domestic happiness. In this case, however, certain grounds are stated on which this inquisition is now sought to be set aside. For the first—the surprize—there is not the slightest foundation. I remember the case of *Dodd v. Norris* well: I was of counsel for the plaintiff in that case: and the sole objection to the question put to the witness was founded on the impropriety of making the breach of a promise of marriage an item in the account in an action for the seduction. But Lord Ellenborough on that occasion did not, according to my recollection, lay it down as an inflexible rule, that the question then put could not in any case be asked, or that the fact might not be got at by other more indirect questions, as if she had been asked whether he had not sent her a ring, or her sister had been called to prove that she had been requested to prepare herself for the part of bride's-maid.

The distinction is where the actual promise of marriage is not relied on as a prominent part of the case, but is merely collateral to the main object of the action, as to

vindicate the character of the young woman, when assailed by the defence set up, as was the case here. But the question does not appear to have been put at all, and even if it had, it would not have vitiated this inquisition, unless it were shewn to have been made an improper use of.

[648] As to the excess of damages, I put that entirely out of the question.

Per Curiam. Rule discharged.

MEMORANDUM.

The Court desired it might be understood to be a rule, that applications for the discharge of insolvent debtors could only be made at the rising of the Court when the other business of the day should be over.

The end of Easter Term.

REPORTS of CASES ARGUED and DETERMINED
in the COURT of EXCHEQUER, at Law and in
Equity, and in the EXCHEQUER CHAMBER,
in Equity and in Error, from Trinity Term,
58 GEO. III. to the Sittings after Hilary Term,
59 GEO. III., both inclusive. Vol. VI. By
GEORGE PRICE, Esq., of the Middle Temple,
Barrister-at-Law. London, 1820.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER,
AND EXCHEQUER CHAMBER, TRINITY TERM, AND THE SITTINGS AFTER
58 GEORGE III.

GRIFFITHS *v.* MARSON. Monday, 25th May 1818.—A count for diverting and turning a stream of water is not supported by proof of penning back and checking it, whereby the water was made to overflow the plaintiff's meadow.—A nonsuit directed on such evidence given on that count confirmed on motion to set it aside.

Cause was shewn against a rule which had been obtained by Jervis, for setting aside this nonsuit directed by Burrough, J. at the last assizes for Shropshire.

The declaration (trespass on the case) consisted of three special counts. The two first were for [2] erecting and placing, and causing, &c. in, over, and across a certain stream or water-course, two dams, two sluices, and two gates, and thereby wrongfully, &c. penned back and obstructed, and kept penned back and obstructed the water of the said stream or water-course, whereby divers large quantities of the said water flowed over, and from and out of the usual and proper course, &c. over the closes of the said plaintiff, and thereby, &c. The third count stated, that the defendant wrongfully, &c. diverted and turned divers large quantities of the water of the said stream out of the usual course and channel over the said closes.

The defendant pleaded the general issue.

The plaintiff at the trial abandoned the two first counts, because he was unable to prove the erection of the dams, &c. but he gave in evidence in support of the third, that the defendant's son had let down the wear of the dam, whereby the plaintiff's meadow was flooded and damaged by checking the course of the stream, which caused the water to overflow.

On that evidence the learned Judge reported that he had nonsuited the plaintiff with liberty to move to set it aside.

Jervis having obtained the rule,

Puller now shewed cause.

[3] The Court held that the count was not proved by the evidence, and that in actions of this nature it was necessary that the count relied on should be so framed as to meet the particulars of the fact more distinctly, and with greater certainty, and therefore they pronounced the

Rule discharged.

JENNER v. YOLLAND. Tuesday, 26th May 1818.—If a landlord distrain *inter alia* his tenant's cattle and beasts of the plough, for rent arrear, and it turn out after the sale (judging by the result) that there would in point of fact have been sufficient to satisfy the rent due, and expences, without taking or selling them, such a distress is not thereby proved to be an illegal distress, and contrary to the statute 51 Hen. III. if there were reasonable grounds for supposing (from the appraisement of proper and competent persons made at the time of the taking), that without taking the beasts of the plough, there would not have been sufficient to have satisfied the rent and expences when sold. Semble, that there is no order required by law to be observed on the sale of such goods, as that the beasts of the plough should be postponed to other goods; nor is it, therefore, a cause of action that the beasts of the plough should be sold before the other goods are disposed of, where the distress itself was not wrongful.

[S. C. 2 Chit. 167.]

A verdict had been found for the defendant on the trial of this cause at the last assizes for Devon, under the direction of Mr. J. Abbott.

The action was trespass on the case against the defendant, who was the steward of the Earl of Morley, the plaintiff's landlord, for a wrongful distress and sale contrary to the stat. (51 Hen. III.).

The declaration consisted of eight counts. The first count was framed on the 51 Hen. III. stat. 4, and was as follows:—

“Whereas by the laws and statutes of this realm, no one ought to be distrained by beasts [4] of the plough, nor by his sheep, so long as he shall have any other goods and chattels, wherein a reasonable and sufficient distress may be had and levied. (except only such beasts as shall happen to be found doing damage to any one, which, by the law and customs of this realm ought to be distrained for the same;) yet the defendant well knowing the premises, but contriving, &c. heretofore, to wit, on, &c. at, &c. took and distrained the beasts of the plough, and sheep of the plaintiff, to wit, &c. then being in and upon the said lands and premises, so held and occupied by the plaintiff as aforesaid, and whereby and wherewith he the plaintiff then tilled his said lands, not for damage feasant, but for certain rent, to wit, the sum of 197l. 10s. then supposed to be due and owing from the plaintiff to the said Earl, for and in respect of the said lands and premises, with the appurtenances: although there were then and there other goods and chattels of the plaintiff, in and upon the said lands and premises with the appurtenances, (not being beasts of the plough, or sheep), sufficient for a reasonable distress for the rent aforesaid: and the defendant afterwards, to wit, on the 20th day of January, in the year aforesaid, at Plymouth aforesaid, in the county aforesaid, sold the said beasts of the plough, and the said sheep, and converted and disposed of the money arising from the sale thereof, to the use of him the defendant, contrary to the form of the statute in such case made and provided.”

[5] There was a count in trover, and other counts for keeping distress on premises for an unreasonable time; for selling part of the goods distrained, not for the best price, &c. &c.

Gaselee having obtained a rule to shew cause why the verdict should not be set aside, and a new trial had on the ground of a misdirection on the evidence, as applied to the pleadings, it having been proved that more had been taken than was sufficient to pay the rent and expences, independently of the beasts of the plough, and sheep; and that they had been sold first, while other things had not been put up to sale.

GARROW, Baron, now read the learned Judge's report, from which it appeared to have been proved, that the defendant had distrained beasts of the plough and sheep, amongst the rest of the farming stock, corn and hay, and farming implements, &c.; and that the furniture in the house was also taken; but only in part sold—that the beasts of the plough and other cattle had been sold first, (producing about 35l.) according to the usual custom of commencing such sales with the out-of-door goods; and that the whole had been previously appraised at 211l. 19s. 6d. by a sworn appraiser assisted by a farmer. The value of what remained unsold was variously estimated from 35l. (the auctioneers valuation) upwards, but by other witnesses from that sum to 100l.

[6] The learned Judge on that evidence left two questions to the jury: 1st,

whether the defendant had used reasonable diligence in ascertaining, whether there was sufficient on the premises without resorting to the beasts of the plough; and 2dly, whether the goods which had been seized had been improperly sold by the improvident conduct of the defendant. And his Lordship directed the jury, that, if they were of opinion, that the defendant had reasonable ground for thinking that they might have sold enough without selling the beasts of the plough to satisfy the arrear of rent and fair expences; and that the taking the cattle, horses, and sheep, were an unreasonable taking, in that point of view they ought to find a verdict for the plaintiff: otherwise for the defendant.

Williams, C. F. Adam and Bailey, shewed cause: contending that to support the present action, it was necessary to prove that the distress was palpably and grossly excessive in its disproportion to the amount of the rent in respect of which it had been made: *Field v. Mitchell* (6 Esp. 71),—that in forming the estimation of such excess, regard should be had to the distress itself only, and not to the result of the sale, which was only one of the media of proof of an excess, and not by any means conclusive; for it might turn out well or ill, according to extrinsic circumstances, which could not be taken into account by the appraisers, and it would be enough if the de-^[7]fendant had acted bona fide, and that a proper appraisement had been previously made by fit persons,—and that that would be sufficient to exonerate the landlord, and those acting under him. In this case the sale had turned out better than had been expected, and that, by the exertions of the defendant. As to the beasts of the plough and sheep, not having been reserved till the last, there is no provision in the statute requiring that to be done, or any authority establishing that that is the rule of law. It was for the plaintiff's accommodation that the household furniture had been kept back, that he might not be turned out of his house, unless it had been necessary to sell the goods in the house; and as he had expressed no dissent, it might therefore be considered to have been with his consent that the household furniture had not been disposed of in the first instance: *Washburn v. Black* (11 East, 405, n.). Here by the appraisement the distress was shewn to be reasonable (according to the criterion of the statute) "after the value of the debt, and by the estimation of neighbours and not strangers, and not outrageous." Since this statute of Hen. III. that of 2 Wm. & Mary, c. 5, has altered the nature of distresses by permitting them to be sold, and they are no longer merely in nomine pome, in which respect the law has become very materially changed. The statute of Henry the 3d, therefore, as applied to the plaintiff's cause of action in this case, may be considered as obsolete, because the principle and policy of ^[8]the act no longer applies, and the distress itself is now rather in the nature of an execution in satisfaction of the arrears of rent due, than a pledge for securing payment. They cited in support of those positions, the case of *Hubbans v. Chambers* (1 Bur. 579 588), where the doctrine on the statute and on the general law of distresses is much discussed: and they submitted, that under the circumstances of this case the direction of the learned Judge was correct, and that this rule ought to be discharged.

Gaselee and Wilde, in support of the rule, insisted that in point of law, not only had the distress been wrongful in taking the beasts of the plough whilst there was sufficient on the premises without resorting to them; but that the illegal sale of them afterwards, before the other goods had been sold, (and which was not a mere gravamen in this case) was alone a sufficient ground for maintaining this action, and one which the first count of the declaration had been specially framed to meet, being, of itself, a substantive charge and integral matter of complaint. And they contended, that the statute of the 2 Wm. & Mary, had merely given the landlord a power to sell the goods distrained, without reference to the statute of Henry 3d, or without effecting any alteration in the law, with respect to distresses, of which the act of Henry was only declaratory, leaving the party still answerable for the illegality of the distress, and of ^[9]course for the sale of what he should have so illegally distrained.

The inducement of the first count and the charge, they submitted, taken together, shewed that the illegal sale of the goods was the gist of the plaintiff's cause of action, as to which they might give evidence under that count of the declaration: for the allegation of contra statum does not vitiate the count more than those words in an indictment for a common law offence would do.

Having noticed the distinction between this species of action and the more common one, for a wrongful distress on an excessive taking, they adverted to the language of

the two acts of parliament, observing that the statute of Henry 3d was peremptory in the provision "that no man should be distrained by his beasts that gain his land, but until they can find other sufficient distress," &c. : and that the statute of Wm. & Mary, authorizing the sale of goods distrained, was in *pari materia*, and was still subject to that provision of the law with respect to the things allowed to be distrained on : nor had that latter statute, in requiring the goods to be appraised, provided that the appraisement should be the criterion of the reasonableness of the distress, or that it should justify the tort of a distress which should turn out to be in fact excessive or otherwise illegal. Every distress must be at the peril of the party, who [10] cannot sell what he cannot take ; and it is equally obligatory on him to sell that last, which he is expressly prohibited from taking first. They submitted that the defendant should have made a second distress if the first had been found insufficient, and the reason why a second distress is allowed is, that the landlord might have no ground for evading the statute.

They then urged, that in point of form, the action, (special, on the case) was here particularly correct and appropriate : and that it was not necessary that the declaration should aver that there was a sufficient distress on the premises, without taking averia caruæ : *Dawson v. Alford* (Dy. 312, a.). That they submitted was matter of defence, as was any accidental circumstance of articles of uncertain value as pictures, horses, &c. (*Hutchins v. Chambers* (1 Bur. 589)), having brought an extraordinary price, in consequence of extrinsic estimation depending on matters out of the common calculation of an appraiser. And so far from furnishing an excuse for the defendant, as matter of speculation, all such possible chances rendered the propriety of reserving the beasts of the plough till all the other goods which had been taken should have been first sold, more obvious as a rule of conduct on the part of auctioneers in all such cases ; and in the present case it was proved that the furniture and household goods left unsold were worth at the lowest estimation 35l. ; and that the hay and corn which had also [11] not been sold was worth 30l. more : whereas the beasts of the plough which were sold had brought only about 15l., so that there could be no doubt as to the fact of there having been sufficient on the premises without taking or selling the beasts of the plough ; and the result of a sale by public auction is a far more correct criterion than an *ex parte* appraisement on the behalf of the distrainor, which is always below the actual value. They submitted therefore, that there ought to be a new trial.

The Lord Chief Baron was not present : sitting in Equity in the Exchequer Chamber.

GRAHAM, Baron, absent.

WOOD, Baron. This motion for a new trial was founded on a supposed misdirection of the Judge. The declaration consists of a great many counts, but it is to the first that the points made in this case apply : for the other objections all resolve themselves into that : and therefore the question will be, whether that count is supported by the evidence.

It has been attempted to be shewn that the circumstances attending the sale of the goods distrained are sufficient to maintain this action, on the idea that they support the first count ; but I am clearly of opinion, that unless the distress itself was wrongfully taken, they do not. Then the whole will turn on the inquiry, whether tak-[12]-ing the beasts of the plough was illegal, under the existing circumstances, at the time when the distress was originally made. Now I think, that they were then legally and properly taken. It is true the landlord is not authorized to take beasts of the plough if there is other sufficient distress on the premises at the time : but that is a question which must not be left to be determined by any subsequent event, or to be ascertained by the actual produce of the sale : for we know that the goods may, and often do, bring both more and less than they are worth. We must look, in a case of this sort, to the circumstances of the distress at the time when it was made. I have no doubt that the true construction of the statute of the 2d of W. & M. in requiring an appraisement, is that the value of the goods taken might be ascertained by a fair estimate made at the time of the distress : and that if on such valuation there should not be thought to be sufficient without them, the landlord might distrain the beasts of the plough. Such was the opinion of the Judge when he left this case to the jury, and I think that he was right in his direction to them. There was no evidence offered to prove that there was a sufficient distress on the premises without taking the beasts of

the plough. The goods were appraised before the sale, and though appraised on the behalf of the vendors, it was an appraisement on oath, and we must presume it to have been fair. From that appraisement it appeared that, without these cattle, there was not sufficient [13] in reasonable estimation to satisfy the landlord's rent and the expenses.

It has been said, that he might have had a second distress. No doubt he might, but that is not an answer to this defence; for if it were, the cattle might in the mean time have been driven away. On the whole, I am clearly of opinion that the direction and the verdict were right.

GARROW, Baron, of the same opinion. The case was properly left to the jury, on the evidence, and the opinion of the learned Judge was quite correct; or it would be a most inconvenient and perilous doctrine for landlords, if the objections which have been taken to it were well founded. On a fair construction of the statutes, all that appears to be required is, that the party shall act *bonâ fide*, and there is nothing in the acts calling on the Court to adopt any such rule as has been contended for—that before the beasts of the plough are sold, the other goods should all be first disposed of. As to leaving the beasts of the plough for a second distress, there is no reason why the landlord should take that trouble, or incur the probable risk of the tenants driving them away, or of their being taken in the mean time in execution by a judgment creditor.

The result of a sale is of itself nothing like a fair criterion of the value of the goods sold, [14] and we must not be told that all appraisers undervalue goods distrained. In this case it appears that the defendant himself augmented the prices of many of the things sold, by frequently bidding. If the produce of a sale were allowed to be the criterion by which the right of action in these cases is to be upheld, nothing would be more easy than for a tenant by collusion to raise the produce of a sale so much beyond the appraisement, as to subject his landlord on all such occasions to this kind of suit. I therefore fully concur in the opinion that this rule should be discharged.

Per Curiam. Rule discharged.

[15] COLE v. BENNETT. Thursday, 28th May 1818.—A defendant settling a matter in dispute with the plaintiff in the absence of the plaintiff's solicitor, after having been served with process, in the following manner, (not admitting any thing to be due on account of the action) by introducing a memorandum into a receipt given by the plaintiff to defendant on another account, that no further proceedings were to be had in the action—does not bind the plaintiff's attorney: but in the present case the plaintiff's attorney, on shewing cause against the motion made for refunding the costs which had been levied by execution, swore that defendant admitted knowledge of notice of declaration before signing interlocutory judgment, and that defendant had told him that he had paid plaintiff the debt, but did not shew him the memorandum; that he then informed the defendant, that unless the costs were paid he should proceed in the action—and that he had therefore on executing the writ of inquiry, taken nominal damages only.—Service of notice of declaration to found an interlocutory judgment and authorise a writ of inquiry, is good, by affixing it on the door of the dwelling house where defendant last lived, if the plaintiff or his attorney do not know the place of his removal, and knowledge can be brought home to him; and in case of irregular service, the defendant should move the Court before the execution of the writ of inquiry.

Sir William Owen obtained a rule that the plaintiff and his attorney should shew cause why all the proceedings, subsequent to the 22d November, should not be set aside for irregularity; and why the sheriff of Gloucestershire should not return to the defendant the money paid under a writ of *cupias ad satisfaciendum*; and why plaintiff, or his solicitor, should not pay the costs occasioned by such subsequent proceedings.

The facts and merits of the case on both sides, as collected from the various affidavits, which were of great length, appeared to be as follows:—The defendant had been served with process in June or October, when he called on the solicitor and told him he had never had any dealings with plaintiff, and that the plaintiff afterwards told the defendant he had never ordered his solicitor to sue out process; that he purchased

some teazles of the plaintiff, for which he paid on the 22d November and took a receipt, in which was introduced a memorandum, that [16] no further proceedings were to be had in the action which had been commenced, each party to pay his own expences; that afterwards, (about the middle of December) the defendant left Weare, (Somerset) where he then resided, and went to live at Felton, (Gloucestershire) having previously publicly sold and disposed of the greater part of his farming stock, &c.—that in the beginning of March, and not before, he heard that a paper (notice of declaration) had been put on the door of his late dwelling at Weare—and that he then called on the solicitor, and shewed him the memorandum of settlement, who observed that he (the defendant) should have settled it with him (the solicitor). It appeared that the person employed to fix the notice of declaration on the door of the defendant's late residence, knew where he then resided, but did not inform the attorney.

On these facts, and the authority of the cases of *Welsh v. Hole* (1 Doug. 237), and *Chapman v. Haw* (1 Taunt. 341), the Court granted the rule to shew cause.

The attorney, in his affidavit filed to oppose the rule, swore that the defendant had requested time, after having been served with process a few days before the return of the writ, but that he had never spoken to him of his merits; and that some little time before interlocutory judgment was signed, the defendant acknowledged to him having received or seen the notice of declaration, but had said that he had paid the plaintiff the [17] debt, without mentioning the other matter of dealing between them, or shewing him the memorandum; and the deponent then informed the defendant, that unless his costs were paid, he should proceed in the action; and that on the writ of inquiry he had taken nominal damages only. And he also swore, that he did not know where defendant had gone to reside, or that he had left Weare, till he attempted to serve notice of declaration; that he believed there was collusion between the parties, and that he had been informed that the plaintiff had gone to America.

Moore shewed cause, submitting that this was a conspiracy and collusion to cheat the attorney of his costs, in his absence, which the Courts would not permit. And he cited *Swain v. Senate* (2 N. R. 99), and the cases there referred to. On the point of the alleged irregularity, he submitted that the service of notice of declaration was good where the defendant's then residence was not known, and that if not so, the defendant could not now take advantage of it, after a writ of inquiry had been executed, when the defendant might have moved the question before. *Toms v. Powell* (7 East, 536): *Downes v. Witherington* (2 Taunt. 243), and *Fletcher v. Wells* (6 ib. 191).

Sir William Owen, in support of the rule, urged the following circumstances existing in this case, as distinguishing it from others on the [18] question of settling with a plaintiff, in the absence of the attorney; that there was in fact no cause of action; and that therefore the plaintiff was paid nothing in the way of settlement, for that no debt had been acknowledged.

On the point of waiver of the irregularity, he submitted, that to make the defendant's inaction a waiver, the plaintiff ought to take some step after the irregularity, for otherwise non constat that the plaintiff will proceed: *Young v. Wilson* (5 Taunt. 664).

Wood, Baron. It does not sufficiently appear that the settlement between the plaintiff and defendant was bona fide; nor is it positively asserted by the defendant, or shewn by the affidavits, that no knowledge of the notice of declaration had reached him; on the contrary, it appears that he had been informed that it had been fixed on the door of the place where he had previously lived. I think therefore the rule should be discharged.

GARROW, of the same opinion. The conduct of both plaintiff and defendant was exceedingly suspicious. They had no right to enter into such settlement behind the attorney's back. Both of them knew that some costs were due to the attorney; and all the cases proceed on the ground that the parties are not to be per-[19]-mitted, by any such collusion, to cheat the attorney.

As to the alleged irregularity, it was necessary for the defendant to shew that the plaintiff or his attorney knew where he resided in Gloucestershire. If he had done so, there might have been some foundation for the application on that ground, though in this case the defendant would even then have been concluded by his delay.

Rule discharged, with costs.

THE KING (IN AID OF MYTTON,) v. HILL AND OTHERS. Monday, June 1st 1818.—

Where goods seized under an extent had been kept by the officers for a long time locked up on the premises, pending a reference of the prosecutor's claim, during which a subsequent arrear of rent accrues due to the landlord: the Court refused to interfere in his behalf, so far as to order the effects to be sold, and the rent in arrear to be paid to him out of the produce.—Semble, his remedy is by action for use and occupation against the tenant, or case against the officer.

[For further proceedings see 7 Price, 636.]

Martin had obtained a rule on behalf of W. Clarke, the defendant's landlord, calling on the Attorney General to shew cause why the stock and effects seized under this writ of extent, should not be sold; and why Clarke should not be paid out of the produce, 180l. 3s. 3d. for rent accrued due to him since the seizure; (in respect of the premises on which the goods had been [20] taken) and why, if the produce of such sale should not be sufficient, he should not be paid the deficiency out of the produce of other stock and effects of the defendants which had been previously seized and sold under the extent.

The facts, as stated in Clarke's affidavit, were as follow:—The defendants, (who were wine-merchants,) in September, 1815, (when the extent issued,) occupied certain premises, consisting of vaults, and a counting house, belonging to Clarke, on a lease for a term ending at Christmas following, at which time the defendants were indebted to Clarke 50l. for half a year's rent. After the extent had issued, the defendants agreed with Clarke, who was not aware of the extent, for a further term in the premises, to commence at the expiration of the former, under which the sum in question had become due for subsequent rent on the 25th March, 1818. The stock of the defendants, which had been seized, and were still remaining on the premises, (and which was more than sufficient to satisfy the landlord,) and the keys had, ever since the seizure, remained in His Majesty's hands. And it was stated, that in consequence of such possession of the Crown, the deponent had been deprived of his right of distress, of which he should otherwise have availed himself, and that therefore he expected to lose the rent so due to him.

[21] The affidavit of the sheriff's officer who made the seizure, stated that he was and had been in possession of the stock, cellar, and keys, under the writ, since the 5th October, but that the defendants had continued to occupy the counting-house over the vaults without interruption or molestation: that no demand was made for rent at the time when he took possession, but that in November, Clarke had inquired of him, who was to pay the arrears of rent, and that the deponent had referred him to the solicitors who prosecuted the extent.

The solicitors also made an affidavit, stating that the defendants had pleaded to the extent, but in Michaelmas term, 1816, withdrew their plea, and suffered judgment to be entered for the Crown, subject to a reference to a barrister, as to the amount of the debt due to the prosecutor of the extent, but that he had not yet made his award; that in the mean time, the sale of the stock on the premises was to be suspended: and that all the property which had been seized, would be insufficient to satisfy the debt sought to be recovered from the defendants.

Dauncey and Nolan, who now shewed cause, contended that, under the circumstances so disclosed by the several affidavits, the applicant was not entitled to the object of the present motion, as in the case of the Crown, an extent is to be preferred to the landlord's remedy of distress: [22] *The King v. Cotton* (Parker, 112), nor is the landlord entitled to the benefit of the statute of the 8th of Anne: *The King v. De Caux* (ante, vol. ii. p. 17).

Martin, in support of his rule, insisted, that the present case was quite distinct from those cited; because the Crown, instead of carrying away or selling the goods seized, had used for a long period the landlord's premises in keeping them there, thereby preventing other goods being brought on those premises on which he might have distrained, depriving him not only of his right of distress on the goods taken, but shutting the vaults against the introduction of any other stock on which that right might be exercised, and that on a claim not yet established.

RICHARDS, Lord Chief Baron. When this property was seized under the extent, it became appropriated and fixed in the Crown. How then can we say it should be

applied to discharge a demand subsequently contracted? Had the property been sold at once, it is admitted no question could have arisen. Then has the Court assumed a new character? Mr. Clarke might have been ignorant of the extent at the time, but he knew of it before Christmas, and still he suffers the defendant to continue his occupation as tenant; and there can be no doubt that an action might be maintained for the use and occupation; and is he to be permitted to say, No, I will look to the [23] Crown, who never made any engagement with him?

As to the reference, if the question had been tried in the usual course, it would not most probably have been decided sooner, and no blame is imputable to any one for referring the matter. There is nothing in the case which can make the Crown a tenant to Mr. Clarke, and he still has his remedy against Hill. The Court therefore cannot interfere on any principle of law or equity.

GRAHAM, Baron, absent.

WOOD, Baron. I agree in thinking that this motion could only be supported by shewing the Crown to be in the situation of tenant to Mr. Clarke, and I do not see how that can be made out. We have held that the statute which gives landlords a remedy does not extend to the Crown.

It seems to me clear that the Hills still continued tenants to Mr. Clarke as before, and an action of use and occupation might be sustained, or a distress might have been levied on any other goods belonging to them.

Whether the officer has done wrong in staying so long on the premises is a very different question, and that might be the subject of a special action on the case. Under the circumstances [24] of this case, I concur in thinking that we cannot make this rule absolute.

GARROW, Baron, expressed himself entirely of the same opinion.

Per Curiam. Rule discharged.

THE KING v. MORRALL. Demurrer. Wednesday, 3d June 1818.—The statute of Limitations may be pleaded to a scire facias issued by the Crown against the drawer of a bill of exchange in the hands of the Crown debtor, and which has been seized by the sheriff under an inquisition on the prerogative process.—Such a plea held good on demurrer.

On a writ of diem clausit extremum against a creditor of the defendant, a debtor to the Crown, it was found by the inquisition that the defendant was indebted to him, &c. as the drawer of a bill of exchange in the usual manner, whereupon the present scire facias issued.

The defendant pleaded, under the statute of Limitations, (21 Jac. I. c. 16, s. 3) that the supposed debt was not grounded upon any specialty, and that the same was not contracted, and did not accrue due to the Crown debtor at any time within six years next before the death of the Crown debtor, or the teste of the writ of diem clausit extremum. The Attorney General demurred.

Nolan, in support of the demurrer, insisted that such a plea was not admissible as a bar to [25] the Crown suing its immediate debtor, not in aid, which, if admitted here, it must be held to be: and that the Crown's right is not barred by the statute of Limitations,—by a plea which in point of fact admits the debt.

He first observed, that in the present plea there was a departure from the usual form of pleading in bar of the Crown, in not setting forth the defendant's title, as was constantly done, because otherwise the defendant shews no right to contest the Crown's demand, who is entitled to rely on a *prima facie* case set up against a weaker title, and which cannot be merely negatived, but must be defeated by proving a better. He then urged, that as the Crown was not bound by any of the other statutes, which affected the subject's right, as the statutes of Frauds, Bankrupts, &c. so it was not by this statute, that even as between subject and subject, the statute of Limitations had been considerably relaxed by the construction put on it by the Courts: and that where debts would have been otherwise barred by its operation, it had frequently been held that a party suing in another right, acquired after the period of limitation had elapsed, was not bound by the statute. And he cited the case of *Karrer v. James* (Willes's Rep. 259), and *Lord Middleton v. Forbes*, and the other cases there cited, in notis, as instances where it had been determined, that in case of a newly-acquired right to sue, as [26] that of administrator or executor, where the action was commenced

in a reasonable time, no disability could be pleaded. He then adverted to the case of *Halsden v. Harridge* (2 Saund. 61), and the numerous authorities collected in the notes of the learned annotator on that case, in support of the same position. Here, he submitted, the Crown having become entitled to the debt, the plea of the statute (which admitted the debt) was no bar to the Crown, who was entitled to advantages denied to private plaintiffs—that the Crown had sued immediately—and that it did not appear by the record whether the Crown's debtor might not have been beyond seas, or in other circumstances, putting him out of the operation of a restraining statute, the principle of which has never been encouraged in Courts of Law to its full literal extent.

[On this part of the case, the Court suggested, that the Crown might have replied the legal disability—and that the argument founded on the plea admitting the debt would apply to a plea of release: and Mr. Baron Garrow observed, that he remembered it to have been remarked by Lord Kenyon, that the defence of the statute of Limitations was by no means generally dishonourable, as some persons supposed: and that if this plea were demurrable, no man could safely burn a receipt at any time.]

It was then submitted that, unless the plea were a good bar, the Crown could not be called [27] on to reply, and that the Crown has a right to be enabled to take issue on every point of the pleading—Stamford, 63—and that in the case of the Crown, many pleas which were available as between subject and subject, had been frequently held to be no bar; thus the common plea of set-off was not permitted where the suit was by Crown process.

[Wood, Baron, observed, that he by no means admitted that, and that when such a question should be brought fairly before the Court, it would be found to require deliberate consideration (c).]

He ultimately submitted that the object of the statute (which he observed was often productive of great wrong) was confined to the parties themselves suing *proprio jure*, and that the act was not meant to affect the rights of other persons which might subsequently arise: and that the Crown was not bound by the laches of its debtor.

Gaselee, about to argue in support of the plea, was stopped by

RICHARDS, Lord Chief Baron. The cases which have been cited of executors, administrators, and *femes covert*, are within the statute, and have been allowed to be so by equitable construction; but the present case is certainly not within any construction which can be put on it [28] (read the section). It has been put, that this plea admits the debt, but I do not think that that is a necessary consequence of it; and in answer to what has been said of the injustice done by operation of this statute, I say that infinite injustice has been prevented by it, and so it appears my Lord Kenyon thought.

[His Lordship adverted to the pleadings.] I admit, that as between the Crown and its immediate debtor, this statute has no application. But in a case like this, where the question is what debt was due from the defendant to the Crown's debtor, the rule is very different; for the Crown is only entitled to its debtor's right, and cannot create or revive any right in the person of its debtor, if none ever existed, or it has become extinct. In this case, nothing could have been recovered by the debtor of the Crown against this defendant if the statute had been pleaded: I therefore consider that it is also a good bar to the suit of the Crown, who stands precisely in the same situation as its debtor, and that this is an honest plea, which therefore the law allows. If the Crown could thus put its debtor in a better situation than he was in before, by such a proceeding as this, the consequences would be monstrous before the passing of the late statute, and the mischief would have been incalculable.

I am therefore of opinion that this is a good plea.

[29] GRAHAM, Baron absent.

WOOD, Baron. I entirely concur in the opinion which has just been delivered. It has been urged that the statute of Limitations does not bind the Crown: and that proposition properly understood is true, that is, the Crown is certainly not bound by the statute, so as that it might be pleaded in bar by its immediate debtor. But in this case, the claim of the Crown is only a derivative right, and it must therefore stand in the same situation as its principal. This plea would have been a bar to the

creditor's claim, and so it would to an action by his executor or administrator; and the Crown can have no better right than the original creditor, or his representative.

It has been said that this plea admits the debt. Be it so; still it is only an admission of the existence of the original debt, and to that the plea is as much a bar as if a release had been pleaded and given in evidence, yet that also would have admitted the original debt, but it would have barred the claim.

Then it was contended the Crown was not obliged to reply; but certainly if a release pleaded could be shewn to be fraudulent, it must have been replied to, or the fraud could not be proved, there is no other mode of avoiding a bar, whether it be a release or a positive statute.

[30] The cases which have been cited establish, that executors have a right to sue, although the statute may have run. That is so where an action has been brought by the testator within the six years; but otherwise executors have no right to sue, for the statute is a complete bar. Even in the former case they have been allowed to sue on the principle of an action being brought within time, before their right has accrued—and are permitted by an equitable rule of construction of the act, adopted by the Courts, that when a suit, which has been commenced in time, shall happen to abate by the death of the party, his representative shall have a reasonable time to revive the proceedings.

An objection was made to the form of this plea; but I think it right in point of form. That objection appears to have been founded on a notion confounding the seizure of this debt with the case of goods seized under an extent, where the party who comes in to claim must make title in himself to give him a right to contest the Crown's proceedings.

GARROW, Baron. I am of the same opinion. Disposed, to the fullest extent, to protect the rights of the Crown, charged as it is with important trusts for the benefit of the community, of which it is the representative, I think that duty best performed by not carrying its claims beyond the line prescribed by justice: and I consider that the privilege now attempted to be established, would be both inconvenient and unjust. This debt was [31] completely gone: then by a process, said, by a fiction, to be for the benefit of the Crown, it is attempted to revive the debt, and place the creditor in a better situation than the law permits. That is too gross an absurdity; and if we suppose the common case of one of the partners of a banking-house being a receiver-general, what extensive mischief might it not produce, when it is well known that the necessary acknowledgments are seldom interchanged on the settlement of banking accounts. It is right that the subject should take advantage of the principle of a statute, which, if it may in one or two cases through the laches of the party, have barred a just demand, yet has the constant effect of shutting out unjust claims founded on experiments made to take advantage of carelessness or misfortune on the chance of vouchers being lost or mislaid. Great care has been taken also by the Court, to prevent its working injury, and slight acknowledgments are sufficient to take proper cases out of its operation. I think, therefore, that this is a good plea in answer to the present claim of the Crown.

Per Curiam. Judgment for the defendant.

[32] BIRDWOOD v. M. HART AND ANOTHER. Friday, 5th June 1818.—Where a defendant has been arrested on an attachment for contempt in not appearing to a subpoena ad resp.: the Court will not grant a motion for a messenger to bring up the body, if he have given a bail bond to the sheriff, although the penalty be very inadequate to the occasion.—If there be an injunction restraining further proceedings in the action, the plaintiff should apply to the Court, under the particular circumstances, to be permitted to sue on the bail bond, notwithstanding the injunction, where the defendant has not complied with the condition by appearing.

[For former proceedings see 3 Price, 176; 5 Price, 593. For later proceedings see *infra*, p. 202.]

Wild moved for a messenger to bring up the body of one of the defendants, arrested on an attachment which had been returned *cepi corpus*.

The affidavit of the plaintiff's clerk in court stated that this action had been

brought to recover the sum of 2000*l.* and upwards; that the other defendant had caused an appearance to be entered to the writ of subpoena ad respondendum; but the defendant, M. Hart, had not appeared; that therefore an attachment was issued on the 31st October, 1816,¹ returnable 6th November, under which the defendant was arrested, and the sheriff had returned *cepi corpus*; that the defendant had afterwards attempted, by motion, to set aside the service of process for irregularity, but had failed (a); that many other actions had, at the same time, been commenced against the defendant, and other persons, involving the same question, some of which had been tried, and verdicts had been found for the plaintiffs; and that the attorney concerned for the defendants in this cause, was also concerned for the defendants in some of the causes which had been tried; that this cause, and some of the others, had been stayed by injunction out of the Court of Chancery till three days previous to the last assizes for [33] the county of Devon, when such of them as were ready for trial were proceeded in, and the plaintiffs obtained verdicts; that the plaintiff, being desirous that the cause should be tried at the next assizes, had, a few days since, applied to the attorney for the defendant M. Hart, requesting him to enter an appearance for him, which he had refused to do; and that without the aid of the Court, the plaintiff would be prevented from proceeding in the cause.

The motion was made on the authority of the case of *Cuthbert v. Aden* (Bunb. 82 *); but it appeared that the defendant had given a bail bond to the sheriff on being arrested.

The Court, therefore, held that the plaintiff's only remedy was on the bail bond, however inadequate to the purpose that might be, (being only in the penalty of 40*l.*) as it had satisfied the contempt: and they observed, that the plaintiff might have proceeded by *Venire*.

Motion refused.

[It having been suggested that the plaintiff could not proceed on the bail bond, there being an injunction in force at the time: the Lord Chief Baron observed that the plaintiff's course, under [34] such circumstances, was to have applied to the Chancellor to be permitted to sue on it, notwithstanding the injunction.]

BLAND v. BUCKLEY. Saturday, 6th June 1818. —A party in custody for a contempt in disobedience of the process of the Court, will not be discharged without undertaking not to bring an action, when, by his own device, the process had been served, in point of fact, on another person of the same name.—It is not the practice of this Court to serve a subpoena ad respondendum, by leaving the body of the writ with the defendant, where there is but one, as is the practice in the Court of Chancery. It is sufficient if a copy be left, and the original produced.

Clarke shewed cause against a rule which had been obtained by Treslove for setting aside the writ of attachment issued in this cause, should not be set aside, and why Thomas Buckley, the elder, in custody by virtue thereof, should not be discharged.

The applicant's family (as it appeared from the affidavits) had directed the officer who called to serve him with process, to the house of his grandson (of the same name), in the neighbourhood, and the subpoena (ad resp.) was accordingly served there, by leaving a copy with the wife, and shewing her the original writ. The defendant not appearing, he was arrested on an attachment for the contempt.

The defendant had not denied knowledge of the service, or the other facts, and on that point the Court were of opinion that the rule to shew cause ought not to have been granted in the first instance: and, treating the whole as an evasion, they refused to make an order for the liberation [35] of the defendant, unless he would undertake not to bring any action for the arrest and false imprisonment; and, counsel not having been instructed to give such undertaking, they

Discharged the rule, with costs.

Another objection, in point of practice, was taken to the mode of service, on the authority of a determination of Lord Hardwicke (*Anon.*, 3 Atk. 567), who held, that

(a) Vide ante, vol. iii. p. 176.

* The deputy clerk of the pleas being referred to, reported that there did not appear to have been any instance of such a motion, since the case in *Bunbury*.

service by leaving the label, and shewing the body, was not regular service, where there is only one defendant: for in that case the body itself should be left.

Per Curiam [having referred to the Register]. The officer reports, that by the practice of this Court, it is quite regular to serve this process as it has been served in the present instance, and they are aware of the different practice which obtains in the Court of Chancery.

[36] GAINSFORD v. BLACHFORD. Tuesday, 9th June 1818.—An answer to inquiries respecting a third person's character and responsibility, that the party inquired of would give him credit for any thing he wanted, does not warrant or support so general an innuendo as that he (the person referred to) believed such third person was a man in good circumstances, and fit to be trusted with goods on credit.—Nor will proof of such a representation of the character and circumstances of another, without fraud, support an action for damages, although it was also proved that the person so spoken of had been then recently discharged under the insolvent act, and that the defendant knew it.—Where the Judge is stopped by a jury in summing up in favor of one of the parties, declaring themselves satisfied, and finding immediately for the other, it is good ground for a new trial.

[See further, 7 Price, 544.]

Jervis had obtained a rule to shew cause why there should not be a new trial in this action for damages, for the value of goods furnished to a third person, on the credit of a reference to the defendant as to his character and responsibility, wherein the jury had given a verdict for the plaintiff, on the trial before the Lord Chief Baron, at the last sittings for Middlesex.

The objections taken to the verdict, on the motion, were, that the declaration was not supported by the evidence, and that it was contrary to the direction of the learned Judge.

The declaration stated, "that one Hofer, having applied to Brown, the plaintiff's agent in London, for certain goods of his principal, to be delivered to him on credit, had referred him, Brown, to defendant, respecting his character and circumstances, who, in answer to certain questions put to him, well knowing the premises, and that Hofer was in bad and insolvent circumstances, falsely, &c. informed said Brown, that he (Hofer) had been in partnership with a Mr. Meyer, as provision merchants; that they (the said Lewis Hofer and the said Mr. Meyer) had disagreed and separated; and that at that time the said Lewis Hofer was indebted to him the said defendant to the amount of between 700*l.* and 800*l.* [37] which, though the separation had caused a little delay in the settlement, had been most honorably discharged; that the said Lewis Hofer then owed him, said defendant, 50*l.* and upwards, and that he, the said defendant, was ready to give him, the said Lewis Hofer, credit for any thing he, the said Lewis Hofer, wanted, thereby then and there meaning, that the said defendant believed said Lewis Hofer to be a man in good circumstances, and fit to be trusted with goods on credit: by means and in consequence of which information so given by said defendant to said John Aquila Brown, as such agent as aforesaid, the said Aquila Brown, not knowing to the contrary, but believing therefrom that the said Lewis Hofer was a man in good circumstances, and fit to be trusted as aforesaid, afterwards, to wit, on the day, &c. and on divers other days and times between that day and the 19th day of November then next following, at, &c. as such agent as aforesaid, was induced to give credit to the said Lewis Hofer, and did then and there, as such agent of said plaintiffs, and on their behalf as aforesaid, sell and deliver to him, the said Lewis Hofer, divers goods on credit, to a large amount, to wit, to the amount of 500*l.* to wit, at Westminster aforesaid, in the county aforesaid, whereas in truth and in fact the said Lewis Hofer, at the time of the said defendant so giving the said information to the said John Aquila Brown as aforesaid, was in bad and insolvent circumstances, and not fit to be trusted with goods on credit. And whereas the said defendant was not ready to give the said Lewis Hofer credit for anything he wanted. [38] And whereas, in truth and in fact, the said defendant then and there well knew that the said Lewis Hofer was in bad and insolvent circumstances, and not fit to be trusted with goods on credit."

There was a second count, charging that the defendant, intending to deceive, &c.

falsely, fraudulently, and deceitfully, then and there asserted and represented to said John Aquila Brown, then and there being the agent of said plaintiffs, on that behalf, in substance, that he, the said John Aquila Brown, as the agent of said plaintiffs, might safely trust and give credit to said Lewis Hofer in that behalf, and that he the said John Aquila Brown, as such agent as last aforesaid, might safely sell and deliver to said Lewis Hofer, goods, wares, and merchandize, upon trust and credit, by means of which said last mentioned false, fraudulent, and deceitful assertion, &c.

The defendant pleaded the general issue.

The Lord Chief Baron reported, in substance, that the first averment in the declaration only had been proved, and that the representations alleged to have been made by the defendant as to the responsibility of Hofer, had not been falsified—that being therefore of opinion, that the plaintiff had not made out such a case as entitled him to the verdict of the jury, he was directing them accordingly, when the jury interrupted him, by saying that they were satisfied, and his Lordship [39] having ceased to proceed with summing up the evidence, they immediately returned a verdict for the plaintiff. It had also been proved that Hofer had recently before the time of the representation mentioned in the declaration, been discharged under the insolvent act, and that the defendant not only knew it, but was actually one of his creditors at the time, and had, as such, received the necessary notice of the insolvent's intention to apply for his discharge.

Chitty, shewing cause, submitted, that as the action, which was in the nature of deceit, had been bottomed on the *suppressio veri*, and not on the *allegatio falsi*, the plaintiff's case had been proved, and he was therefore entitled to the verdict which he had obtained, on the authority of the following determinations, *Pasley v. Freeman* (3 T. R. 51), (where mere falsehood, whereby the plaintiff was deceived into a loss, without benefit to the defendant, or collusion with the person benefited, was held sufficient to maintain the action), *Eyre v. Dunsford* (1 East, 318), and *Hutchinson v. Bell* (1 Taunt. 558). Therefore, as it had been proved that the defendant had knowledge of a fact which, if he had communicated, would have prevented the credit which he had caused, by what he did communicate, to be given, he had, by having undertaken to answer the enquiries fully, as he had answered them in part, rendered himself liable to the plaintiff for damages in this sort of action.

Jervis was stopped by the Court.

[40] RICHARDS, Chief Baron, was absent; sitting in Equity in the Exchequer Chamber.

GRAHAM, Baron, was absent.

WOOD, Baron. This is too extensive an inuendo clearly, and by no means warranted by the speeches attributed to the defendant, nor is there any thing in the evidence to prove that the defendant intended a fraud on the plaintiff, by the representation of the character of the defendant; and unless the declaration be proved, this action cannot be maintained.

GARROW, Baron. This is certainly a most unsatisfactory verdict. Every one must know that there may be, and frequently are, cases in which a man who has been discharged under an insolvent act, where it is the consequence of inevitable misfortune, may still be thought trustworthy by many who know him, from a confidence in his honesty, and his skill and industry in trade. Then the inuendo is by no means borne out, or the substance of the declaration proved. But I do not think it necessary to go into those questions, where I find the judge interrupted by the jury in summing up, and about to direct them as to the representations proved not being sufficient in law to maintain the action, and they having thus misled the judge, give a contrary verdict. I cannot but think, that that alone is a sufficient ground for granting a new trial.

Rule absolute.

[41] IN THE EXCHEQUER CHAMBER. (IN ERROR.)

DRIVER ON THE DEMISE OF FRANK v. FRANK. Tuesday, 9th June 1818. — Construction of devise. — Devise to B. F. (having no children at the time of the testator's death) for life, remainder to the "second, third, fourth, and all and every other the sons of B. F. (except the first or eldest son)," successively in tail male — with remainder over to F. S. is contingent only till B. F. have two sons born both living

—not till his death. As soon as B. F. had two sons in esse at the same time, it then became vested : not to be divested by any subsequent changes in the family of B. F. —Therefore where B. F. had several sons, some of whom were in esse together, and they all afterwards died without issue, except the youngest, who alone was living at the father's death, such son was held not to be the first or eldest son within the meaning of the exception introduced into the devise : for he took a vested interest in remainder, when he became the second son of his father (living an elder son), which interest would vest in possession on his father's death, notwithstanding he should then have become his father's only son living, by the death of his brothers, for their death did not divest his vested interest.—The exception introduced into the will does not afford such a plain indication of the testator's intention that the devise should pass from a younger son of B. F. in the event of his becoming the eldest or only son, as to give it that effect in legal construction.

[S. C. 8 Taunt. 468 : 2 Moore, C. P. 519, affirming 3 M. & S. 25. Not applied, *Windham v. Graham*, 1826, 1 Russ. 347. Distinguished, *Ormonde v. Wandesford*, 1839, 1 Ir. Eq. R. 252. Observations approved, *Bird v. Luckie*, 1850, 8 Hare, 307. Considered and explained, *Radford v. Willis*, 1871, L. R. 12 Eq. 110, reversed L. R. 7 Ch. 7. Referred to, *Wharton v. Barker*, 1858, 4 K. & J. 503 ; *Birmingham v. Tuite*, 1872, Ir. R. 7 Eq. 223, affirmed 1875, L. R. 7 H. L. 634.]

On the trial of an ejectment brought by the plaintiff, in error, against the defendant, before Mr. Baron Wood, at the Summer Assizes, at York, 1812, the jury found a verdict for the plaintiff, subject to the opinion of the Court, on a case which was afterwards turned into a special verdict, finding the following facts :—

“That Margaret Frank, widow, being seised in fee of the premises, &c. by her last will and testament, in writing (12th day of November, 1765), appointed, limited, gave, and devised, all that, &c. (part of the premises), unto and to the use and behoof of her sister, Dame Catherine Standish, for and during the term of her natural life, upon the condition therein mentioned, with [42] remainder unto and to the use of her (testatrix's) niece Catherine, the wife of Bacon Frank, for and during the term of her natural life. She also appointed, limited, gave, and devised, certain lands and premises to trustees, for and during the term of ninety-nine years, to be computed from the time of her decease, if her said niece should so long live, upon trust, to pay and dispose of the clear rents and profits of the said lands, &c. to such person or persons as her said niece should direct and appoint, by way of pocket-money for her during her said husband's life, and in augmentation of her jointure after his decease, in case she should survive him.

“And as for and concerning all the said premises above mentioned, from and immediately after the determination of the several estates and interests therein before limited and devised, in and concerning the same, and also as for and concerning all and singular her manors, &c. &c. real estate whatsoever, as well freehold as copyhold, from and immediately after her (testatrix's) decease (except as therein is excepted) she devised as follows : I do hereby appoint, limit, give, and devise, the same, and every part thereof, charged unto, and to the use and behoof of Bacon Frank, for and during the term of his natural life, without impeachment of waste, and from and immediately after the determination of that estate, to and to the use of the said trustees, and their heirs, during the natural life of the said Bacon Frank, in trust, to preserve and support the con-[43]-tingent estates hereinafter limited, from being destroyed or defeated, and for that purpose to bring actions and make entries as occasion may require, but nevertheless to permit and suffer the said Bacon Frank, and his assigns, during his natural life, to take the rents and profits thereof to and for his and their own use and benefit : ‘And from and immediately after the decease of the said Bacon Frank, then to and to the use of the second, third, fourth, and all and every other the son and sons of the body of the said Bacon Frank, begotten or to be begotten on the body of my said niece Catherine, his now wife (except the first or eldest son) severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of every such son and sons (except of the said first or eldest son) lawfully issuing, the elder of such sons, and the heirs male of his body, being always preferred, and to take before the youngest of such son and sons, and the heirs male of his and their body and bodies issuing : And for default of such issue, then I do appoint, limit, give, and devise, all and every my said manors, &c. and real estate

whatsoever, as well freehold as copyhold (*except as before excepted*) unto and to the use and behoof of my godson Frank Sotheron (the present lessor of the plaintiff), youngest son of William Sotheron, by my niece Sarah, his now wife, for and during the term [44] of his natural life, without impeachment of waste, and from and immediately after the determination of that estate to and to the use of the said trustees, during the life of the said Frank Sotheron, in trust, to preserve, &c. and from and immediately after the decease of the said Frank Sotheron, then to and to the use of the first, second, third, fourth, and all and every other the son and sons of the body of the said Frank Sotheron, lawfully begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of every such son and sons lawfully issuing, the elder of such son and sons and the heirs male of his body being always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing—with divers remainders over, the ultimate remainder being to the use and behoof of her nephew and three nieces, Sir Frank Standish, Bart. Sarah, the wife of the said William Sotheron, Elizabeth, the wife of Robert Ramsden, and Catherine, the wife of the said Bacon Frank, and to their respective heirs and assigns for ever, to take both freehold and inheritance as tenants in common, and not as joint tenants.

“That there is a proviso in the will, that the tenant in possession for the time being of the estates devised, shall assume and use the surname [45] of Frank only, which has been accordingly done by the said Frank Sotheron in the said will named, who is now Frank Frank, the lessor of the Plaintiff.

“That the testatrix died on the 1st of June, 1766, without, &c. and that the said testatrix’s sister, Dame Catherine Standish, died many years ago.

“That Bacon Frank, the tenant for life in the said will named, had issue by his said wife four sons, that is to say, Richard, born in 1768, who died in 1769; Bacon, born in August, 1770, and who died without issue in 1789; Edward Richard, born in 1777, and who died in the same year; and Edward Frank (the present defendant), who was born on the 6th day of March, 1780, and who is now living.

“That the said Bacon Frank, the tenant for life, died in 1812, leaving the said Edward Frank (the defendant) his *then only son him surviving*.

“That the said Catherine, the wife of the said Bacon Frank, died in his life time.

“That at the time of making the said will of the said Margaret Frank, the said Bacon Frank, the first taker of the said devised estates, was in possession, as tenant in tail, of large freehold estates in the county of York, of considerable annual value, and tenant in fee of other estates; [46] and that at that time William Sotheron, the father of the said lessor of the plaintiff, was in possession, as tenant in fee of part, and as tenant for life, with remainder to his eldest son in tail, of other part of estates of considerable annual value.”

When this case had been argued at the bar, in Serjeant’s Inn, by Richardson for the plaintiff, and Holroyd for the defendant, the Court of King’s Bench ordered it to stand over for a second argument, and in Michaelmas Term, 1813, it was re-argued by Park for the plaintiff, and Topping for the defendant. The Court then took time to deliberate, and, in Trinity Term following, they gave judgment for the defendant (*vide* 3 Maul. & Sel. p. 29). Not being unanimous, they delivered their opinions *seriatim* at considerable length. Dampier, Bayley and Le Blanc, Justices, holding that the defendant below was entitled to judgment, and Ellenborough, Lord Chief Justice, that judgment ought to be given for the Lessor of the Plaintiff.

The Lessor of the Plaintiff then brought a writ of error, and the case came on for argument in this Court, in Trinity Term (second time) 1815, when

Richardson again appeared for the Lessor of the Plaintiff, and

Holroyd for the Defendant.

[47] This Court also desiring a second argument, it was re-argued in Easter Term, 1818 (28th April), by

Scarlet for the Plaintiff, and

The Solicitor General for the Defendant—when it again stood over for judgment.

[So important a case, which elicited so much difference of opinion on the Bench, the Reporter is desirous of rendering as complete as its intrinsic importance and the extraordinary discussion and deliberation bestowed on it appear to demand—and it would not be doing justice to the questions to omit the substance of the arguments,

and a brief notice of the authorities cited in support of the several propositions: especially as the learned Judges in this Court have not, in delivering their judgments, adverted particularly, or but slightly, to either; but have rather grounded their opinions on their own individual construction of the tenor of the will, and the question of inference of intention, treating it almost as if it were a case of first impression.

For the Plaintiff, in error, it was contended that in order to give effect to the devise in the will, and to the obvious and manifest intent and meaning of the testatrix, as apparent both from the particular terms of the clause and the general tenor of the will,

[48] Either the limitation to the second, third, fourth, and other sons of Bacon Frank, must be construed to have been meant to be what, in legal construction it may be, a remainder contingent, till it should be known and ascertained which of the sons of Bacon Frank would be, at the time when it was intended to vest, the second son of his father then living:

Or that if it were not a contingent but a vested remainder, it became divested from subsequent incapacity to hold it, in the event of a younger son becoming *eldest son* of Bacon Frank within the terms of the exception.

The Plaintiff's counsel then adverted to the language of the devise, and the facts and events which had taken place, noticing particularly (with a view to establish what was submitted to be the manifested intention of the testatrix, on which this whole question was admitted to depend) that the will was made so long ago as 1765; that the testatrix had then two nieces married to gentlemen of fortune and consideration, one of whom had children at the time of making the will, the other having none at that time, his first child being born some years after the will was made, and after her death; from which it was inferred that she could not therefore, with respect to the first objects of her bounty, have had any personal predilection, but must have been actuated by other motives than preference, when she gave this estate, in exclusion of the first or eldest, [49] to the second, third, fourth son, &c. of Bacon Frank.

The first and most material question, therefore, (it was submitted) would be, what was her reason for thus excepting a first or eldest son not then in esse?

And it was urged that, consistently with common sense, and the most limited experience in questions on matters of this sort, there could be no assignable motive for her excluding all possibility, of the first or eldest son of Bacon Frank succeeding to the estate, unless to prevent the two estates from being united in the family of the same person. She knew that the estate belonging to the Frank family was a large estate; and that both families in fact were possessed of considerable landed property. She must therefore have been looking to the probability that the eldest son of Bacon Frank would be amply provided for, and her intention must have been to found a new family, to be endowed with this property of her's, to be selected undoubtedly in the first instance out of the Frank family; but if that branch failed, out of the Sotheron family; and if the estate should come to one of the latter, he was to take the name of Frank, which the lessor of the plaintiff had done. And that that was clearly her intention, this will being read to any one of the least intelligence other than a lawyer, would not admit a shadow of doubt.

[50] There are many cases in the books where the Court have inferred, from the tenor of a will, an intention to found * a new family, and have given effect to it. In the case of *Fen d. Lourdes v. Lourdes* (4 Bur. 2246), the estate was held to pass over, on the second son (to whom it had been limited) becoming the eldest, to prevent the union of the two estates.

It was admitted, that the words were stronger in that case than in the present. Here, however, the intention to create and endow a new family, and prevent the union of the two estates, is clear and manifest: although (it was suggested) in contending that that intention was not made clear, intention had been confounded in the argument with motive, and it had been treated as if because the motive was not expressed, the intention was therefore not manifest.

* By which phrase Lord Ellenborough, in his judgment in the Court below, says, "he (Lord Mansfield) must have meant the constituting a new fund of provision to be enjoyed in succession by a new and distinct class of persons from the heirs of the family; the expression 'a new family,' imports that there existed another family fund descendible in a different course, &c. &c."

Then, taking that to have been the intention of the testatrix, such intention may be carried into effect in two ways, as had been already observed, namely, either by holding that this was a con-[51]-tingent remainder not vesting until the contingency was destroyed, or that it vested in interest liable to be divested by the events that have happened—Submitting, first, that it should be considered to be a contingent remainder, for as it was her intention that the person who de facto should be the eldest son, neither could have any interest in the estates during the life of the tenant for life, because till his death it was uncertain who would be entitled to take it under this devise, or, in other words, who would be at that time the person answering the testatrix's description of the intended devisee.

And on that part of the case, it was urged that the words of the exception were to be applied to the *first* or *eldest* son in esse, and not strictly to the first *born* or *maximus natus* only—to either of the sons who should, at any time before the contingent should be reduced to a vested interest, become the eldest; that stronger words than these, as expressive of the *first born* son, and in instruments less flexible than wills, have received a meaning of greater latitude than their strict and literal signification. In Fitzherbert's Nat. Brev. (82), (of the writ *De auxilio ad filium suum militem faciendum vel ad filiam maritandam*) the words "*primogenitus filius*," as applied to the eldest son to be made a knight, in respect of whom the lord was to have aid, were construed to extend to the primogenitus then alive, for (as it is there said) he ought to be heir apparent. In Selden [52] Titles of Honour (vol. iii. part 2, p. 777), referring to *The Prince's case*, 8 Co. 1, the same word is so construed.

In *Lomas v. Holmden* (2 P. W. 244), as decided by Lord Hardwicke, the same latitude of construction was adopted. It was there held, that a testatrix's intention might be collected from the circumstances, and the whole tenor of the will, although he certainly says, that there must be such words in the will as would either express or warrant an implication of that intention: *Beale v. Beale* (1 Ves. sen. 291).

The case of *Trafford and Wife v. Ashton* (2 Vern. 660), was then adverted to by anticipation, as a case of somewhat adverse bearing, and was distinguished from the present, because the words there used were more peremptory and less flexible than those of this will, and therefore not capable of any other construction than was given to them by the Court.

As to "the first or eldest," those words mean here such sons as shall be first or eldest for the time being. They mean, as in the case of the eldest son to be made a knight after fifteen, although not the first born,—if his elder brother is dead: or in that of the lord's eldest daughter, to be married after she has attained the age of seven years, although she may not be the first born, yet if she is the eldest daughter living, it is sufficient—they mean in short that the first or eldest son for the time being is to be excluded.

[53] In that view this devise must be considered as contingent till the death of the tenant for life should ascertain the question of who would then be the eldest, which, till that time, must remain doubtful. Not, however, that children of deceased elder sons are to be excluded, for they by representation would stand in loco parentis.

To the argument urged at the bar, and adopted by part of the bench—that great inconvenience would result from holding this remainder to be contingent; for that then the children of an elder son dying would be passed over and disinherited—it was submitted, that that was not well founded; for in law a remainder may be contingent, and although the remainder-man die before the contingency happen, his family will not be excluded if the life estate, which is to support the contingent remainder, continues. In illustration of that position, reference was made to *Fearn's Treatise on Contingent Remainders, and Executory Devises*, page 364, ch. 6, sect. 4, where many cases are collected and adverted to in support of it—and *Wood's case* (1 Rep. 99)—the text of Co. Lit. 378 b. *Wheat v. Lower* (Pollexf. Rep. 51), and *Fitch v. Edwards* (P. W. 372), were cited to the same point.

[Gibbs, C. J. Observed, on this part of the case, that it could not be disputed that generally a contingent remainder is transmissible.]

[54] On the other hand it was urged that, from the argument that the estate vested indefeasibly in the second son, this consequence would follow; in case the eldest son had died a few months before the second son was born, or at least in case he had lived only a few months after a second son was born, the second son would take the estate as a vested interest, and keep it, whereas it cannot, from the tenor of this will, be

conceived that it was the intention of the testatrix that if there were a second son living for only a few days during the life of the eldest son, that the estate should vest in him, and descend to his heirs, who, if he or they should live, would also be entitled to the estate of his father.

Then, regard being had to the issue, it was submitted that the difficulty suggested by the supposition that there had been in fact an eldest son, born of Bacon Frank who had had issue, and died, and after his death his father had another son born to him, that second son or his children would not have taken the devised estate, and would have been excluded from the paternal estate, and a third son, afterwards born in the life time of the second son, would be entitled to take the devised estate as being the second son of Bacon Frank would be got over; and it was urged besides, that such a case was much too remote to have been contemplated by the testatrix.

Then, proceeding to the other point (admitting that this was a vested interest at one time), it was [55] submitted, that it would be divested afterwards, on the coming into esse of particular persons intended to take in certain events: and it was denied that the law was adverse to the divesting of vested interests, or had any preference for such interests as had been said on the former occasion.

In Fearn's Treatise it is shewn, with much learning and research, that vested estates may be divested on subsequent contingencies, and that for the whole, or a moiety, or nineteen-twentieths, or any proportional part: or they may be divested by a failure of capacity to hold, by one coming into esse with a better title, as well as from other causes.

In *Chudwick and Wife v. Doleman* (2 Vern. 528), there was an appointment de facto to the second son, who afterwards became the eldest, and it was held, that it was a defeasible appointment, and that, although he was a person capable of taking at the time of the appointment, yet that was sub modo, and upon a tacit or implied condition that he should not afterwards happen to become the eldest son and heir.

In the present case, it was necessary, that at the time of the death of the tenant for life, there should be a second son: but there was then no second son, the only surviving son having become the eldest son by the death of his elder brothers; [56] whereas the capacity in the younger son to take should have continued up to the time when the remainder should fall in—up to the time of enjoyment; but at that time his capacity to take had failed, and if the limitation had before vested, it then became divested, according to the cases of *Chudwick v. Doleman* and *Lord Tenham v. Webb* (2 Ves. sen. 208,—and *Duke v. Doidge*, in notis, 203): and therefore the estate must go over to the Sotheron branch of the family, according to the construction proposed to be put on this will, which construction violates no rule of law, but carries into effect the manifest intention of the testatrix.

It was therefore submitted, that the plaintiff in error was entitled to the judgment of the Court.

For the defendant, on the other hand, it was urged that he took a vested interest in remainder eo instanti that he became a second son, living an elder, and that it had not been divested by any of the events which had happened, whatever might have been in fact the intention of the testatrix, and however probable her wish to exclude from the benefit of the devise the person who was to inherit the fortune of the Frank family might be, while there is no such intention, expressed on the face of the will, or capable of being inferred from it by necessary implication. She [57] might or might not advert to the probable circumstance of the eldest son dying leaving issue, or not, and the second son succeeding to the estate of his father, to whom she had given this estate, but nothing appears in the will sufficiently expressive of her intention to exclude the second son in case of his becoming the eldest son.

According to the construction attempted to be put on it by the plaintiff in error—if the second son were to lose the estate given by the will, in the event of his becoming the eldest, by his elder brother dying leaving issue, he and his issue would lose both the estates, and that, certainly, whatever might have been the intention of the testatrix with respect to keeping the two estates separate, would be directly contrary to her express devise; for she clearly did not mean that in such an event he should lose the estate which had been given to him, as in that case the estates would have been kept separate, provided that were her intention. It was urged, that there would be great danger if the Court should proceed on any probability, however apparently well founded, in giving a construction to this will, framed on the particular circumstances

which are supposed to have influenced the testatrix, whilst, after all, she might never have contemplated any such thing: and therefore it has been always held, that the highest degree of probability will not justify the Court in adding to a will, or supplying omissions. And on that point the case of [58] *Chapman et Al. ex dem. Oliver v. Brown et Al.* (3 Bur. 1626), was cited, and *Perrin v. Blake* (Hargr. Tracts).

In the present case (it was submitted) the intent of the testatrix can only be guessed at, and that it is only by conjecture that it can be supposed or conceived that the testatrix had any such intention to keep the two estates separate as has been attributed to her.

And further, it was contended that, even supposing that she had expressed her intention on the face of this will, and that she had stated that her wish was that these two estates should not unite, but be kept separate, it could not control the quantity of legal interest, which she had given. The Court cannot consider a devise as creating a vested divesting estate or interest, according to the circumstances of facts to happen subsequently to the period of making the will, but it must be taken to be vested or contingent, according to the then existing state of facts, subject nevertheless to the acknowledged and established rules of law, (*Doe, ex dem. Long v. Laming* (2 Bur. 1100)). It is one of those rules, that remainders are always to be considered as vested in preference to being contingent, and that as to such as are contingent, as soon as a person comes into esse who is capable of taking the remainder, the contingency is destroyed, and the remainder becomes vested*. [59] There is no contingency on the face of this will after a second son has once come into esse living a first. The estate is given to the second son, in the order of birth, the moment a second son, who de facto shall answer that description, comes into existence, and in the present case it is not necessarily after the death of his father that this devised estate is to be given to the second son: and any such qualifications of the devise as has been assumed, ought to be most clearly stated on the face of the will before they can be given effect. On the coming into esse of a second son, the remainder vested, and being vested it was not divested afterwards by his becoming the eldest son, or by any of the subsequent events which, in this case, have in point of fact happened. In *Humphreston's case* (2 Leon. 219), the doctrine of estates once vested not being divested by the coming into esse of other persons, is plainly recognized.

This property was not to go to the Sotheron family till the failure of all the issue of the Frank family, excepting only the eldest son, and though there may be something conditional in the words, yet the remainder notwithstanding takes place presently. That rule of construction was applied in the case of *Conden v. Clarke* (Hobart, 30, 1).

[60] In the case of *Doe, on the demise of Comberbach and Others, against Sir R. Perry* (3 T. R. 484), and also in *Doe, ex dem. Willis v. Martin* (4 T. R. 39), and *Doe, ex dem. Tanner v. Dorrell* (5 T. R. 518), and *Ires v. Legge*, and other cases there cited, it has been determined and settled that Courts are not to proceed on conjecture; that a remainder shall be construed so as to vest rather than to be contingent; and that vested estates shall not be divested by contingencies having reference to the death of the particular tenant, although they may be subject, under certain circumstances, to open and let in other persons, who may be born afterwards. There are also many cases of what may be called collateral contingencies, — as where a preceding estate may be at an end before the remainder-man comes into esse, in as much as it might depend on a contingency whether he may or may not be capable of taking it in the life time of the particular tenant—where an interest may vest, although the estate is contingent. But in the present case the remainder is only contingent (if at all) in respect of the person to whom this estate is given. The testatrix meant that that person should take the estate who was the second son, but if the second son should die before the death of the tenant for life, supposing this a contingent limitation, his heir would not take, because he would not be a person coming within the meaning of this will. If the contingency, on which the estate is to take effect, be destroyed,

* *Cholmondeley v. Magrick*, Bro. Ch. Ca. 253, n. *Willis v. Willis*, 3 Ves. 51. *Hop v. Lord Clifden*, 6 Ves. 499. *Bromfield v. Crowder*, 11 N. R. 313, and *Edwards v. Hammond*, there cited. *Goodtitle, ex dem. Hayward, v. Whitby*, 1 Bur. 228, and the cases there cited. *Doe, ex dem. Hunt v. Moore*, 14 East, 601. *Doe, dem. Rothe v. Nowell*, 1 M. & S. 327.

there is [61] nothing to go to the heir therefore, because it is in that case given over to another.

Admitting all the cases cited from courts of equity to be rightly decided, it was submitted, that the present being a question of law, arising on an action of ejectment, founded on the effect of a legal limitation, equitable rules of construction could not be applied to its determination, and therefore decisions of courts of equity were not applicable, as was observed by Lord Hardwicke in *Heneage v. Hunloke* (2 Atk. 456)—and that there was also another distinction in this case, disposing of the whole of that class of cited cases from the courts of equity, because in those as in *Doe v. Perryn*, and the other decisions on that doctrine, the estate from necessity divested, or otherwise the effect of the instrument creating the remainder would have been destroyed; whereas there is no difficulty of that sort on the face of this will; for the present devise may be well carried into effect without any divesting ex necessitate of the estate which had been previously given. The same distinction was applied to the case of *Doe, ex dem. Willis and Others v. Martin and Others* (4 T. R. 39), and that of *Morgan, d. Surman v. Surman* (1 Taunt. 289), and *Doe, d. Tanner v. Dowell* (5 T. R. 518), in all which cases (it was observed) a power of subsequent appointment was given to the tenant for life, and in all of them it might [62] have been contended, that no estate in remainder vested till an appointment should have been made under the power so given.

There are some other cases which establish the same principle, where the limitation is to a person till he comes of age, and in the mean time to apply the rents and profits for his maintenance and education, and although those words are words of contingency, yet the law holds the interest to be vested, in order to prevent the mischief that would arise from holding them to be contingent.

As to whether the accident of the second son becoming the eldest son, can have any effect on this devise by construction of the words that are there used in divesting the estate, they submitted, that they must for that purpose be considered as riding over the whole limitation to the second, the third, the fourth, and every other son (except the first or eldest son) which is not only against grammar, but is not consistent with any grammatical construction, and is also directly contrary to the intention the testatrix must have originally had, and that it was besides absurd, because it would be nugatory.

As to the argument that the second son must not only be capable of taking when the remainder vested in possession, supposing it to be a vested remainder in interest, but that that capacity to take must continue till the time of enjoyment, it [63] was urged, that that was contrary to all the principles of law, and unsupported by any authority. All the cases tend to shew, that where an estate vests, it is not divested by death, and a fortiori it is not by the devisee not continuing to answer the temporary description under which he first took the vested interest.

The rule of construing wills according to the intention of the testatrix was denied to apply here in favor of the plaintiff; for the first object should ever be to see what the testatrix generally means by the will, and then to see whether there be words to express, or necessarily to imply, her meaning. If there be, the Court cannot model the will to meet supposed cases, depending on subsequent accidents and circumstances, the existence or chance of which she probably never had in her contemplation. When second, third, and fourth sons are adverted to, she probably did not consider the events which have since taken place, and if she had considered them, it is by no means clear that she would have done what she might have been advised to have done with a view to meeting any such events.

The sole question, it was then submitted, was shortly, what the testatrix had in effect and by legal operation of the terms employed by her, given by this her will, leaving the rules of law to determine the consequences of the events which have since taken place.

[64] On the whole, therefore, it was urged that the estate devised having once vested in the defendant in error, was not divested by any subsequent event, and that therefore the judgment of the Court below ought to be affirmed.

In reply, it was urged that however there may be in some cases an inclination to vest estates which does not obtain in others, yet if they are capable of being divested when the family purposes of the parties, expressed in a voluntary deed, so require it, they may be divested, as in the case of *Chudwick v. Doleman*, and that class of cases where it was admitted that a vested interest became divested ex necessitate. Here,

on the same principle, the estate is divested *ex voluntate*—a rule of construction quite as well founded, and therefore entitled to equal respect.

The description of persons who were successively to take under the devise in this will, must be either a temporary or permanent *designatio persone*: and to construe this devise according to the will of the testatrix, and her obvious intention, it should, in this case, be taken to be the latter, and therefore not to be absolutely determinable till the death of the tenant for life, keeping in mind that throughout this whole case regard must always be had to the issue of the several sons who should die, and their representation of their ancestor; for though, till the appointment takes effect, the estate does not become vested, yet the interest is transmissible to representatives, sup-[65]-posing such deceased children had left issue. And it was urged, that where circumstances might be changed by subsequent events, the purposes of the testatrix, which should be made to depend on such events, could not be effected, unless the capacity to take should be held to be contingent in the primary object of the limitation.

As to the cases that were cited, being said to be distinguishable from the present, because there could be no enjoyment till the death of the parent—it was answered, that here also there could be no enjoyment till the death of the tenant for life, and that such an analogy was sufficient to support the argument which had been founded on them. With respect to the cases of collateral contingencies not being contingencies connected with the temporary description of the party who is first to take, and where the death of that party before the contingency happens, destroys the contingency with regard to him—it was insisted, that such cases would not apply here, if regard be had to the issue of deceased children.

To the grammatical argument, founded on the words of the will, it was answered, that an inconsistency with the rules of grammar in a will would not get rid of these two emphatic exceptions, even if they were absurd, for it is a very common error to introduce an exception when there is no proposition before stated, to which it can apply. By beginning with the second son, in fact the eldest son was excluded, and the exception of first or eldest [66] son, which is afterwards introduced into the will, was only used *ex abundanti cautela*.

The reply was concluded by strongly pressing that the intention of the testatrix ought to be carried into effect: and insisting that that intention was clearly manifest from the general tenor of the will, from which, if, even without express words, intrinsic evidence of intention could be collected, it would be sufficient to enable the Court so to construe it as to give that intention effect—citing the case of *Goodtitle, d. Sweet v. Herring* (1 East, 264), on that point,—and that such general intention ought not to be rejected, although it should happen to be inconsistent with some remote minor object with which it might by possibility collaterally interfere.

Cur. adv. vult.

There being still a difference of opinion in this Court, the several Judges present now delivered their reasons *seriatim*.

BURROUGH, J. [Having stated the special verdict, dwelling emphatically on the parts of the will distinguished by italics, as being those on which the questions turned.] Under these circumstances the case is brought before us, and we are now called on to say whether the judgment of the [67] Court of King's Bench has been erroneous or not.

The first question is, whether the remainder limited to the second and other sons of Bacon Frank, vested in the defendant Edward Frank, in his father's life time, or remained contingent till his father's death. If the estate can be shewn to have once vested, I see no ground for contending, from any thing which appears to be expressed throughout the whole of this will, that it was subsequently divested by any thing which happened afterwards.

I have been much governed in the opinion which I have formed on this case by the consideration of the very accurate and technical manner in which this will has been framed. And my reason for stating the whole of the will is, because on the face of it the arguments arise which have occurred to me in favour of the defendant in error: while, on the other hand, I can find nothing there to support the case of the plaintiff, or any argument favourable to him, without calling in aid extraneous matter. And here I feel I cannot do better than employ the language of one of the Judges of the Court of King's Bench, (Le Blanc, J.), "Supposing that we could be satisfied that it was the intention of the testatrix to keep the two estates separate, and that they

should never be united in the same son of B. Frank, of which I cannot satisfy myself, still I can find no words in the will sufficient to carry such intent into effect; for whatever the [68] intent be, if there are not words in the will to warrant it, either express or implied, it cannot have effect." [His Lordship also adopted other parts of the same learned Judge's reasoning in the earlier part of the judgment, as reported in 3 M. & S. which proceeded on the absence of any apparent ground for inferring the intention contended for by the plaintiff in error.]

Nor can I (continued his Lordship) here avoid adverting to what was said by another of the Judges of the Court below (Mr. J. Dampier), on one of the principal arguments urged for the plaintiff in error. "It has been attempted (says that learned Judge) to assist this supposed intention by a distinction between the words *first* or *eldest*, as not being synonymous. I must confess I did not very much feel the force of this argument, and I am not sure that I understand all the bearings of it: my opinion, however, is that it fails in its foundation, and that *first*, or *eldest*, mean the same person; *eldest* being only another description of *first*." In adopting that construction I entirely agree.

Then it was contended, for the plaintiff in error, that the remainder was divested out of the defendant in error, by operation of the excluding clause in respect to the *eldest* son. On the other hand it was argued, and as I think with irresistible force, that the remainder was untouched by the exception, and that is my opinion; for otherwise it would not be consistent with the [69] general tenor of the will, in which great caution is used, to exclude the first or eldest son, and him only, leaving the remainder limited to the other sons untouched throughout. And in a will so carefully framed, if it had been the intention of the testatrix to have given it that effect, it would not have been left to supposition and conjecture, but would have been expressly provided for.

On the whole, I am of opinion that this judgment ought to be affirmed.

First, because it is the rule of law that wills shall not be construed so as to have any effect not warranted either by express words, or manifest implication of intention. And here there are certainly no words expressing, and—in my opinion at least—no ground for implying any such intention as is contended for by the plaintiff in error.

Secondly, because it is also a rule that as far as words may, without violence, be construed to vest interests, they shall not be considered contingent, unless a manifest intention to render them so, clearly appears; and therefore as there is nothing in this will to exclude the operation of that principle, I am of opinion that this remainder to the defendant vested in the life-time of his father.

The consequences of a contrary opinion I have not overlooked, but they are so fully considered in the delivery of the judgment below that I do not think it necessary now to enter into them more [70] at large. It will be sufficient for me to say, that I think the judgment of the Court of King's Bench on this case correct.

PARK, J. had been of counsel for the plaintiff.

WOOD, Baron.—On the best consideration which I have been able to give to this case, I cannot agree in affirming the judgment of the Court below. I shall be extremely short in stating my reasons, and it might have been sufficient for me to say merely that I concur entirely with the Lord Chief Justice, whose judgment is very fully reported in Maule & Selwyn's Reports, where it appears that this question was discussed by all the Court, and therefore it may not be necessary that we should now give our opinion at great length.

I think it necessary, however, to state that I found my opinion on what appears to me to have been the clear intention of the testatrix, as it may be inferred from the words of the will.

I agree that the words of a devise are not to be construed by conjecture, but wherever a plain intention can be clearly collected from the whole tenor of the will, if there be no legal objection to it, the law will give it effect. My argument in support of the opinion which I hold is founded entirely on the exception in the will as to the first or eldest son of Bacon Frank, which, although it has been already fully stated by my [71] Brother Burrough, I will read. [His Lordship read the excepting clause.]

Thus, having expressly provided that the eldest son of Baron Frank shall not take under the devise, she devises this estate over to her godson, the present defendant, by name. The whole question in the case turns on the effect and operation of

that excepting provision. And from that it appears to me to have been the obvious meaning of the testatrix to exclude the eldest son of Bacon Frank, whichever of his sons might ultimately become the eldest, from taking under this devise; because he would then be entitled to the estate of his father, which she must have intended should not belong to the son who was to take her estate under this will. That being, as it appears to me, the manifest reason of the exclusion, and that it should be extended to the younger brothers in succession, as they should each in turn become the eldest and the probable successor to the estate of their father, and therefore, if all the elder brothers should die, the property devised was intended to pass over to the plaintiff in error, although a son of Bacon Frank should be living at the time of his death,—it cannot be conceived that the testatrix meant, under the description of the first or eldest son, to exclude only the first born. She could have no ostensible object for so doing. Those words are by no means synonymous. The first son means exclusively the first born, the eldest means [72] any of the sons who may become so by the death of elder brothers: and it would be idle to suppose that the framer of this will did not know that difference, or that he introduced the words “or eldest” into it, without intending that it should have some certain meaning; and in the devise to Sotheron no such distinction is made.

As therefore it could not be ascertained who would be the eldest son at the death of his father till that event should happen, the remainder was contingent, and was not intended to vest till that time; for if it did, it would defeat what I consider to have been the manifest intention of the testatrix. In the common limitations in settlements, the words “eldest son” mean any one who may become so, and here there is an obvious intent apparent on the face of the will, explaining the reason why those words “or eldest” were used in the excepting clause. And if in the true construction of the words, they are applicable to the person who should be the eldest son of Bacon Frank at the time of his death, there can be no doubt that whichever at that time should answer the description of eldest son, he was not to be entitled to this estate, the necessary consequence would be, that the lessor of the plaintiff would be entitled to it, and that in conformity with the plain intention of the testatrix, according to the only sense and reason of the devise, and that intention is quite manifest also from the terms of the exception.

[73] As to the absurdities said to be the necessary consequence of such a construction of the will as the plaintiff contends for, by which a younger son might still become entitled to both estates, or the issue of a younger son dying would be deprived of both, it is not necessary to consider here how that may be; but admitting that argument for a moment, the answer is, that the person who drew this will did not call the testatrix's attention to such an event: if he had, she might perhaps have provided against it. In point of fact, however, she has not looked so far into futurity, but only to the case that has happened. That she did contemplate, and that she has provided for. And I am not for superseding a provision calculated to meet events which have actually happened, for the sake of providing against possible cases which have not in fact occurred.

It has also been said that there is an absurdity in the argument, that the remainder, if it vested at any time, was divested by the subsequent events; but I apprehend that there is nothing contrary to the rules of law in that. Considering it either as a contingent remainder, or if vested, that it was liable to be divested, if the obvious intention of the testatrix may be carried into effect, that intention must be the criterion by which we should be guided.

It was said in argument, that the law favours the vesting of estates, and that an interest is never to be considered as contingent if it may be considered as vested. That is an entirely techni-[74] cal rule, and is not conclusive in this case, where if the interest vested, it was subsequently divested, and that depends wholly on the intention of the testatrix, to be collected from the objects which she had in view in wording the devise, and from the general tenor of the will: for however untechnically words of legal import may be used by a testator, if they can be understood with reference to an apparent intention, the law gives them a corresponding effect. In this case (I repeat), when she excludes the first born or eldest son of Bacon Frank from the benefit of the devise, she clearly intended to exclude every one of the sons who should there after answer that description: and that intention can only be carried into effect by giving this estate to the lessor of the plaintiff.

GRAHAM, B. and DALLAS, J. were absent.

RICHARDS, Lord Chief Baron. Although I have considered this case with all the diligence which the importance of the question, and the circumstances under which it comes before us, demand, I have not been able to bring my mind to entertain a doubt upon it. It is contended that the limitation to the second and other sons successively of Bacon Frank was either a vested remainder, to be divested on certain subsequent events—or if not, that it was a contingent remainder to such sons, depending on the circumstances in which the family should happen to be placed at the death of Bacon Frank.

[75] I entirely concur in the opinion, that the intention of the testator must govern the effect of the words used by him in his will, but the main difficulty in all cases is to ascertain that intention, and in the course of my experience, I have often witnessed the great mischief of seeking the intention of testators out of the paper itself. In considering what was the intention of this testatrix, it is only necessary to have recourse to the expressions which she has used throughout the will, and if in any other intention which may be contended for, there should be found any absurdity, that may be opposed to any conjectural probabilities surmised in support of it.

Now let us consider the words of this will. [His Lordship read the words.] Here we have a clear intention expressed in words, that, subject to the life interest of Bacon Frank, a vested estate in remainder was to be communicated to his second, third, and other sons successively, with an express exception excepting what had been indeed already excepted by necessary inference: for a devise to a second, or other younger son, is of itself an exception of a first or eldest.

Then it has been argued, that if the limitation was a vested remainder, it might have been divested by subsequent events. There is no doubt that a vested remainder may be so divested, but then there must be words found in the will which are capable of giving such an effect to it, and of manifesting an intention in the [76] mind of the testatrix, that it should be so. Such intention must be signified. Now, I do not find any such words in any part of this will, and therefore I think it is impossible to contend, that this vested remainder was intended to be divested by any of the events which have happened.

The next question is, whether this is a remainder contingent till the death of the tenant for life? Now I find nothing from which I can consider it to be so; and to make it so we must introduce many other words than are to be found in this will. Some such words as these might have made the limitation contingent, "*I give my estate to the second, third, fourth, or other son of Bacon Frank, if he shall not have become the eldest son of his father at the time of his death, but if he shall, then remainder over.*" It has been said that the excepting clause has the effect of making the limitation contingent; but to give it that effect, we must carry it much further than the actual words warrant, or we must enlarge the terms of the exception, by adding the words, "*or such son as shall be the eldest living at the death of Bacon Frank.*" What the testatrix might have done if her attention had been called to the subject, is a speculation which we cannot now entertain.

It is incumbent on the plaintiff in error to carry the intention which he contends for, throughout the whole of the sons of B. Frank: and without dwelling on the absurdity already [77] alluded to, which would be one consequence of inferring such an intention from the words of this will, there is another instance which may be put. Suppose the tenant for life had died, leaving several sons, and immediately after his death his eldest son had died without issue—notwithstanding the intention imputed to the testatrix by the argument of the plaintiff in error, the second son would have both the estates, wherein there might possibly be some hardship: but I think that we have nothing to do with such speculations in considering the questions that arise on this case.

I entirely concur in the opinion that the judgment of the Court of King's Bench is right.

GIBBS, C. J. The respect due to the opinion of the learned Lord and the other Judges in this country who think with him, that judgment ought to have been given for the plaintiff in error, has compelled me to give this case my most anxious attention.

The question turns entirely on the construction to be put on the limitation of this remainder to the second and other sons of Bacon Frank.

At the time of the death of the testatrix, Bacon Frank had no son. At that time,

therefore, the remainder was unquestionably contingent. So it was until a second son of Bacon Frank was born : but as soon as there was such a second son born, living an elder brother, that is, as soon as [78] there was a person in esse capable of taking under the devise, the remainder vested in interest.

Then it is said, that if it vested on the coming in esse of a person capable of taking, it was divested by his becoming the eldest son of his father, on the death of his elder brother. By the general rule of law, this would have been a vested interest, and if so, it cannot be divested without an express and special clause for that purpose, or something indicating plainly an intention to provide that it should be left contingent till the death of the particular tenant.

The question, therefore, turns on the existence of such an intention in the contemplation of the testatrix, and the general rules of law with respect to construction of wills, according to the intention of the testator, must be applied to it in our inquiries on that subject.

It has been stated to us in the argument for the lessor of the plaintiff, that it was the intention of the testatrix to keep the two estates separate, and that they should not both belong to the same member of the Frank family, and it was contended, that in order to give effect to that intention, we should determine that the person who should be the second son of Bacon Frank, at the time when the remainder should fall in and become vested in possession, is alone entitled to the beneficial interest under this devise, and that such a construction would be that which would [79] best effectuate the intention of the testatrix, and therefore ought to prevail.

[His Lordship then stated the language of the devise, and the facts of the case immediately applying.]

I certainly think it probable that the testatrix gave the estate to the second son, no son being then born, for the reason given in the argument, that it was probable the first son would be otherwise provided for by the patrimonial property : but there appears nothing in the will on which we can build a supposition that she intended to carry her views further than to take the chance of that result, whether it should turn out so or not. Not a word is introduced in the will expressing or indicating any desire or intention on her part to keep the two estates separate, nor is it stated to be her reason for the exception : then the question is, whether such clear intention is to be collected from the general tenor of the will. I have considered it with great attention, and yet cannot infer that the testatrix had any thing further in view than the exclusion which she has expressed, of the first or eldest son, and I do not think that she meant to carry it further. We should besides not overlook the distinction between a provision against an event which must happen, and one which possibly may occur. Bacon Frank had two sons living at the same time, after the will was made. She has expressly limited the remainder to his second and other sons, [80] without guarding against the possible event of their severally becoming the eldest, and although she has selected the younger sons as her devisees, she has left the chance of their becoming the eldest unprovided for. I therefore infer, that she meant to give the remainder to the younger son who should first become capable of taking it absolutely, without concerning herself further about any future possible event.

Then, as has been well observed, this will is accurately and technically drawn, and therefore we must pay greater respect to the terms of the several devises, and should take them as expressing the testatrix's intention, and as not omitting any thing which might be necessary best to effectuate that intention ; and nothing could have been more easy than to have inserted words which would have clearly expressed the supposed intention which the plaintiff in error contends that she entertained.

Before we can adopt any construction founded on a supposed intention which the testatrix has not expressed, we should examine all its necessary consequences, to see whether they correspond with the construction proposed to be adopted. Now, in so doing, we cannot but see that in this case, as has already been pointed out, the construction contended for would, in many probable events, disturb the very order of taking which must have been the object of the supposed intention, and on which alone that construction [81] could be founded : for this estate, which it is said the testatrix meant should not go to the person who should take the paternal estate of the family, might, under the proposed construction, come into possession of a third, fourth, or other younger son, who, on failure of male issue of his elder brothers, would also

become entitled to the estate of his father. Thus the son who would be the second in the course of events, would take nothing; and the male issue of younger sons would be also excluded, by holding this remainder to be contingent till the father's death, which would be contrary even to this fancied intention of the testatrix. So, if there were six or more younger sons of Bacon Frank, living at any given time, and they happened to die successively in the life-time of their father, leaving issue, this devise would go over to the prejudice of the issue of the younger sons who never had any real or presumptive title to the estate of their father. And many other such cases are referred to in the judgment delivered by the Court below, shewing the inefficacy of giving to this will the construction proposed by the plaintiff.

According to the doctrine contended for by the plaintiff in error, the consequence would be, that this estate never could vest till the remainder should fall in, and indeed it was so put broadly in argument. It would in that case be sometimes in one branch of this family and sometimes in another. It is certainly very material to have due regard to the intention of the testatrix; [82] but for that purpose we can only look to the will, and, as is properly said in the case from Vesey senior (*Lomas v. Holmden*, p. 294-5), we must confine our view to the time of the making of the will. And doing so, I can find nothing expressed here which bears out the plaintiff in the construction which he would put on it, although words to that effect might easily have been introduced. In my view of the case, therefore, it is impossible to adopt the construction contended for by him. I am of opinion that the remainder vested on a second son coming into being, and that it was not divested by any of the events which afterwards happened in this family, and therefore I think that the judgment of the Court below should be affirmed.

My Brother Graham authorizes me to say that he agrees in the opinion which has been delivered by my Brother Wood.

My Brother Dallas concurs with the rest of the Court.

Judgment affirmed.

The end of Trinity Term.

[83] SITTINGS AFTER TRINITY TERM, 58 GEO. III. GRAY'S-INN HALL.

THE ATTORNEY GENERAL v. BEAR. Thursday, 25th June 1818.—Practice in crown cases.—A defendant who has been arrested on a revenue information filed against him, and has entered into a recognizance of bail to appear and answer, cannot move to discharge such recognizance on the ground of the Attorney General not having proceeded to trial according to notice till after three clear terms (exclusively) have elapsed after the time for which notice of trial had been given, not after issue joined.—Thus a defendant arrested in Michaelmas Term, having given bail in December, and pleaded in Hilary Term, and received notice of trial for the subsequent Sittings, cannot move it after Trinity, nor until after Michaelmas Term.

Sir William Owen moved that the recognizance of bail entered into for the defendant might be discharged on a common appearance being entered for him, the Attorney General not having proceeded in due time to the trial of this information in pursuance of notice.

The motion was made on an affidavit by the defendant's solicitor, stating that in Michaelmas Term, 1817, the present information was filed against the defendant for an offence against the revenue laws, on which he was arrested in the latter end of November, and held to bail for 525l. having been kept in custody till the middle of the following month, when he was discharged on the usual recognizance of bail to appear and answer to the information: that the defendant [84] pleaded not guilty, and notice of trial was given for the Sittings after the next Hilary Term, but the Attorney General did not proceed to the trial of the information, nor had he countermanded his notice of trial. That notice of trial was afterwards given for the following Easter Term, which was countermanded, and a third notice given for the Sittings after last Trinity Term; and that on the 3d instant notice was served on the solicitor for the customs, and the clerk in court for the Crown, of the present application.

Dauncey opposed the application on the ground that three clear terms had not

elapsed since the time for which notice of trial had been given, which, in the case of the Attorney General proceeding for the Crown, was the rule of practice, and in the present case there had been only two clear terms between the time and the present application, the plea in this case having been filed of Hilary Term.

The Court (having taken the report of the practice from their officers) refused the Motion.

[85] THE ATTORNEY GENERAL *v.* EYTON AND OTHERS. Thursday, 25th June 1818. —Query whether in case of an information filed by the Attorney General, where the defendant has put in his answer, and the Attorney General has not replied, or otherwise proceeded, for three terms, the defendant may, on motion, obtain an order that he may go without day. —A motion made for such an order was directed to stand over, to abide the result of a search for precedents.

An information had been filed against the defendant Eyton, the customary heir of his father, who had died indebted to the Crown, and the other defendants, for the purpose of procuring the copyhold property, which had belonged to the deceased, to be sold, in discharge of the unsatisfied Crown debt.

The general creditors of the deceased had, in the mean time, filed a bill in Chancery against the defendant, praying that the copyhold estates might be sold, and the produce applied in satisfaction of their demand; and they had obtained a decree accordingly. It therefore became necessary, for the purpose of making a clear title and affecting a sale, that the question between the Crown and the customary heir, should first be disposed of.

With that object a motion was made in Trinity Term, informing the Court that the defendants had filed their answer to the information in Trinity Term, 1817, and that the Attorney General had not since replied, or otherwise proceeded in the cause, praying therefore that the defendants might go without day, and the Court granted an order nisi, which was afterwards made absolute.

[86] Dauncey, for the Attorney General, now moved to discharge that order, contending that by the practice of this Court such an order as had been made, could not be granted against the Crown: and he cited Fowl. Exchequer Practice, vol. i. p. 118, and the cases there adverted to, informing the Court that this information was by the Attorney General in his own right, and not through the medium of a relator, and that the defendants had not, before they made this motion, demanded a replication or given notice of the intended application.

Richards, Chief Baron, having expressed himself to incline towards the same opinion, inquired as to the practice of the officer (who reported that the defendant might obtain the order applied for, under the circumstances, and the delay of the Attorney General in not proceeding for three clear terms, and he stated that he was allowed only one term when he proceeded *ex relatione*): but the Lord Chief Baron observed that his impression was still against the propriety of making such an order.

Martin having informed the Court that he had obtained a similar order against the Crown, in the case of *The Attorney General v. Cochran*, the motion was ordered to stand over, to afford the officer an opportunity of searching for precedents, when it was directed to be mentioned again.

Adjourned.

[87] CORAM RICHARDS, LD. CH. BARON.

MICHEL *v.* BULLEN (AND MITCHESON AND DASHWOOD, Deceased) Friday, 26th June 1818. —Costs. Where one of several co-defendants in a suit for tithes, wherein a general decree of costs had been made, survived the rest, the Court refused to order the costs to be apportioned, so as to relieve the survivor from the effect of such decree.

[Referred to, *Stumm v. Dixon*, 1889, 22 Q. B. D. 530.]

Dauncey moved on behalf of the defendant Bullen, that the Deputy Remembrancer, to whom it was referred to tax the plaintiff his costs of this suit, so far as the same respected the defendant Bullen and the other deceased defendants, and also his costs

of the issues at law, tried by the same defendants, might review his taxation in certain respects, and that he should, after such reviewal, ascertain and apportion so much of the costs as respected the defendant Bullen only, the sole surviving defendant in this cause, and that defendant Bullen might be at liberty to file exceptions to the Deputy Remembrancer's report of his allowance of the costs, the apportionment of which was now sought to be made, and also in respect of the items complained of.

The grounds of the motion were first, that larger fees to Counsel had been allowed than ought to have been given; and secondly, that the defendant Bullen ought not to be considered liable to the payment of the costs of the other defendants, who were dead, as the interests of the several defendants were distinct, and the trials had been distinct.

[88] Martin appeared for the plaintiff, in opposition to the motion.

RICHARDS, Lord Chief Baron. I never remember any instance of a case where the decree for costs had been general, in which a defendant who has survived his co-defendants, has been relieved on such an application as the present. It may possibly be a hard thing on the surviving defendant, but it is one of the hardships which necessarily belong to such a case. No instance whatever is adduced of such a thing ever having been done, and I think it contrary to every rule of a court of equity. As to the first part of the motion it may be referred back to the Deputy Remembrancer to review his taxation, but the latter part must be refused.

WHYMAN v. LEGH. Demurrer. Friday, 26th June 1818.—Where a defendant demurred generally to a bill for discovery as to whether he had not deeds, &c. in his possession destructive of his title, there being parts of the bill which, whatever should be the fate of the demurrer, ought to be answered, and the demurrer was on that account over-ruled, the Court gave leave to withdraw and demur particularly, and answer, on payment of full costs as between party and party.—Such a demurrer over-ruled, a defendant being entitled to avail himself of instruments in the possession of a plaintiff, which may shew that the former has a right, or that the latter has none.

This was a demurrer to a bill filed for a discovery of the defendant's title to certain tithes, for an account of which he had filed a bill, as impropriate rector of Prestbury in the county of Chester.

[89] The present plaintiff's bill charged the said suit still depending; that the defendant had, or had had, in his possession, certain conveyances, deeds, &c. by which he, or the person entitled to the tithes sought, had conveyed, or intended to convey them; and that the said tithes were not purchased by, or well and sufficiently conveyed to defendant, or the party from whom, &c.

The bill then charged more particularly certain conveyances (describing them by their dates and parties), wherein the tithes had been conveyed to persons, inconsistent with any title being in the defendant, and that such deeds were in his possession, &c.—and also that the said tithes had been severed and devised for a term of 400 years still outstanding, chargeable with the payment of certain annuities, and not vested in defendant, and that there were other outstanding terms and divers family settlements affecting the right to the said tithes, whereby it would appear that the defendant was not entitled thereto.

The bill then stated that within a certain township within the said rectory there was a modus on the part of the occupiers who had corn and hay on their lands, of a tenth kiver or ryder (a quantity of ten sheaves), in lieu of the tithes of corn and hay; and as to the occupiers whose lands produced hay and no corn, 6d. for every day's math of upland, and 1s. for every day's math of watered meadow, the day's math being half an acre of customary, or an acre of statute [90] measure; and that the defendant had in his possession or power divers books, &c. which would prove and establish the said moduses, and which he refused to produce.

To that bill the defendant filed a general demurrer, which came on to be argued in last Easter Term, by

Dauncey and Spence for the demurrer, and

Agar and Simpkinson for the bill, when

The Court held that the bill having stated that there existed a modus, and there-

fore required an answer as to that part at least, held that the general demurrer must be over-ruled.

Leave was then asked to withdraw the present demurrer for the purpose of confirming it, and demurring more particularly, and at the same time answering such parts of the bill as required to be answered.

That application was opposed: for that thus a defendant might, on every occasion, first demur generally, and having taken the opinion of the Court, might withdraw, and demur more particularly according to exigencies: all which operates in delay of the discovery, but

The Court gave leave as prayed, on terms of payment by the defendant of the full costs, to be [91] taxed as between party and party. Vide 2 Sch. & Lefr.

The second demurrer now came on to be argued.

The defendant on this occasion had demurred to so much of the bill only as sought the discovery of his title deeds, taking the charges severally on that point; and as to the charge of moduses, and the possession of papers, books, &c. which would establish them, he answered, by submitting the point to the Court, and a denial of the facts.

Dauncey and Spence for the demurrer, objected that the present was nothing more than a mere experimental fishing bill, filed, not bona fide for the purpose of the discovery affected to be sought, but to harass the defendant in his other suit—and that it was vague and uncertain, without precision in its object, if it had any beyond an attempt wantonly and at random to expose the defendant's title deeds, without setting up any title in the plaintiff: *Buden v. Dore* (2 Ves. sen. 444).

And they also objected that the plaintiff had stated no fact to shew the Court that there existed any thing entitling him to call on the defendant for the indefinite discovery sought; that even if the defendant had in his possession [92] the deeds, &c. alluded to, the plaintiff could not oblige him to produce them, without shewing that he had a common interest with the defendant in them: *Burton v. Neville* (2 Cox, 242); and they mentioned that a demurrer in all respects precisely similar, had been lately allowed by the Vice Chancellor.

Clarke and Agar, contra, contended that the present bill was not of the description which had been given to it; that the object of it was merely and fairly to know from the defendant, whether he had in point of fact any pretence for setting up a title to the tithes sought: and they cited the cases of *Stroud v. Deacon* (1 Ves. sen. 37), and *Metcalf v. Hervey* (1 Ves. sen. 248). In this case it might appear by the very deed, under which the defendant claims title, that the tithes were reserved.

Dauncey having replied,

RICHARDS, Lord Chief Baron. The question put is merely whether the defendant has not in his possession certain deeds, which, if produced, would shew that he had no title. The plaintiff does not ask the production of the deeds, unless that should be so in point of fact—unless he has deeds in his possession which destroy his pretended title, and shew him to be a stranger.

Suppose that this had been a cross bill filed to establish a modus. On a reference or an issue, [93] all the deeds would be ordered to be produced; and why should they not now be inquired into? This is a very different case from an application to inspect title deeds. The plaintiff has a right to the benefit of any instrument in the possession of the defendant, which might make in his favor, such as, for instance, would shew that he had the right, or that the defendant had not.

GRAHAM, Baron. A defendant has a right to charge a plaintiff, bringing an ejectment against him, with having no title, and to ask him quo jure he proceeds. If this demurrer had been more confined, the Court might, to a certain extent, have protected the defendant, but they must also assist a plaintiff where he makes out a fair case for their interference, and the defendant cannot produce any reasonable objection to it in the mode of demurrer.

WOOD, Baron, absent.

GARROW, Baron. If a man chuses to become a litigant, he may surely be asked as to his consciousness of having not a shadow of title to the subject matter of his claim: and that without infringing the sacred rule that titles are not to be wantonly raked up without good cause.

Per Curiam. Demurrer over-ruled.

[94] THE KING (IN AID OF OSBOURNE,) *v.* OSBOURNE. Friday, 26th June 1818.—The statute 56 Geo. III. c. 50, although passed for the purpose of general good and public benefit in promoting good husbandry, does not extend to bind the Crown: therefore sales of goods seized under prerogative process are not within it, and the sheriff must sell unconditionally. Nor can the sheriff sell crops as subject to tithe: he must sell without any qualification.

A writ of venditioni exponas having been directed to the sheriff of Stafford, commanding him to sell so much of the defendant's goods and chattels, crops of corn, farming stock, and other effects, seized by the said sheriff under this extent, as would satisfy the debt, he made (in substance) the following return:—that he had sold the residue of the said goods, &c. (some of them having been already sold under a prior writ of extent) for the best price, &c.: and that he had sold 136 acres of growing oats, subject to a condition that the same should be used and expended according to a certain covenant or indenture of lease bearing date, &c. &c. pursuant to the statute 56 Geo. III. c. 50: and that he had offered to sale the meadow grass, and seed grass of the second and third year's growth, and the manure within mentioned, subject to a condition that the same should be used and expended upon the premises according to the covenants of the above lease, but was not able to sell them, and that they remained in his hands for want of buyers. And he also returned that the 136 acres of growing oats were sold by him, subject to the tithe to be taken thereupon by the tithe owner.

On that return Dauncey and West, E. moved for an attachment against the sheriff, for a contempt [95] in not selling the said goods, &c. unconditionally, in obedience to the writ of venditioni exponas, without imposing any of the terms enumerated in his return. The Court granted the rule, on the general ground that the Crown was not bound by the 56 Geo. III., because not expressly named*.

Winter now shewed cause. He contended (admitting the general prerogative of the Crown) that the present case was distinguishable from the existing authorities which have determined, that in certain cases the Crown is not bound by statutes which are not expressly made to affect the royal prerogative, not only in the very general terms of the act of parliament on which the return had been founded, but on the higher consideration that it was † a statute which had for [96] its object a public good, and therefore precisely within the principle of the acknowledged exception (a) to the rule, that the Crown shall not be ousted of a precedent prerogative without express words. This act was manifestly passed for the purpose of suppressing the wrong (b) done to landlords, in allowing the accidental interference of the law, by execution of process in the hands of the sheriff, to defeat their tenant's engagements with them, and destroy the covenants by which they had provided for the protection of their property from deterioration, by the ruinous effects of bad husbandry. Nor was the advantage of the landlord the only object of the statute, for it was an act passed for the general encouragement of the agriculture of the country. And for those reasons he submitted that it was peculiarly within the rational and liberal exception, which had, from the earliest times, been recognized in law, as affecting, and narrowing the otherwise

* *Attorney General v. Allgood*, Parker, 1. *The King v. Ellis*, ante, vol. i. 23. *The King v. De Caux*, ante, vol. ii. 17.

† The words are, “that from and after the passing of this act no sheriff or other officer in England or Wales shall, by virtue of any process of any court of law, carry off, or sell, or dispose of, for the purpose of being carried off from any lands let to farm, any straw threshed or unthreshed, &c. &c. &c. being produce of such lands, when, according to any covenant or written agreement entered into and made for the benefit of the owner or landlord of any farm, such hay, &c. &c. ought not to be taken off or withholden from such lands, or which, by the tenor and effect of such covenants and agreements, ought to be used and expended thereon.”

‡ The preamble of the act recites, that, “whereas it is expedient that the execution of legal process should be so regulated as to be consistent with good husbandry, and the effect and intent of covenants and agreements entered into between the owners and occupiers of land let to farm.”

(a) *The case of Ecclesiastical Persons*, 5 Rep. 14 b. 2 Inst. 142 and 350.

(b) *Magdalen College case*, 11 Rep. 72 a., b.

general legal proposition, that unless the Crown be expressly named in acts of parliament, it shall not be bound by their enactments.

The public utility and benefit contemplated by this statute, and the comprehensive and un[97]-restrained terms of it, he submitted, rendered inapplicable to this question, the authorities deduced from the cases wherein the statutes of the 4th (ch. 16.) and 8th (ch. 14.) of Anne had been the subject of consideration; the one being merely an act for amending the law as to certain formalities of pleading and removing certain technical restrictions; and the other, which had a more enlarged and beneficial object, having an express saving of the rights of the Crown, so far being a legislative admission that such statutes would otherwise, on principles of public policy, have been binding on the Crown: and in the act on which the return of the sheriff is in this case founded, the right of the Crown is not as in the 8th of Anne, ch. 14, expressly saved.

Danney, in reply, relied on the prerogative of the Crown and the admitted rule of law respecting it: which he urged could not be abridged by the operation of statutes, intended to suppress private wrongs working injury between subject and subject. As much for the suppression of wrong, he contended, were the statutes of Frauds (*Reg. v. Arnold*, 7 Vin. 105),—of Bankrupts, and others, none of which bind the King, and that solely because he is not named; yet those statutes were as obviously intended to promote the public good and to suppress wrong, as this act of parliament. He submitted therefore that in the case of the Crown, the landlord was left to his remedy against the tenant on his covenant.

[98] RICHARDS, Chief Baron. The question is, whether the Crown is to be considered as in the situation of a plaintiff, within the meaning of this act of parliament, who has obtained judgment and put his execution into the hands of the sheriff. It has been very fairly argued on the part of the sheriff, and with considerable ability, that the Court should consider the saving clause which has been introduced into the statute of the 8th of Anne, as an acknowledgment that acts of parliament in favor of agricultural interests may bind the Crown, although not expressly named; but we are unanimously of opinion that that proviso must have been thought to have become necessary, in consequence of the word extent having been used in that act, and that alone may account for the abundant caution of inserting such a clause. In this statute, on the contrary, the Crown, or the Crown process, is not in any way alluded to, and therefore we are of opinion that it does not bind the Crown or affect the prerogative process.

The rest of the Court concurred.

GARROW, Baron. The act begins with providing for preserving covenants between the owners and occupiers of land let to farm, and it never loses sight of those parties till the end; and there, in the 11th section, it contemplates the case of tenants becoming insolvent, and provides that the assignees shall not deal with the crops on the farm, otherwise than the tenant might have done: evidently in every other possible case of insolvency, leaving the landlord to his remedy on the covenant, and clearly abstaining from cases where the Crown might be concerned.

Per Curiam. Rule absolute.

As to that part of the return which stated that the sheriff had sold the property, subject to the tithe which should be due—on its being mentioned to the Court for the purpose of obtaining their opinion, on the propriety or impropriety of the sale by the sheriff, with such a qualification—they said that the sheriff had no right to clog the sale with any such condition, but should have sold the effects unqualifiedly; for the land might have been subject to a modus or composition.

[100] DRAKE v. SMYTH AND OTHERS. Saturday, 27th June 1818.—The Court will not make an order that a plaintiff, in an issue directed by a decree to be tried at a previous assize, shall name an attorney in the office of pleas to appear and accept the issue.—The course is to move that the issue be taken pro confesso against the plaintiff, if he do not go to trial.

An issue having been ordered to try a modus in this cause by a decree made therein, on the 3d of February last,

Barber on the part of the defendants moved pursuant to notice, that the plaintiff might be directed forthwith to name an Attorney in the Office of Pleas in this Court,

to appear, receive, and accept the issue directed by the decree to be tried at the next assizes for the county of York, or that the issue might be taken pro confesso against the plaintiff.

Martin opposed the motion.

Per Curiam. This application is premature. The course is to move to take the issue pro confesso if the plaintiff do not go to trial in pursuance of the decree.

Motion refused.

[101] WOODHEAD v. BOYD. Saturday, 27th June 1818.—In the affidavit used in applying for commission to examine witnesses abroad, it is not necessary to state that the applicant would have a good defence if he could procure the evidence of the witnesses proposed to be examined, or to shew that there are necessary facts within their knowledge required by plaintiff to be proved on his defence.

Stephen opposing a motion for a commission to examine witnesses abroad, objected—that the affidavit did not state that the plaintiff had a good defence if he could procure the evidence of the witnesses proposed to be examined,—and that his Solicitor ought to join in that part of the affidavit,—and that the mere statement that he could not safely proceed to trial without the evidence of such witnesses was insufficient without shewing it (generally at least) by some stated necessary facts required to be proved, and being within their knowledge.

RICHARDS, Chief Baron. However desirable it might be to adopt the practice on which the first objection is founded, it has never yet been held to be indispensibly necessary in these cases, although the Court have often said that it would be useful to require it, such affidavits have always been held sufficient to call on us to exercise the inherent jurisdiction of Courts of Equity in granting these commissions.

[102] IN THE MATTER OF JOHN BICK. Saturday, 27th June 1818.—A prisoner whose recognizance had been estreated for not appearing to an indictment for embezzlement of county bridge money received by him as constable, ordered to be discharged conditionally on his producing the consent of the county from the Clerk of the Peace at the next General Quarter Sessions, after having been in gaol for a certain time. But the Court had originally refused the application without such consent on petition, (verified by his affidavit) stating that he had been in gaol since December, and that he was not worth 5l.

This petition set forth that the petitioner who had been constable of the lower division of Tewkesbury, had been a defaulter in respect of certain bridge money received by him as a constable for the use of the county, on account of which he had been indicted at the Quarter Sessions, when he entered into a recognizance for his appearance which he had forfeited, and on that account was remaining in gaol: and that he was not worth 5l.

Sir William Owen had moved for his discharge in Hilary Term under these circumstances; but it appearing that he had only been in gaol since November; they said he had not been so long in prison as the nature of his offence demanded.

In Easter Term following the application was renewed, when the Court required the consent of the county.

It was now moved again conditionally on the consent being produced at the next General Quarter Sessions of the Peace.

The Court doubted whether they could make any such order, but referring to the Officer of [103] the Lord Treasurer's Department, he certified, that similar applications had been granted. They then

Allowed the Petition.

IN THE MATTER OF AN INSUPER, set in Respect of Certain Sums Deficient on Account of the Land Tax—Assessed Taxes—and Property Duty, for several Years, ON THE INHABITANTS OF THE PARISH OF WOOTTON, IN THE DIVISION OF REDBORNSTOKE, (BEDFORD) for the Defalcation of one of the Collectors of those Duties. Saturday, 27th June 1818.—If the acting commissioners of the land-tax, assessed taxes, &c. refuse (unless indemnified) to proceed to make a re-assess-

ment on the parish, to which the deficiency applies, in execution of the powers entrusted to them by the several acts of parliament, where insuper has been set on the parish, whose collector is a defaulter, the Court will order them to do so by rule to shew cause in the nature of a mandamus.—Service on their clerk ordered to be deemed good service.—The Crown is not limited to any time within which to make such an application.

Dauncey had obtained an order against the commissioners for executing the acts relating to the above taxes, to shew cause why they should not proceed to make a re-assessment for the insupers set on the inhabitants of the parish of Wootton, and to raise and pay the several sums to his Majesty in discharge thereof, according to the powers and directions of the several statutes, 38 Geo. III. c. 5, s. 18, (land-tax)—43 Geo. III. [104] c. 161, s. 56, (assessed taxes)—46 Geo. III. c. 65, s. 189 (property duty)—and that service of the order on the clerk to the commissioners, might be deemed good service on them respectively.

The motion (which was in the nature of a mandamus) was made on an affidavit, stating that it appeared from the accounts of the Receiver General for Bedfordshire, and the records of this Court, that the insuper processes of distringas, having been returned against the collector, and his effects having been taken and applied in discharge of his arrears, and he himself in prison for the deficiency, process had issued against the inhabitants of Wootton, for his default and failure, and that issues had been distrained on them, on account of the said deficiency, which remained to be raised by re-assessment:—that the acting commissioners had been called on and supplied with instructions by the commissioners for the affairs of taxes, to proceed to make re-assessments in pursuance of the acts; but that they had declined to do so giving as a reason that they did not consider themselves safe in making a re-assessment without an indemnity.

It was urged that the Court had power to make the order prayed against the commissioners, that it had exercised such a jurisdiction in many cases (*a*); and that the commissioners had no [105] right to any extraordinary indemnity from the Crown. It was stated that the insuper was still pending against the inhabitants, and that owing to the delay of the re-assessment, fines were levied on them twice a year.

Storks shewed cause, submitting, that the terms of the act (38 Geo. III.) were not large enough to authorize, or at least to require the commissioners to make the re-assessment, and it was contended that in a case of doubt the commissioners were entitled to demand an indemnity.

Per Curiam. The words of the act* (38 Geo. III.) are quite large enough to impose this duty on the commissioners. The deficiency arose from the neglect of the collector. It is the duty of the officer, and the inhabitants to take care that the money paid for taxes, finds its way into the Treasury. We therefore make the

Rule absolute.

The cases of the other taxes were admitted to be determined by the above decision, unless as regarded the assessed taxes, the provision in [106] the 43d George III. that "the parish or place (in respect of which such taxes were deficient) shall be re-assessed as soon after such default shall be discovered as conveniently can be done," had tied the commissioners down to any limited time within which such re-assessment should be made. In the present case the deficiency was discovered in the year 1809.

Curia. There can be no limitation in the case of the Crown, in matters of public revenue.

End of Sittings after Trinity Term.

(*a*) See the case of the Commissioners of the Land tax of Westminster, Park. 74.

* "Where the same (assessments) cannot be collected or levied, or that through any wilfulness, neglect, mistake, or accident, the said assessment, charged on each county," &c. happens not to be paid, &c. the said commissioners, &c. are hereby authorized and required to assess and re-assess, upon the respective parishes, the sums deficient.

[107] CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND
EXCHEQUER CHAMBER, MICHAELMAS TERM, 59 GEO. III.

MEMORANDA.

In the preceding Vacation the Right Honorable Lord Ellenborough resigned the office of Lord Chief Justice of the Court of King's Bench, and was succeeded by

Mr. Justice Abbott, who took his seat on the first day of Term.

Sir Vicary Gibbs, Chief Justice of the Court of Common Pleas, retired just before the commencement of the Term from that Court; and was succeeded by

Sir Robert Dallas, one of the Justices of the same Court, who took his seat on the first day of Term.

[108] The following Gentlemen, having been appointed to be of His Majesty's Counsel in the Law, were called within the bar:—Archibald Cullen, Esq. Middle Temple; William Owen, Esq. Lincoln's Inn; William Wingfield, Esq. Lincoln's Inn; William Horne, Esq. Lincoln's Inn; George Heald, Esq. Gray's Inn.

LOUGHMAN AND OTHERS v. NOVAES. Friday, 6th November 1818.—When a commission issues to take the answer of a foreigner, a power to take it through an interpreter, when necessary, is virtually implied.—If the commissioners certify that the defendant was duly sworn to such answers in presence of the commissioners, and it appears by the affidavit of a commissioner, that the interpreter was duly sworn, and that he believes the defendant understood the contents of the answer, it is sufficiently verified.

A commission had issued in this cause to take the answer of the defendant, who was resident in Lisbon. On the return of the commission, the usual motion was made to dissolve the injunction upon the coming in of the answer.

It was now moved to take the answer off the file, and to discharge that former motion, on the ground of irregularity.

Fonblanque and Raithby objected to the reception of the answer, 1st, that it appeared to have been taken through the medium of an interpreter, there being no authority for so doing, and [109] they contended that the same rule prevailed in commissions to take answers as in those to examine witnesses, which was, that there should be inserted in the commission a power to examine the witnesses by an interpreter, when such a power was necessary, and that, without such insertion, it was not competent to the commissioners either to take an answer or depositions, through such a medium:

2dly. That it did not sufficiently appear in the present instance that the interpreter had been sworn, or that he had explained the answer to the defendant.

Martin and Sir William Owen, contra, contended, as to the 1st objection, that whenever a power was given by a commission to take an answer, it was virtually implied that the answer may be taken by means of an interpreter, when it was necessary to employ one. And they stated that, whatever practice may have prevailed as to commissions to examine witnesses, such authority had never been specially inserted in commissions for the taking of answers.

As to the 2d objection, they relied upon the certificate of the commissioners, at the foot of the answer, which stated that the answer was taken, and the defendant duly sworn to the truth thereof, in pursuance of the commission; and they contended that it was to be inferred from thence that omnia ritè acta fuerunt, and [110] that such would not have been the case, unless the interpreter had properly explained the answer to the defendant. They also produced an affidavit from one of the commissioners, in which he swore that the oath was duly administered to the interpreter, and that he believed the interpreter interpreted the answer properly to the defendant, and that the latter fully understood its contents.

The Court (consisting of the Lord Chief Baron and Graham, B.) were of opinion, that (it appearing there was a distinction in the form of commissions to take answers, and to examine witnesses) the power to employ an interpreter, when necessary, was implied under the power to take an answer,—and they said, that as it had been certified to them that the defendant was duly sworn under the commission, and as

the commissioner now swore that the oath was properly administered to the interpreter, they must conclude that the answer was properly interpreted to and understood by the defendant, and they therefore

Refused the motion.

[111] PERFECT AND OTHERS v. MUSGRAVE. Tuesday, 10th November 1818.—One of two drawers of a joint promissory note, payable twelve months after date, who is surety for the other to the amount, is not discharged by the drawee not having demanded payment from the surety when due, nor till after having entered into a deed of composition with the principal and his other creditors, and received the composition money.

Hullock, Serjeant, moved, that the verdict which had been found for the plaintiff in this action, might be set aside on the ground of a misdirection.

He stated, that this was an action on a promissory note, brought by the plaintiffs (bankers at Leeds,) under the following circumstances:—

A corn factor of the name of Sowden had kept a banking account with the plaintiffs. In the year 1811, they required security from him when he deposited with them certain title deeds, and prevailed on the defendant to join him as a surety in a promissory note for 400l. at twelve months after date, which he gave them. Soon after that note became due Sowden and the defendant gave the plaintiffs another joint note at twelve months after date (14th April, 1813) in exchange for the note which had become due, and Sowden still continued to keep a running account with the bank, and in the course of that year paid in very large sums. In January, 1815, Sowden failed, and entered into a composition deed with his creditors, whereby his debts were compounded for ten shillings in the pound. The defendant in the mean time never heard any thing about the note, and the note was stated to have been given under [112] an express understanding that the defendant would not be answerable for a longer period than the twelve months. In 1816 a person named Slater, a holder of the note, first demanded payment of the amount from the defendant, who took no notice of the application, and that several months afterwards, the note being returned to the plaintiffs, they brought the present action. It had been contended at the trial, that the plaintiffs, under these circumstances, had lost their right as against the defendant. On the evidence Mr. Baron Wood had directed the jury that the defence was not a bar to the action.

It was now submitted, that after what had passed between the parties, the surety had become discharged either by the laches of the plaintiffs, or by their altering his situation in consequence of their subsequent transactions with Sowden, without the privity, concurrence, or knowledge of the defendant; that the plaintiffs should have demanded payment of the note when it became due, and before any subsequent increase of credit had been given to Sowden; that they should not, by lying by, have deprived the plaintiff of the chance of recovering over from Sowden, which he might at that time have had, Sowden having since gone to America; and that the plaintiffs having become party to the composition deed, and received the amount of their composition of ten shillings in the pound on their whole debt, could not now recover the remainder, or if they could, it would be a fraud on the other creditors, parties to the deed, [113] and they cited *English v. Darley* (2 Bos. & Pul. 61), *Poss v. Berrington* (2 Ves. jun. 540), and *Gould v. Robson* (8 East, 576).

The Court however were clearly of opinion, that the defendant was not discharged; holding that as to the first point, the onus was on him to take care that the note was satisfied; that the situation of the defendant had not been changed to his prejudice; but that what had been done by the plaintiffs, in accepting the composition of ten shillings in the pound, had operated in favour of the defendant and was for his advantage to that extent as much as if he had received so much money from him in part payment, and no prejudice affecting the defendant in any other respect was shewn by evidence; and that the time which had elapsed between the note becoming due, and the demand made on the defendant for payment, and the want of earlier notice were not objections to an action against him as the joint drawer of the note.

Therefore they

Refused the rule*.

* See *Badnall v. Samuel*, ante, vol. iii. p. 532.

[114] THE KING v. SLOPER AND ALLEN. On a Writ of Immediate Extent. Saturday, 14th November 1818.—It is the sheriff's duty on an immediate extent to seize goods which have been already taken in execution under a fieri facias at the suit of a subject, if not actually sold: although the judgment on which the fieri facias issued was not only obtained, but the goods had been seized under it before the Crown process was sued out—the provision of the latter part of the 74th section of the 33 Hen. III. applying (as this Court holds) only to cases where the goods of the debtor are not only taken in execution but sold: the property in them not being altered till then: and that until the property be altered and transferred absolutely from the debtor, by sale and delivery, the Crown's execution is to be preferred, even where process is awarded after, &c. (as above).—The case of *The King v. Wells and Allmatt*, recognized and adhered to by this Court as clear law. (Wood, Baron, dubitante.)—A solemn decision standing uncontradicted by later authority, although at variance with former determinations of other Courts, not suffered to be questioned on an interlocutory motion.

On the 12th February, 1814, a writ of Venditioni exponas had been issued under this extent, for the sale of the goods of the defendant Allen, on which the sheriff of Middlesex returned, that he had caused them to be sold, and that Morland and Co. claimed the proceeds in satisfaction of an execution against the said goods and chattels, and therefore he prayed the judgment of the Court.

The Attorney-General moved, pursuant to notice, that the sheriff might be ordered to pay over the proceeds to the Solicitor of the Treasury, in discharge of the Crown's debt: when the Court, after hearing counsel in opposition to the motion, granted an order on Morland and Co. to shew cause why that should not be done.

[115] The facts were as follows:—

On the 16th October, 1813, the sheriff of Middlesex seized the goods in question, the property of Allen, under a writ of fieri facias, at the suit of the claimants. On the 19th, a writ of extent issued against the two defendants, and by the inquisition taken thereon, on the 2d November, it was found, that "on the said 19th of October, and still die captionis, &c. defendant Allen was possessed of goods and chattels of the value of 1059l. and that before the teste of the extent, viz. the 16th of October, the fieri facias of Morland and Co. was delivered to the said sheriff, who seized, as the property of the defendant Allen, the same goods, &c. which then remained in his hands, and which he had seized into his Majesty's hands, subject, as far as the same were by law subject thereto, to the said writ of fieri facias."

On the rule to claim Morland and Co. entered their claim, which, after having obtained several orders for time to plead, they at length abandoned, in Hilary Vacation, 1814.

In Trinity Term following, on its being moved to make the above order absolute, it was suggested by the counsel for the defendants, that a similar question as to the priority of claim of a levy under an extent, before a private execution, was then pending in the Court of King's Bench, the sheriff was ordered to pay the money into [116] Court, in trust in this cause till further order. That case being afterwards compromised, without bringing the question before the Court,

It was moved, in Easter Term, 1818, that the Deputy Remembrancer should pay over the money to the Solicitor for the Crown.

Sir William Owen now shewed cause, relying on the words of the provision in the statute (33 Hen. VIII. ch. 39, s. 74), giving preference to suits for the recovery of the King's debts to private suits and first execution, "so always that the King's said suit be taken and commenced or process awarded for the said debt at the suit of the King, before judgment given for the said other person," and citing the cases of *Uppom v. Sumner* (Bl. R. 1251-1294), and *Rorke v. Dayrell* (4 T. R. 402).

In the case of *The King v. Wells and Allmatt* (16 East, 278, in notis), he admitted that those determinations had been brought into doubt, but he contended, that that case was not law, and urged, that from what had been thrown out by the Court, in the case of *Thurston v. Mills* (16 East, 254), and particularly by Lord Ellenborough, the inclination of the opinion of the Court (for the point was not determined) was with the former decisions: for Lord Ellenborough particularly is there reported to have said (when the case of *Uppom v. Sumner*, and *Rorke v. Dayrell*, [117] were

mentioned as authorities conflicting with the case of *The King v. Wells and Allnutt* "that the Lord Chief Justice De Grey and Lord Kenyon, who concurred in those judgments, had been Attornies General, and must have been conversant with the rights of the Crown upon such questions. And that had not that case been decided on the minor question, from the apparent bias on the minds of the Court, and the respect frequently intimated in the course of the argument to be due to the authority by which those cases had been sanctioned, it was most probable that the Court of King's Bench, in the case then before them, would have come to a similar conclusion."

Having gone minutely through all the authorities cited in support of his propositions, as brought together in the cases of *Rorke v. Dayrell*, and *Thurston v. Mills*, and distinguished the present case from those of *The King v. Cotton* (1 Park. 112) and *Stringfellow v. Brownsoppe* (1 Dyer, 67 b.), by the difference of the facts, he proceeded to reason in their behalf from the nature and history of the process, to the same effect: contending, that the proceeding by writ of extent was given and created by the statute 33 Hen. VIII. and that that opinion had been adopted and propounded by Lord Coke (g), and that the proceeding was then first taken from the then common and well-known right of the subject to process of execu-[118]-tion on statutes-staple. And he contended, that that being so, the preference, if any had been intended, ought to have been given by the statute to the Crown's new species of execution which was not its common law prerogative, as being thought by the legislature not necessarily to belong to the new remedy, and to require specific words—and that therefore the right of the Crown so given was only to have a preference in cases of concurrent executions, and not where that of the subject had actually been executed before the suit had been commenced by the Crown, and he cited West on Extents, cc. 1 and 14.

[Graham, Baron, expressed his dissent from that doctrine, saying that he was of opinion that the process by extent had always belonged to the Crown, but was merely put on a new footing by the statute 33 Henry VIII. and that such new statutory provision was intended to be in furtherance of the Crown's then existing remedy, and not to restrain its prerogative.]

He then adverted to the terms of the statute 13 Edw. I. c. 18, where the word "Extent" is first mentioned, and to the form of the writ of extent, itself, (which always concludes with the words, "by the said act of parliament made in the 33d year of the reign of the late King Henry VIII."), to shew that the remedy had not before been exercisable by the Crown of right, but was first given by that statute, and therefore not till that time a prerogative proceeding, but merely a pre-[119]-viously exclusive remedy of the subject extended to the Crown, and to be therefore exercised in common with the subject, and entitled to no other preference than what it should derive from priority in point of time, by which alone that preference was to be determined according to the terms of the statute.

He then submitted, that as the prior execution in this instance, under which the defendant's goods had been actually seized before the Crown process was sued out by the claimants, it ought to be preferred to the subsequent statutory execution of the Crown, on a suit not commenced till afterwards: and therefore he contended, that the present order nisi could not stand.

The Attorney General, in support of the order, insisted, that the present question ought to have been raised by the claimant prosecuting his claim by entering it regularly on the record, and pleading to the extent, that the question might be fairly and fully tried, or might be carried to a higher tribunal, as was said by Mr. Justice Le Blanc, in *Thurston v. Mills*, to be the proper course of proceeding.

On the law of the case, he adverted to, and founded his reliance mainly on the authority of *The King v. Wells and Allnutt*, which he submitted was the most recent and conclusive decision on the subject:—that it had been made by this Court, [120] and had never been impeached by any subsequent determination: nor should this Court subvert their solemn decision made with the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell* before them, after mature deliberation.

He submitted that the writ of extent, and the proceedings thereon, had been in modern days merely regulated by the statute of 33 Hen. VIII., but contended that the right of the Crown so to proceed was not wholly founded on or created by that

(g) See *Sir Thomas Cecil's case*, 7 Rep. 19.

statute, and Lord Chief Baron Gilbert *, doubting the assertion of Lord Coke, says, that "that act only altered the practice in this respect, that before it was a writ founded on an inquisition, and was used upon motion to the Court, and in cases of necessity, but since that statute there might be an extent without any such inquisition touching the goods." If on the contrary, the remedy itself was given by that statute, still the Crown had it clothed with and subject to all its inherent common law prerogative rights.

That prerogative in this respect was indeed abridged by the statute of Edw. III. c. 19, in allowing the subject creditor to have an action and judgment against the King's debtor, notwithstanding the ancient prerogative writ of protection, but still he was not to have execution, unless he paid the King's debt, and in that case he might have had execution for both debts: Fitz. Nat. [121] Br. 28 b. At that time, it is clear, the creditor could not have executed his judgment until the Crown's debt had been satisfied. Then the statute 33 Hen. VIII., effected a further alteration; but it was never intended by that statute to take away the Crown's priority in cases of concurrent execution with the subject, because the subject had a judgment before the Crown process was tested, or the Crown would be in certain possible cases in a worse situation than the subject whose right to prior execution is determined by the prior delivery of the writ, and it was the professed object of that statute throughout to advance the Crown's suits. He contended, therefore, that according to the true and consistent construction of the statute of Henry VIII., the rule was, that the subject's judgment should not be preferred to the Crown, till the execution thereon should be perfected by a sale of the goods levied, and till in fact the property in the goods seized had become altered, and had been transferred to, and was absolute in the creditor—and that the actual change of property alone could defeat the Crown's right to seize the goods of its debtor. If the mere fact of judgment being obtained on the part of the subject was to stay the Crown's execution, the consequence would be, that a judgment creditor might exclude the Crown from the benefit of the proceeding for any length of time, during which he chose to remain passive, and such a possibility would be alone sufficient to destroy the construction endeavoured to be supported by the [122] claimants, as being the true one with regard to the statute of Henry VIII.

In support of all these propositions, the Solicitor General cited *passim* the judgment delivered by Macdonald, Lord Chief Baron, in the case of *The King v. Wells and Allnutt*, which decision, he contended, had corrected a misunderstanding of the statute of Henry VIII., into which the very high authorities, who decided the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, had been led, through a less familiar converse with the doctrine of the royal prerogative, than this Court were in the practice of holding, in the habitual discharge of their peculiar duties.

RICHARDS, Lord Chief Baron. The Court have attentively considered the arguments which have been urged on both sides, by Sir William Owen and the Attorney General, with great ability. The question is undoubtedly one of the first importance. But there exists a decision of this Court, which I must consider as an established authority, for that decision has never yet been overthrown, and still stands uncontradicted. Being therefore in possession of the last authority, we think that we are not entitled, in point of justice, further to delay the Attorney General. We are consequently of opinion, that under the circumstances this motion at least must be at present granted. On that part of the case we all concur.

[123] As to the arguments which have been pressed upon us on the great point, bringing into review the former decision of this Court, in the case of *The King v. Wells and Allnutt*, if they had been urged in support of such a question arising on the record, and to be more solemnly decided, I should have required further time to have matured my opinion; but as it is I cannot refrain from saying, with regard to the decision in the case of *The King v. Wells and Allnutt*, which I perfectly well recollect, that I think the decision quite right, so much so, that if I were bound to decide it now, I should express my entire concurrence in it.

GRAHAM, Baron. I have not so great a predilection for any judgment which I may have heretofore delivered, as not to be quite willing to hear any thing which may be urged against it in argument, and if solid, to alter my opinion. At present, with respect to the case of *The King v. Wells and Allnutt*, I entirely adopt the sentiments of

* Treat. on Excheq. p. 127 (edition of 1758).

my Lord Chief Baron. Indeed, it appears to me, that it would be somewhat indecorous to canvass that deliberate determination on a mere interlocutory application. I know that on occasion of the delivery of that judgment, my Lord Chief Baron Macdonald was at great pains to inform himself, by every means in his power, of the sentiments of the other judges of the day on that question, and he delicately suggested that the high authorities by whom the case of *Uppom v. Sumner* had been decided, had not sufficiently taken into consideration, on that occasion, many [124] matters with which the Judges of this Court were necessarily more conversant; and I remember his saying, that although my Lord Kenyon, in delivering his opinion in *Rorke v. Dagrell*, certainly goes into the ground on which the decision in *Uppom v. Sumner* is founded, his Lordship was nevertheless entirely governed by that case in the conclusion to which he ultimately came. I also remember, that in the case of *Butler v. Butler* (1 East, 238), when the case of *The King v. Wells and Allnutt* had not been decided, Lord Kenyon first began to waver in his former opinion, on being informed of the decision of this Court, in the case of *The Attorney General v. Aldersey*, and as to the doubts mentioned in Dyer, to have been entertained, in the Temple, of the decision in *Stringfellow's case* (1 Dyer, 67 b.), they have always been treated very cavalierly. Lord Chief Baron Parker recognizes that case as undoubted law †; Lord Chief Justice Hobart also treats it as acknowledged law ‡; and all the cases establish that the Crown's right is not affected till there has been a complete alteration of the property, by delivering to the party, then, and then only, the Crown cannot touch it. I therefore see no reason, in any thing that has been advanced to-day, for altering our opinion in the case of *The King v. Wells and Allnutt*, and to treat that judgment lightly, as a [125] subject-matter of discussion, on a mere interlocutory motion, would be quite indecorous.

WOOD, Baron. This case involves a question certainly of very great importance, as establishing a principle of law, and one on which I confess I have entertained considerable doubts. But I am not for differing from a solemn decision of the Court, which as yet stands uncontradicted, on an interlocutory motion, on which, whatever doubts I may have, I should not think that the Court could give any opinion, by which that judgment might be impeached, and therefore I concur in making absolute the order which has been obtained by the Attorney-General.

GARROW, Baron. I should perhaps have required a further argument, if the decision in *The King v. Wells and Allnutt* had been about to be brought under revision on a more grave occasion, and we had now to consider to what degree of deference that decision was entitled. At present I think that I should myself abide by that determination; but even if I considered it at all doubtful, I should hold it most disrespectful to assail so high an authority on an interlocutory motion.

Per Curiam. Rule absolute*.

[126] PLUMMER AND ANOTHER v. SAVAGE. Friday, 20th November 1818.—If the plaintiff take out of Court a less sum than that for which he has originally proceeded, and below the amount fixed by the statute, as that for which a defendant

† *The King v. Cotton*, Parker, p. 139.

‡ *Sheffield v. Rutcliffe*, Hob. 339.

* This case has in different ways come very often before the Court, as appears from the dates of the several motions and other proceedings in the course of the present cause. There has been from time to time much discussion as to the fittest mode of bringing it fully under the consideration of the Court, that the question might receive the fullest investigation; but certain objections have always hitherto stood in the way of putting the matter on the record.

It should be observed, however, that on many occasions of the great question in the case being mentioned to the Court, during the time of the late Lord Chief Baron Thomson, that learned Judge (when it has been candidly avowed at the bar, that the discussion would have for its principal object to bring the judgment of this Court, in the case of *The King v. Wells and Allnutt*, under revision,) has frequently declared, that the decision of this Court in that case had been pronounced after so much anxious consideration of the object and language of the statute of Henry III., and all the authorities on either side, that he considered his own opinion, and that of the rest of the Court, as constituted at that period, as not to be shaken but by the highest authority.

may be held to bail, it is not in this Court within the 43 Geo. III. c. 46, if the plaintiff give a good reason for taking it out.—The order made, on motion to pay money into Court, that the defendant shall pay the costs, is imperative in that respect in this Court, and if not paid when taxed, the plaintiff may have an attachment against the defendant for non-payment, which process in the Exchequer is final, and in the nature of an execution, and therefore not bailable.—The plaintiff may however proceed to try the cause if the costs are not paid, as is his only course in the Court of K. B.

Sir William Owen obtained a rule to shew cause why it should not be referred to the Master to tax the defendant's costs under the 43 Geo. III. c. 46, s. 3, in this action, (the plaintiff having taken out of Court 50s. paid in by the defendant, and the cause having been carried down to trial for nominal damages, the costs not being paid,) and why they should not be paid to him by the plaintiff, with the costs of this application—on an affidavit, the arrest of the defendants for 16l. —that it was upwards of seven years since he had [127] last had any dealing with the plaintiff, and that he had paid him all that was due to him on that account, except 50s. which he had deducted from one of the sheep that he had purchased, which had died in a few days after—and that he had paid 50s. into Court, and defended the action as to the remainder—that the plaintiff afterwards took the 50s. out of Court, and taxed his costs at 15l.—and that he believed the plaintiff had caused him to be arrested for the purpose of extorting from him the 16l.

Reader and Chitty now shewed cause, on an affidavit made by the plaintiff Plummer and another person, stating, that at the time of the arrest, 16l. was justly due and owing to the plaintiffs from the defendant (detailing the particulars in a stated account)—that the defendant had from time to time promised to pay the plaintiffs that debt—that the plaintiffs were induced to take the 50s. out of Court, believing (on information) that the defendant had no property of his own, and that he had determined on rendering himself in discharge of his bail—and that the plaintiff's sole reason for proceeding to trial afterwards was for the costs which the defendant had refused to pay.

On those affidavits so filed on both sides, it was contended on the part of the defendant, in support of the present rule, that the order for paying money into Court being *peremptory* this [128] in Court *, as in the Common Pleas, and not *conditional* †, as in the Court of King's Bench, the plaintiff's course was to have proceeded by the summary mode of attachment given him by the practice, and that he had no right therefore to carry the cause to trial for the sake of the costs, as that could not have given him a stronger claim, and increased the defendant's loss, and it was not shewn that the costs had been demanded.

As to the case being within the statute, the plaintiffs having taken the money out of Court, it was contended, that the sum which had been paid in, bearing so small a proportion to that for which the defendant had been held to bail, the whole being under the amount on which bailable [129] process could have been issued, left no doubt of the arrest being originally vexatious and malicious, which the subsequent events, stated in the plaintiff's affidavit, could not (if true) justify or excuse. In the Common Pleas, it has been held, that where a plaintiff takes out of Court a smaller

The terms of the order are, "*That the defendant bring into Court the sum of 2l. 10s., to be paid to the plaintiffs, their attorney or clerk, in Court; and if the plaintiffs will accept the same, with costs, to be taxed in full discharge of this suit, that then they shall proceed to tax such costs: and the said defendant shall also pay to the plaintiffs, their attorney, or clerk in Court, such costs; and that thereupon all further proceedings in this action shall be stayed. And if the plaintiffs will not accept of such sum, in full discharge of this suit, then the plaintiffs are to be at liberty to take the said sum of 2l. 10s. out of Court, and to proceed in their cause; but that in case they shall suffer a nonsuit at the trial of the said cause, unless their demand shall be found to exceed the said sum of 2l. 10s.; and that if their demand shall be found to exceed the said sum of 2l. 10s., then that they shall take their verdict for the excess only.*"

† In the King's Bench, the order is, that the defendant *have leave to bring, &c.* and the words in italics form no part of the order in that Court. Tidd's Forms, 256, 257.

sum than that for which the defendant was held to bail, the case came within the statute (*a*).

On the other hand, it was urged that the reasons given by the plaintiff's affidavit for taking the money out of Court, were sufficient to justify his doing so, as being a more prudent course, and were not inconsistent with the fact of his original demand being bona fide of the amount for which he at first proceeded: and in the Court of King's Bench, it has been frequently held, that taking out of Court a sum less than the plaintiff's demand, for which the defendant had been held to bail, did not bring the case within the statute: *Clarke v. Fisher* (1 Sm. R. 428), *Linthwaite v. Bellings* (2 Sm. R. 667), *Rouveroy v. Alefson* (13 East, 90).

It was also submitted, that the difference which obtained in the practice of this Court, and the King's Bench, with respect to the terms and effect of the order for payment of money into Court, the former giving the plaintiff a more speedy remedy for his costs, did not preclude him from adopting the other course of proceeding to trial, if they should not be paid, whereby he would obtain the advantage of an execution for the amount.

[On a reference to the Master, as to the practice of this Court in that respect, he reported, that the order for payment of costs, on paying money into Court, was imperative here, and that a plaintiff might certainly have an attachment in the first instance against the defendant for the costs, when taxed, without proceeding further; but that it was frequently the practice to proceed to trial, if those costs should not be paid, for the purpose of recovering them.]

On that statement of the officer, Graham, Baron, took occasion to observe, that such difference in the practice of the Courts, as to the nature and effect of the order for payment of the costs, (it being imperative here, while it is only conditional in the King's Bench,) might account for the recent decision of that Court, in the case of *Lewis v. Morland* (2 Barn. & Ald. 56), as far as it appeared to clash with the previous determination of the Exchequer in *Philips v. Barrett* (ante, vol. iv. p. 23), inasmuch as in the former Court, the proceeding is not in the nature of an execution, while in the latter it is. And his Lordship added, that this Court had, in consequence of the determination in *Lewis v. Morland*, reconsidered their judgment given in [131] the case of *Philips v. Barrett*, and saw no reason for departing from what they there held on the point then before them, and intimated, that in any similar case, they should abide by what they had then determined, and would not suffer bail to be taken, where the process was final and peremptory, as in that case.]

On the other part of the case, the Court held that, although the plaintiff might have done wrong in carrying the cause down to trial, yet, as the defendant had also been obstinate in not paying the costs, and the plaintiff had satisfactorily answered his affidavit, they made the

Rule absolute*.

SHARP AND ANOTHER v. WARREN. Friday, 20th November 1818. Assumpsit for money had and received may be maintained against one who had been a member of a benefit club, for money entrusted to his keeping, by the rest of the society, in the name of the officers properly appointed for managing their affairs, under the articles. — If by the articles the society are empowered to appoint a treasurer, an appointment of two persons to be treasurers is within the power. — It is not an objection to such an action that the defendant, having been a member at the time when the promise is said to have been made in the declaration, was a partner or tenant in common, and therefore could not be sued in assumpsit for money had and received. — An act of parliament, giving a summary remedy to persons against defaulters, though in terms apparently prescribing such remedy, is cumulative, and does not take away the previous right to sue by action at law.

Storks had obtained a rule, calling on the plaintiffs to shew cause, why the verdict found for them on the trial of this cause, at the Summer [132] assizes for Bedfordshire, before Mr. Baron Graham, should not be set aside on three technical objections arising on the facts in evidence.

(a) *Laidlaw v. Sir James Cockburn*, 1 N. R. 76.

* Et vide *Cadwallader v. Batley*, 3 Anstr. 1.

The parties had been all members of a benefit club under articles which had been duly enrolled. The plaintiffs had originally acted as stewards of the club, and the defendant as auditor. This action (assumpsit for money had and received) was brought by the plaintiffs, to recover a sum of money, constituting the funds of the society, which had been placed in the hands of the defendant, by them, for safe custody, and which the defendant had applied to his own use, and refused to pay over.

For the purpose of the present suit, the plaintiffs were, previous to its commencement, appointed treasurers to the society, to enable them to sue under the 33 Geo. III. c. 54, s. 4.

Under these circumstances it was objected, first, that the act of parliament had not authorized the appointment of two treasurers, and therefore the plaintiffs were not in a situation to sue the defendant, on the behalf of the society, by the second article* of their rules, which authorized the appointment of a treasurer.

Secondly, that the defendant, being himself a member of the society, was a partner, and a [133] tenant in common with the other members, when the right of action (if any) accrued, and therefore could not be sued by them in this form of action; *Foster v. Allanson* (2 T. R. 479).

And thirdly, that the act of parliament having, by the 8th section, expressly provided a remedy in cases of this sort, where money, constituting part of the general fund, was withheld by an officer of the society, to whom it had been entrusted, and who should refuse to account, by petition to the Court of Chancery, or this Court, had precluded the right of proceeding by action at law, whereby the money of the club would be unnecessarily squandered.

The learned Judge reserved the points, and gave liberty to move.

Frere, Serjt. and West shewed cause, contending that the appointment of two persons to the office of treasurer was good, and satisfied the words of the rule, and of the statute, the latter having authorized them to appoint any number of persons to the office, and the former having not restrained that power, being merely applicable to the mode of appointment; and they cited *Auditor Curle's case* (11 Co. 3 b.), as to the practicability of appointing two persons to one office.

On the second point, they submitted that the defendant had ceased to be a partner, having left [134] the society when he had possessed himself of the money, and had then, by the operation of the rules, no longer any interest in common with the club.

To the third objection, they answered, that the statute, giving the more summary remedy by petition, was cumulative, and not intended to deprive the society of any previous right to sue at law, and that the section, giving the extraordinary proceeding, related only to persons being official members of the society, whereas the defendant had ceased to belong to the club, and was no longer in office.

Storks and Dover were then heard in support of the rule, when they took a distinction between the present case and that of Auditor Curle, the objection here taken being not that two persons had been appointed to one office, but that two officers had been appointed, whereas the articles authorized the society only to appoint one.

GRAHAM, Baron. We are of opinion, that there is no solid foundation for either of the objections taken to this verdict. As to that of the defendant being a partner, I think that he was, under the particular circumstances of this case, bound by his promise, independently of his going out of the society, and running away with the box; and that this action might be sustained against him, even though he might be considered a tenant in common. If one tenant in common [135] oust the others, an action of trespass lies. So if tenants in common appoint one bailiff or receiver, by the old law they might have an action of account against him. I am therefore of opinion, that in a case of this sort, *indebitatus assumpsit* would lie. His carrying away the money, and leaving the society, makes him liable to them, as if he were not himself a member of the society, and it might be recovered as money had and received. The defendant had placed himself out of the protection of his situation in the society, by his conduct in withdrawing, under the circumstances, and he had no longer any further interest in common with them.

But this case is besides clearly within the 11th section of the act of parliament.

* That article authorized the club to appoint a person to be auditor, "and also a treasurer, if necessary."

It is one which the act contemplated and provides against, removing all question as to the supposed partnership in the money, by enacting that the property of the society shall vest in the proper officer, for all purposes of action and suit in anywise touching the same, and that such actions may be brought in the name of such officer.

The objection of two treasurers having been appointed is equally untenable. The appointment, though inaccurately worded, is in effect an appointment of two persons to be treasurer, and on that *Curle's case* is precisely in point.

The last objection could only have weight, if the statute had been imperative on the officers of [136] the society, in directing them to proceed by the extraordinary mode of petition only, but as it has not done so, we must take it that the legislature gave the society the more summary remedy, in addition to whatever they might otherwise have had.

WOOD, Baron. I think neither of these objections can hold.

As to the appointment of the treasurer, the act empowers the members to appoint two persons to the office if they think fit; the 4th section expressly enacts, that such societies shall and may elect and appoint such persons (in the plural) into the office of treasurer, &c. and to elect and appoint others in the room of those who should die, and that is made still more clear by the subsequent language of the section, which speaks of the treasurers in the plural, which would otherwise be nonsense.

The question then is, whether the rule of the society abridged the power given to them by the act. The object of the rule was merely to enable the members, for the sake of convenience, to appoint a treasurer at a monthly instead of a yearly meeting. They use the word "treasurers" as meaning the office of treasurer, and in that sense it would be absurd to suppose that they meant to abridge, by the rule, their own power, as given by the statute.

[137] There is therefore no pretence for the objection. Both by the statute, and by their rule, they had a power to appoint two or more persons to the office, and that is what they have in fact done.

The next objection is, the defendant being a partner. Now, without reverting to the terms of the act of parliament, I think that enough appears from the facts of this case to enable the plaintiffs to maintain the present action: for the promise laid in the declaration must be implied from the circumstance of the defendant's having the money of the society in his hands after he had left the club, and when he had consequently ceased to be a partner. I may, however, ground myself on the words of the act; for the 11th section enacts, "that the monies, &c. of the society shall be vested in the treasurer or treasurers, (or other officers) for the use and benefit of the society, and in the succeeding officers, for all purposes of action and suit, and that it shall for those purposes be taken to be the property of such officers, who are authorized to bring actions in their own name."

As to the specific remedy given by the statute, it is clear that that does not preclude the plaintiffs from suing the defendant in a court of law. That does not deprive the plaintiffs of any pre-existing right. It gives merely an additional remedy, and all the remedies are concurrent, and the plaintiffs may choose whichever is most suitable to their case. I am of opinion, therefore, that these per-[138]-sons were properly appointed treasurers, and that they may maintain the present action in their own name; and that notwithstanding they have been given a more summary remedy by the act of parliament

I therefore think that there is nothing in either of the objections which have been taken that ought to be suffered to disturb this verdict.

GARROW, Baron. I have much satisfaction in being supported by my brothers in the opinion which I have formed of the weakness of the objections which have been taken to this verdict, and which are admitted to be merely technical, and not consistent with the justice of the case. If there was any thing held out to the neighbourhood by the language of the rules of this society which might tend to mislead, we might hold them strictly to the terms of the articles; but they propose to obviate the inconvenience of a treasurer dying leaving a long interval before another could be appointed, by altering the time from six months to one. They alter their rule accordingly, and the Court of Quarter Sessions sanctions it. If these poor people could have foreseen this discussion, they would most probably have struck out the *s*, and then the language of the rule would have brought their officers within *Auditor Curle's case*.

As to the other point of the partnership, the answer is that the defendant is not

sued as a [139] member, but as a mere defaulter, accountable to the society for their money in his hands.

I have therefore no doubt that the plaintiffs had a right to sue the defendant in this action. He must be taken to have promised to pay over the money intrusted to his keeping whenever it should be demanded,—and the person entitled to make such demand is the treasurer for the time being, or, in other words, the person or persons holding the office of treasurer. I say nothing of the conduct of the defendant, although that is a circumstance in this case which ought not to be overlooked, in considering his liability to the plaintiffs in the present action.

Per Curiam. Rule discharged.

RUSSELL v. BUCHANAN & UX. Friday, 20th November 1818.—Where the solicitor for a defendant sued jointly with his wife for a debt due from her *dum sola*, appears on his undertaking, and pleads for the husband only—the plaintiff (having caused the wife to be served with a copy of the process,) may appear for her *secundum statutum*, and treating the plea so put in by the husband alone as a nullity, sign judgment for want of plea.

Dauncey, on a former day, obtained a rule to shew cause why the interlocutory judgment which had been signed in this cause and the subsequent proceedings should not be set aside on the ground of an alleged irregularity.

[140] The plaintiff's solicitor, (as appeared from the affidavits,) having apprized the solicitors of the husband by letter, of a joint action about to be commenced against the defendants on a note of hand given to the plaintiff by the wife before her marriage, they gave an undertaking to appear for him only, (expressly stating that they would not appear for the wife) which they did: and they also afterwards pleaded the general issue for the husband alone, but on being applied to to plead for the wife also, they refused to do so, repeating their determination before expressed to act for the husband alone.

The plaintiff's solicitor then, in consequence of such refusal, (having before the filing of the declaration served the wife with a copy of the process) entered an appearance for her under the statute, and signed judgment as for want of a plea.

It had been submitted, when the rule was obtained, that the husband, having appeared by attorney, the plaintiff was irregular in appearing for the wife, *sec. stat.*—that the separate appearance of the husband to the joint action against himself and wife, was a nullity, and could not be proceeded on as an appearance to the writ; that the solicitor for the plaintiff should have appeared for both, if either, and ought not to have accepted the appearance of the husband alone; and that the plaintiff might have moved [141] the Court on the undertaking which had been given.

Husband and wife being but one person in the eye of the law, an appearance according to the statute, entered on account of her not appearing, ought to have been entered as for both, for otherwise either appearing in a different manner from the other would invalidate the appearance of each.

Manning shewed cause. The defendants being both regularly before the Court, the husband in due obedience to the writ, the wife by force of the provision of the statute (12 Geo. I. c. 29), he submitted the plaintiff was in a situation to declare in the common course, and might therefore demand a joint plea. And he adverted to a case recently before the Court of Common Pleas, wherein it was said to have been held that two persons who had been sued in a joint action by different process, might, on the appearance of both, be regularly declared against. He urged that the plaintiff was of necessity obliged to appear for the wife under these circumstances, or he could not proceed in the suit; because he could not recover in such an action against the husband alone.

[The Court, having inquired of the Master if there were no instance of an appearance being entered under the statute for some of the parties to a joint action after others had appeared volum-[142]narily, he reported that there were instances of such practice.]

It was then submitted that, as in an action against husband and wife, neither could plead alone, (*Warner's case*) (Y. B. p. 43, pl. 23), the plaintiff could not declare against either singly, (*Watson v. Thorpe & Ux.*) (Cro. Jac. 239), the obvious consequence would be, that a plaintiff's course of proceeding in such cases might always be

defeated by a refusal to appear on the part of the wife, the husband having appeared ; unless the plaintiff were allowed to avail himself of the benefit of the statute in appearing for the wife, by which means the husband's separate plea being rendered null, he might then sign judgment as if there had been none pleaded.

In support of the rule, it was insisted, that if the plaintiff had been placed in difficulty, it was his own fault in having accepted in the first instance an imperfect appearance, which was in point of law a nullity in such an action as this ; for not to appear for both was not to appear at all : and it was contended that, the plaintiff not having objected at the time and in limine, he was not entitled to lie by for the purpose of taking advantage of his own negligence, and in order to enable him to sign an interlocutory judgment, as for want of a plea.

[143] WOOD, Baron. The husband might have appeared both for himself and wife. He has chosen however to appear for himself only, and not for his wife, and she has not appeared. The plaintiff's course then was quite plain, which was to appear for the wife according to the statute, and having done so, he might declare, and he would then be entitled to demand a plea, and might sign judgment, if none were pleaded.

GRAHAM, Baron. The appearance of the husband for himself was so far from being a nullity as that if the plaintiff had afterwards entered an appearance for him also under the statute, the former appearance having been recorded, the judgment would in that case have been properly moved to be set aside for irregularity. As it is, he has done quite right.

RICHARDS, Chief Baron. If the husband and wife are to be considered as one person for this purpose, the husband appearing for himself has appeared for both : if not, his appearing for himself is a defective appearance, which the plaintiff ought to have some means of rendering perfect, and I think that looking to the spirit of the act of parliament, it enables him to do so in the way which he has adopted. Under these circumstances, therefore, I think that the entry of an appearance for the wife by the plaintiff, according to the statute, was regular, and that having afterwards declared the plea by the husband alone, was [144] a nullity, and consequently the plaintiff has properly signed judgment.

Per Curiam. Rule discharged, with Costs.

REX IN AID OF PATTISON AND OTHERS v. SLOPER AND ALLEN. Saturday, 21st November 1818.—The doctrine of the crown process having priority where it bears teste on a day subsequent to a subject's execution on a *fi. fa.* under which the sheriff has seized, applies to cases of extents in aid.—The statute 59 Geo. III. enacting, that extents in aid shall not be sued out and prosecuted in certain cases, does not extend to the prosecution of such extents where they have been commenced before the passing of that Act.

Dauncey moved that a sum of 250*l.* which the sheriff had levied under an extent in aid, who had made a special return of the facts of the case, should be paid to the Secretary of the Albion Insurance Company, for whose benefit the extent issued.

The extent in aid bore teste on a day subsequent to the seizure of the goods under a *fieri facias* at the suit of Messrs. Morland and Co. but before any sale had taken place.

Sir William Owen opposed the application, and admitting that after the decision of the Court of Saturday last, he could not upon motion expect the Court would now come to a different deter-[145]-mination, submitted that there was a distinction between this case and that of Saturday last, inasmuch as that was the case of an extent in chief, and this was the case of an extent in aid ; and that the ground of the former decision was the priority which was vested in the Crown by virtue of the Royal Prerogative, and that such prerogative did not extend to a subject suing out an extent in aid. That the Court recognized a distinction in several cases between extents in chief and in aid, as in allowing parties to plead several pleas against a Crown debtor, which would not be permitted against the Crown itself.

He also submitted, that as by the statute of 57 Geo. III. c. 117, the persons suing out the present extent in aid, were of that class who could not now sue out an extent ; and as that statute prevented any such persons from suing out and prosecuting an extent in aid, and made such proceedings void, the Court would not grant this

motion, which would give effect to the extent, and permit a prosecution of it, although it had been commenced some time before the passing of the act.

But the Court held, as to the first objection, that there was no distinction between an extent in chief and in aid in this particular: and as to the second objection they said, that the statute did not apply to suits which had been antecedently commenced, and they

Granted the Motion.

[146] MEREDITH v. GILPIN AND OTHERS. Thursday, 26th November 1818.—

On a question of title, in an action of trespass between a parish and an individual, to certain lands claimed by the former, under an inclosure act, by the provisions of which the land in dispute would (if they had a right to it) be vested in them in trust for the parish, in aid of the poor's rates, rated inhabitants are admissible witnesses by virtue of the 9th section of the 54 Geo. III. c. 107.—The Court will not disturb a verdict in an action of trespass to land, on the mere ground of the judge at nisi prius having directed the jury, that the weight of evidence was with the other party, where he does not report himself dissatisfied with the finding.—Where rent is paid by succeeding tenants after an adverse possession of twenty-three years, it does not amount to an attornment, unless the consent or at least the knowledge of the landlord can be shewn.

This was an action of trespass brought by the plaintiff against the overseers of the township of Great Wyrley (Stafford).

The first count of the declaration was, for breaking the plaintiff's close. The second, for carrying away his barley.

To the first the defendants pleaded the general issue. To the other *liberum tenementum* in the overseers of the parish.

The cause was tried before Mr. Justice Holroyd at the last assizes at Stafford.

The trespass was proved. The proof of the plaintiff's title was adverse possession, and certain deeds of feoffment under which his landlord claimed.

The defence set up was, that the croft and garden in question were vested in the overseers for the time being, under a local act of parliament of the 32 Geo. III. for inclosing certain waste lands in the parish of Great Wyrley.

[147] To prove that the croft and garden were an encroachment from the common, and that the overseers had received rent for the premises before and since the passing of the act, the defendants' counsel called a witness to those facts. He was objected to on the ground of his being a rated parishioner of Great Wyrley, when the learned Judge, who was at first inclined to reject the witness, after having attentively collated the provision of the local act of parliament transcribed in the note* with the enactment of the statute (54 Geo. III. c. 170, s. 6) † rendering rated [148] persons competent as witnesses in matters relating to parish rates or cesses, admitted his testimony.

* The act provided that a part of the common should be set out and sold for the purpose of defraying the charges of carrying the act into execution by the produce of the sale, and "that such part as should not be so sold, should be vested in and remain for ever thereafter under the direction and management of the overseers of the poor, for the time being, of the township of Great Wyrley, and be by them let, and the rents and profits thereof applied in aid of the poor's rates within the said township, and accounted for at the same time, and in the same manner, as the levies and assessments for the relief of the poor within the said township are to be accounted for by law."

† By that section it is enacted, "that no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any Court or person or persons whatsoever, be deemed and taken to be by reason thereof, an incompetent witness for or against such district, parish, township, or hamlet, in any matter relating to such rates or cesses; or to the boundary between such district, parish, township, or hamlet, and any adjoining district, parish, township, or hamlet: or to any order of removal to or from such district, parish, township, or hamlet, or the settlement of any pauper in such district, parish, township, or hamlet, or touching any bastards chargeable or likely to become chargeable to such district, parish, township, or hamlet, or the recovery of any sum or sums of money for

Evidence was then given in support of the defendants' claim of right to the premises, and they proved that rent was paid by an occupier of the croft in 1787 to the then overseer, and also at other times since: but it appeared that the subsequent payments were made without the knowledge of the landlord, and other evidence was given hostile to the claim of the plaintiff's landlord.

On this case, so supported by the testimony on either side, the learned Judge in summing up directed the jury, that the weight of evidence was in favor of the defendant. One of the jury during their deliberation, enquired if twenty years possession without paying rent would give a title, and the Judge answered, that if it were proved that no rent had been paid for that time, it would have been sufficient in this sort of action: but that that was in this case the question for their consideration. They then found a verdict for the plaintiff.

[149] Puller obtained a rule to shew cause why that verdict should not be set aside, and a new trial granted, on the ground of its being against evidence, and the direction of the learned Judge.

The Judge's report, after it had stated in substance the evidence already detailed, did not express any marked disapproval of the verdict.

Jervis and Campbell now shewed cause. They relied as against the objection—that the verdict was against evidence, and the Judge's direction—that that did not appear by the report, and that the questions being dependent entirely on facts, the jury were warranted, where there was conflicting testimony, in their belief of one set of witnesses in preference to the other, and their finding ought to be held conclusive.

On the point of the admissibility of the witness who had been objected to on the trial, on the part of the plaintiff, they urged, that his evidence had been improperly admitted, for that it was clear, that but for the 54 Geo. III. he would (being a rated inhabitant of the parish) have been incompetent to give evidence in favor of their rights. A question therefore would arise, whether the matter in question on the trial of the present issue was within the enabling clause of that act: and they contended, that inasmuch as that clause was not general—the general terms being controuled and confined by the subsequent very particular enumeration of the [150] various subject-matters of question to which it was meant to be applicable—an issue of title in a parish to land was not one in which the competency of a rated inhabitant was restored by that act: and that this cause did not in any such sense relate to the rates, but was a mere contest with respect to a right to certain inclosed lands claimed by the parish against an individual.

Dauncey and Puller, in support of the rule, contending that this was a case wherein the witness was rendered competent by the act of parliament, were stopped by the Court on that point.

They then proceeded to shew, by reference to the testimony of the witnesses, that the weight of the evidence was against the verdict of the jury.

RICHARDS, Lord Chief Baron, was absent, sitting in Equity in the Exchequer Chamber.

GRAHAM, Baron. On one of the two questions which have been made we are clearly of opinion, that the witness objected to was competent, because he is within the terms of the 54 Geo. III. The plain sense and meaning of that act is to make such persons competent witnesses, (for the legislature saw the inconveniences of excluding their testimony,) notwithstanding their partial interest in the result of such questions, and therefore their competency was restored. The matter in issue in this cause had relation to rates and cesses, because it was, if recovered, to go [151] in aid of the parish rates. It would be otherwise an absurd construction, because if these premises had been omitted, it would have been a ground of appeal, and the effect would be to make interested parties evidence against the parish in charging them with the omission, while they would be excluded in favor of the overseers, if they should endeavour to recover the property.

It was contended, that the words of the act although at first general in form, are afterwards made particular by the effect of the subsequent enumeration of the matters

the charges or maintenance of such bastards, or the election or appointment of any officer or officers, or the allowance of the accounts of any officer or officers of any such district, parish, township, or hamlet: any law, usage, statute, or custom, to the contrary in anywise notwithstanding."

of question to which it was to apply, but it is manifest that what is so particularized is merely *ex abundanti cautela*, and to shut out doubts, and the very argument which has been used, is founded on the question having relation to the rates, which alone would justify our present decision.

The next and important question is, whether the jury having been justified in finding the verdict which they have returned by the facts of the case. Now, notwithstanding I may myself have very great doubts on that point, from the circumstances of the case I do not however feel myself warranted in saying, that they have come to a wrong conclusion. That would in a suit of this sort be to send down the cause again with a prejudice, and that where the matter is not of great importance, and the defendant's right is not concluded, because an ejectment might still be brought. The plea of *liberum tenementum* [152] to a claim founded on possession, put merely the possessory title in issue. The plaintiff might certainly have had a possessory right founded on his adverse enjoyment, yet the defendants might have had the real right to the fee, notwithstanding their defeat in such an action. The question put by the jury was a sensible one, and it received an appropriate answer. The issue was left to them, and they have found a verdict. I am of opinion, that it was a question within their province, and therefore I dare not say that they have done wrong. [His Lordship then went into a comparative estimate of the evidence on both sides.] The jury may have gone far in finding for the plaintiff; but we cannot now disturb the verdict without creating a prejudice at least, if not imperatively requiring them to find the contrary way. There are besides other modes of trying the same question still open to the defendants. I think therefore this rule should be discharged.

WOOD, Baron. I cannot say, that I think this verdict ought to be disturbed. An objection was made to the competency of some of the defendants' witnesses, on the ground of interest in the result, being rated inhabitants of the parish, whose right they were called to support. And certainly, but for the statute of the 54 Geo. III. they would have been incompetent. That statute however has restored their competency, having enacted, &c. (his Lordship read the section). The question then is, whether this is a matter re-[153]-lating to the rates. It certainly relates to a fund out of which the rates are so far to be diminished, and I therefore think, that it is within the meaning of the statute: and that the witness was competent to give evidence.

The other question regards the merits, and depends on whether the jury have done wrong in finding this verdict. I cannot say that I think they have. The proof on the part of the plaintiff consisted of his possession and certain deeds; the first deed is dated in 1779, at which time the feoffor had been in long continued possession. The words of that deed are sufficient to pass these premises where possession has gone along with it.

The defendants proved a solitary instance of a former overseer receiving rent in 1787, from the person then in possession; but it appeared that from that time till 1810, no other rent was paid during all that interval; therefore for a period of twenty-three years the possession was adverse, and that was sufficient to support the plaintiff's title. The defendant, it is true, also proved, that in 1810 the overseers received rent from the tenant in possession who two years before had sold the land to his landlord under whom he then held. He said, he was persuaded by his father to do so. His landlord however knew nothing of it, and afterwards he under-lets to other persons, who also pay the overseers rent. Thus against an adverse possession of twenty-three years, the [154] defendants' only title is founded on these attornments made without consent or knowledge of the landlord, and behind his back. The tenant never tells his landlord of it, nor even deducts rent on account of such payment, such an attornment, however frequently repeated, is contrary to law, and the express provision of the 11th of Geo. II. c. 19, s. 11, (having read that section) which is calculated to defeat this sort of surreptitious attornment.

If these attornments then are null and void, on what does the title of the overseers rest? (Having more particularly examined other less material parts of the evidence on both sides.) I do not think therefore, continued his Lordship, that a possession which was clearly adverse for so long a time as up to these fraudulent attornments, should be overthrown by such a case as that relied on by the defendants. There was good sense in the question put by the jury, and I think that on the whole they have done right in finding this verdict.

As to the question of title if an ejectment should be brought, it would then certainly be a different thing, but I do not see how the overseers could resist such a case as that which has been made on the part of the plaintiff in this action.

GARROW, Baron. On the question of law affecting the competency of the witness, I entirely [155] agree with my brothers. The history of the act of the 54th of Geo. III. is that, rated witnesses being incompetent by the rules of law in cases where the rates came in question, having been found to be productive of the greatest inconvenience, that act was passed to restore their competency, and that was the express object of the statute to effect. To bring this case within the act we have only to inquire, whether the question on this issue is a matter relating to the rates or cesses. Can any one doubt that it is? But then it was said to be confined to cases where the issue involves questions as to the payment of the rates, and where the rates are directly affected by the result, as in the instances afterwards enumerated, which it is quite clear are all cumulative, and extensions, rather than restrictions of the first general expression in the clause.

As to the question of granting a new trial on the merits, whatever one's private opinion may be, we cannot say that the jury on the whole have done wrong, although I should not go the length of saying, that the granting a new trial by us would be imperative on the jury as to finding the other way. The jury, whose important duties should always be held sacred, having decided, and it being within their province, although I should not myself perhaps have come to the same conclusion, I do not think that we should be warranted in disturbing the verdict.

Per Curiam. Rule discharged.

[156] NORWAY v. EDE. 27th November 1818.—If a plaintiff in an injunction bill, filed to restrain the defendant from proceeding in an action at law, gives a cognovit, and undertakes in writing to dismiss his bill, and consent to the dissolution of the injunction, but afterwards refuses to do so, the Court upon a motion by the defendant, and notice to the plaintiff, will dissolve the injunction, but not dismiss the bill.

The defendant had brought an action against the plaintiff for recovery of a sum of 6525l. The plaintiff filed a bill praying that the defendant might be restrained from proceeding in his action, and obtained the common injunction: the plaintiff afterwards gave the defendant a cognovit in the action, and also an undertaking in writing that he (the plaintiff) would withdraw his bill, and consent to the injunction being dissolved with costs, as between solicitor and client. Notwithstanding that undertaking he would neither move to have his bill dismissed, nor consent to the dissolution of the injunction; and the injunction being in existence, it stood in the way of the defendant so as to render the cognovit he had obtained from the plaintiff an inoperative instrument. Under these circumstances:

Hone now moved, upon notice to the plaintiff, that the bill might be dismissed, and the injunction dissolved pursuant to the written undertaking which the plaintiff had given, relying that the Court in the exercise of its equitable jurisdiction would interpose in behalf of the defendant by granting the motion, which, although unusual in practice, only sought what the plaintiff himself had by his undertaking admitted that the defendant was entitled to.

[157] The Lord Chief Baron. I fear the Court cannot upon a motion of this nature dismiss the plaintiff's bill, but, as you have given notice of this motion, it will relieve the defendant by dissolving the injunction.

Injunction dissolved.

HULL v. VAUGHAN, Clerk. Friday, 27th November 1818.—Use and occupation.—

Where an owner of an estate contracts to sell to another, who thereupon sells a part of the property so contracted for by auction to a third person, and he, (the sub-vendee,) gets possession, and the original vendor afterwards refuses to perform his contract, which occasions a suit in equity, pending which the original vendor obtains possession from the sub-vendee, on a demand to be restored to it, it being rumoured that the original purchaser had failed in the suit instituted for specific performance—if, in fact, the plaintiff should ultimately succeed in that suit, and

the estate is in consequence conveyed to the purchaser under a decree of the Court, the sub-vendee may maintain use and occupation against the original vendor, for all the time during which he held the possession so obtained from the second purchaser.—A nonsuit directed at nisi prius, under such circumstances, set aside.

[Observed upon, *Winterbottom v. Ingham*, 1845, 7 Q. B. 617.]

The question which arose in this case was, whether the plaintiff could maintain an action for use and occupation under particular circumstances affecting the right to the possession of the premises, which were the subject-matter of the suit as between the plaintiff and defendant.

The cause was tried at the Hereford Summer Assizes, 1818, before Mr. Justice Holroyd, when that learned Judge, holding that the action could not be maintained under the circumstances disclosed in evidence, nonsuited the plaintiff.

[158] Puller having obtained a rule for setting aside that nonsuit,

GARROW, Baron, now read the report of the evidence, which was in effect—that in 1804 the defendant agreed to sell some freehold property to a Mr. Bach, an attorney, at that time the defendant's solicitor. Bach immediately afterwards sold the property by public auction, in lots. Hull, the plaintiff, became the purchaser of one of those (the premises in question), and took possession at Candlemas, 1805, having paid by far the greatest part of the purchase-money; but there was no agreement made between Bach and him in writing. The other lots were sold to various persons (among whom was the defendant himself), and all of them entered into possession. When the time arrived which had been agreed on for the completion of the original purchase by Bach, Vaughan refused to complete the contract. Bach then, after having tendered the purchase-money and deeds of conveyance for execution, filed a bill to compel specific performance, and for an injunction to restrain actions of ejectment brought by Vaughan against the vendees in possession. The injunction was granted, and the cause was set down for hearing in the early part of the year 1813. About that time Vaughan the defendant, availing himself of a report then prevalent, (in consequence of Bach having been attached for not paying the purchase-money into Court, in pursuance of the terms on which he had obtained the injunction,) that he had succeeded in [159] the suit, required the plaintiff Hull to deliver up to him the possession of the premises which he had bought of Bach, which under the influence of the rumour he consented to do. Hull soon afterwards discovered that the suit in equity between Bach and the defendant had not been determined, Bach having by that time paid in the purchase-money; and he then demanded back possession of the land from Vaughan, who refused to restore it. Hull afterwards knocked the lock off the gate, and took possession. Vaughan took possession again, and putting on another lock, kept it till the month of April, 1815, a period of two years.

During the time that Hull the plaintiff had had possession under his contract for the purchase of the premises, he had improved the land from rough ground into productive hop-ground and orcharding, and it had become worth double the sum which he had originally agreed to pay Bach for it. Vaughan, on taking possession, had agreed to allow Hull a fair valuation price for the hop-poles on the premises, which were of considerable value, and the apple trees which he had planted, but which he never paid.

The suit in equity being afterwards (in 1815) finally determined in favour of Bach, the plaintiff therein, Vaughan then took the purchase-money out of Court—gave up possession of the estate—and executed the deeds which had before been tendered to him for that purpose by Bach.

[160] On these facts an objection was taken at the trial, that the plaintiff had no title on which to found the action for use and occupation—that the relation of landlord and tenant did not at any time subsist between the parties—and that the defendant was in truth at the time for which the plaintiff sought to recover, the legal owner of the premises: and they cited the cases of *Hearn v. Tomlins* (Peake's N. P. C. 192), and *Kirtland v. Pounsett* (2 Taunt. 145).

On the other hand, it was contended that the plaintiff had the true title to the premises at the time of the defendant's occupation, as confirmed and acknowledged by the subsequent delivery up of them to Bach at the termination of the suit, and that he had had such a right during the occupation by the defendant as would enable him

to recover in this action; for that it was not necessary to the owner's remedy against an occupier; that the positive relation of landlord and tenant should subsist between them: citing the case of *The Dean and Chapter of Rochester v. Purce* (1 Campb. N. P. C. 466).

The learned Judge, adopting the objection, ruled that this was a case where the plaintiff could not maintain the action, which, in this instance, his Lordship observed, had been brought by one who had no right to the land, against another who had, the purchase-money not having been paid at that time, and that whatever remedy [161] the plaintiff might have had as against Bach, he could not sue the defendant in the present form of action, which was in effect, as between these parties, suing a man for the use and occupation of what, in legal construction, was his own land.

Russell and M'Mahon now shewed cause, insisting, on the objection taken at the trial. They submitted, first, that there had been in point of fact no contract or privity between the parties, which would enable the plaintiff to sustain this action: and secondly, that the plaintiff had had no title whatever to the land, or at least no legal interest in it. By the 14th sect. of chap. 19th of the 11 Geo. III. giving landlords a right of action for use and occupation, where there existed no demise, it was submitted that it was still indispensibly necessary, according to the terms of that statute, that there should be some parol agreement constituting the connection of landlord and tenant, to protect a plaintiff from nonsuit; whereas in this case, no contract of any sort could even be implied; for the facts expressly negatived the relationship, as between these parties, of landlord and tenant, and also that of owner and occupier; nor was this even a case of vendor and vendee. The dispute as to the right was wholly between Vaughan and Bach, and no right could possibly accrue to Hull till that suit should have been determined, even if its determination should be ultimately in favour of Bach.

[162] Another material point of the case (it was urged) in favour of the defendant against this action was, that he had demanded of the plaintiff the re-possession as matter of right, and took it under an adverse claim against Bach, under whom alone the plaintiff could claim, there being no sort of privity between him and the defendant.

The cases of *Hearn v. Tomlin*, and *Kirtland v. Pounssett*, were again applied to this question, and that of *Cobb v. Carpenter* (2 Campb. N. P. C. 13), in which last case Lord Ellenborough held, that a plaintiff could only recover rent, in an action for use and occupation, from the time when he first had the legal estate, although he might have had the equitable estate long before.

[Richards, Lord Chief Baron. Hull was, at the time of giving up the land to Vaughan, in point of equity, rightfully in possession: and he was entitled to the possession, having been let in under his sub-contract with Bach, who had purchased of Vaughan. Then Vaughan regained possession by taking advantage of a rumour which was not founded in truth, and Hull gave it up under a mistake as to the fact. Such a yielding up of possession ought not to be permitted to affect his right.]

But Hull (it was urged) had neither the legal nor equitable right to possession of the premises, [163] one of which would be certainly necessary to sustain this action, and it was said by the Chief Justice, in delivering judgment in *Kirtland v. Pounssett*, that "a contract cannot arise by implication of law under circumstances the occurrence of which neither of the parties ever had in their contemplation."

[Richards, Chief Baron. Is there any other case ruling that a person who has the equitable right cannot maintain use and occupation?]

Here the plaintiff had not, during the defendant's occupation, even an equitable title, and he could not have compelled Vaughan to convey to him. There was then a condition to be performed before even Bach could have had either even a legal or equitable right to the possession. Until Bach had actually paid the purchase-money into the Court of Chancery under the order, he could not confer any right.

[Graham, Baron. When the money was in fact paid, he then had a right which related back to the day on which he would have been rightfully entitled to the possession, and through him to Hull his sub-vendee.]

Lord Chief Baron. A court of equity would merely prevent his using his rights of ownership till he had performed his part of the contract: but that being done, his contracts would be binding ab initio, and the Court would not suffer him to turn [164] round on his vendee, and say that he had no right to sell, because he had not paid the

purchase money, and therefore he should not complete his contract. A court of equity extends its protection to all parties who have equitable rights.]

But it was submitted that, with a view to this question as to the right in the plaintiff to maintain this action at law, there was no case where it had been held that use and occupation could be maintained by one who had not a present right to possession, or at least to the legal estate, as was ruled by Lord Ellenborough, in the case of *Cobb v. Carpenter*, and now, in the present case, by the learned Judge who tried this cause.

[Richards, Chief Baron. It has frequently occurred to learned Judges at nisi prius, that the rules of courts of Equity have been over-looked. Money paid into Court, is in Equity considered as paid into the hands of the party, and on the suit for specific performance being determined in favour of the plaintiff, the defendant would be decreed to account for the rents and profits.]

It was finally pressed, that this question rested solely on the existing right of Hull, independently of any title in Bach at the time of the present occupation, and that he having voluntarily surrendered his right to Vaughan on demand, and having afterwards asked his permission to become his tenant, had so far acknowledged Vaughan's [165] claim as to be estopped from now succeeding in this action against him, under all the very particular circumstances of the present case.

Dancey, Puller, and Campbell, in support of the rule, urged that as, on the facts in evidence, it was quite clear that Vaughan had received the money agreed on as the price of the land sold, he at least could have no right to the land during the two years of his occupation, and rent must in the mean time have become due to some one. He had clearly no right to the possession, and the person at that time entitled to the rent might maintain use and occupation as soon as his right should be afterwards ascertained.

On the point of objection founded on the absence of right in the present plaintiff to maintain use and occupation, they contended that, although the possession was given up by him on the demand of defendant as matter of right, yet as that demand was complied with voluntarily, and on the ground of a misrepresentation by means of which the plaintiff had been deceived, in such a case the law would raise an implied assumpsit to pay rent to the person who should be entitled during the defendant's occupation to the right of possession of the premises, agreeably to the two-first counts of the declaration *, or [166] otherwise a party in the situation of the present plaintiff would be without remedy in analogous cases, which would be a manifest imputation on the sufficiency of the law.

They distinguished the present case from *Hearn and Tomlins*, and from *Kirtland v. Pounsett*, the determination in the former case having been founded on the absence of benefit to the occupier, and the latter being a case where a vendor having parted with a house on receiving the purchase-money, was held to have had an equivalent, in the use of the money, for the occupation of the house.

On the part of the plaintiff they cited the case of *The Dean and Chapter of Rochester v. Pierce* (1 Camph. N. P. C. 466), where Lord Ellenborough held that this species of action was maintainable for use and occupation of premises by permission of a plaintiff, without a demise.

On the whole, they submitted that, so far from the present form of action being applicable only to strict rights, it was peculiarly adapted to cases like the present, where the relative situation of [167] parties might not be known at the time of the occupation, but should be afterwards fixed by the decision of a court, submitted to by all parties, otherwise in all such cases a party might derive a benefit from his own misconduct in the breach of his engagements. And they urged that as this case stood clear of adverse authorities, it was therefore open to a decision which might establish such a rule of law in similar cases, as would meet the justice of such demands between other parties who might be so circumstanced in future.

* The declaration consisted of twelve counts: the first was indebitatus assumpsit, for use and occupation, at the request of defendant, by permission and sufferance of the plaintiff.

2d. In consideration that plaintiff, at like special instance, &c. had before, &c. permitted and suffered defendant to hold, &c. and that defendant, by such permission, had held, &c. assumpsit quantum meruit.

RICHARDS, Chief Baron. I am happy to say, that in this case, which is certainly one of peculiar circumstances, the Court are unanimously of opinion that the rule should be made absolute; because that determination is agreeable to the obvious justice of the case.

(Stating the facts). Bach beyond all doubt, both in equity and substance, having paid into Court his purchase-money, agreeably to the terms of the order of the Court of Chancery, became then as much entitled to this property as if he had been the owner of the fee-simple at law. He became entitled absolutely, and might have settled, devised, or sold it. He had in point of fact sold the premises in question to Hull the plaintiff. Hull had therefore a legal title, that is, such a title at least as the law will support. He took possession under his agreement for the purchase of the property, and held it for eight years.

[168] [His Lordship minutely detailed the subsequent facts reported, observing particularly on the manner and means of Vaughan obtaining possession from the plaintiff, and that the fact of the Lord Chancellor granting the injunction, and the subsequent payment of the purchase-money into Court, were so far in effect affirmances of the contract.]

At that time (when Vaughan so obtained possession) nothing had been determined respecting the suit between Bach and Vaughan, yet Hull, on the faith of a false rumour, delivers up possession to Vaughan. Now, without saying that the possession had been obtained by fraud, it is enough that it was in fact obtained from Hull, and with his consent, who, as it ultimately turned out, was then actually entitled to it himself. If however there were in fact no misrepresentation originally on the part of Vaughan, his subsequent silence and acquiescence contributed to confirm the mistake at least. Then Hull having given up to Vaughan, at his instance, the possession to which he was at that time entitled, shall it be said that Vaughan is not compellable to account to Hull, the person by whose permission he was let into the possession, for the use and occupation of the premises, to the possession of which he alone had a right? This is a case surely as strong as that of vendor and vendee, and there it is admitted, that this action would lie, although there would certainly be no tenancy subsisting in that case.

[169] In the case of *Heun v. Tomlin*, which was cited for the defendant, it was held by Lord Kenyon, that under the circumstances in evidence there, use and occupation could not be maintained. That determination proceeded entirely on the ground of the defendant having been induced to make a contract with the plaintiff for the purchase of a term in the wharf, which the defendant refused to complete, because the plaintiff had misrepresented the quantity of the term, and that having improved the premises, on the faith of the plaintiff's statement of his interest, the defendant had sustained injury by the occupation, and therefore, as it was not a beneficial occupation (that is, such a possession as would entitle the plaintiff to compensation), and as the defendant would never have entered on the premises had he known the fact of the plaintiff's interest, in respect of which the plaintiff had mislead him, his Lordship directed a nonsuit. Now, from reading the terms of that decision, as pronounced by so great a Judge, who never threw away words, the plain inference is, that had the occupation been advantageous to the occupier, his Lordship would have considered him liable in that action, although it is quite clear that there was no privity between the parties in the character of landlord and tenant, for they stood in the relationship of vendor and vendee. Here there was no contract, but there was a permission on one side, and an enjoyment on the other.

The case of *Kirtland v. Pounsell* applies as little in favour of the defendant [stating that case [170] fully]. There there was no mistake as to the existence of the contract, but the contract could not be completed, because the plaintiff could not make a title, and the opinion of the Chief Justice in the earlier part of the case, who puts hypothetically an instance somewhat approaching this, that such an action could be supported, is much in favour of the present plaintiff.

Notwithstanding, therefore, the respect we all entertain for the learned Judge, we must decide on the circumstances of the case as now brought before us, with regard to the real ownership of the estate, which for the purposes of this action was with Bach and Hull all the time, although the legal estate was in neither of them. I am clearly of opinion, that the rule for setting aside the nonsuit which has been obtained, must be made absolute.

GRAHAM, Baron. Although I have entertained considerable doubts on this question,

yet on the whole, after much anxious consideration, the opinion which has been delivered by my Lord Chief Baron has my entire concurrence.

In questions which have reference to the act of parliament, it is quite clear that a distinct relationship of landlord and tenant should be established; but this case may stand on principles of common law, as recognized by all the cases, both old and new.

[171] It is not necessary in this species of action, that the proper relation of landlord and tenant should be distinctly made out between the parties, because the action is calculated in form to meet cases where the parties do not bear those characters, if there be in point of fact an ownership on one hand, and an occupation on the other: and it should be liberally applied, where it may be found to be a party's only remedy. My difficulty has been to reconcile that rule with the case of *Kirtland v. Pounsett*, where the Chief Justice has certainly expressed himself very strongly against the implication of an assumpsit where it was not in the contemplation of the parties.

Although in raising an implied assumpsit, however, we may or may not be doing what was not in the contemplation of the parties at the moment, that should not be the only consideration with us in determining whether this species of action can be maintained or not. The merits of the case are, that Hull, acting under a mistake at the least, delivers up possession of premises the right to which might at that time have been doubtful, and probably even thinking that Vaughan's claim had been decided in his favour, still, however, when the question then pending was ultimately determined, and Vaughan was found not to have been entitled to the possession, he became accountable to some one for use and occupation. He was accountable either to Bach or Hull, and according to my apprehension of the facts of this case, I think that he was accountable to Hull.

[172] As to the proposition that a man who has an equitable title only, cannot be sufficiently entitled to maintain use and occupation, I cannot find any thing sound in it. Bach's decree gave Hull an estate and ownership in the premises, vesting from the time when he first agreed to purchase, and his title related back to that time. If Hull, as soon as he became armed with such a title as Bach could then give him, had brought ejectment against a stranger in possession I think it clear that he would have been entitled to recover against any one from the date of his agreement with Bach. That at least is my apprehension of the case, as affecting his right. Therefore I am clearly of opinion that this rule should be made absolute.

Wood, Baron, of the same opinion. The short question is, whether, under the circumstances of this case, the law would not raise an implied assumpsit on the part of the defendant, that he would pay the plaintiff a quantum meruit for use and occupation of premises to the possession of which the plaintiff during the time of such occupation had such a right as under the circumstances in evidence he certainly had in equity.

[Stating the circumstances.] Hull was, at the time of his giving up possession to Vaughan, the equitable owner of the premises in question, for notwithstanding Vaughan had the legal estate, the Chancellor, on the facts of the case, restrained an ejectment which had been brought by him. [173] Hull therefore was, to all intents and purposes, the substantial owner.

Vaughan got possession by the effect of a misrepresentation of the state of things as between him and Bach. Whether there was fraud in that, or merely a mistake, it makes no difference. It was in fact by permission of Hull that he was let into possession. Then the contract between Bach and Vaughan was at length discovered not to be at an end, but to be still in force against Vaughan, and he accordingly once more delivers up possession of the land, and executes the proper conveyance. Then Hull makes this demand for use and occupation, and the defendant resists it on the ground that there was no agreement between him and the plaintiff to hold on such terms as would entitle him to maintain this action. Will the law permit such a defence? Certainly not: for it implies in such a case a tacit promise that he will satisfy the plaintiff for the use and occupation had. The form of the declaration in this case is material, and as this has been drawn, laying the holding by permission and sufferance, it is sufficient to meet the facts in proof in the present instance, and to maintain the action which has been properly founded on these circumstances.

The sufferance is alleged, and it is proved. He was suffered to take possession in consequence of a mistake certainly, but when that [174] mistake is discovered, the defendant must do the plaintiff justice.

GARROW, Baron, expressed his entire concurrence, founded on the reasons already given.

Per Curiam. Rule absolute.

THE KING v. BARRY. Demurrer. 27th November 1818.—Plea to scire facias on bond conditioned to take out the bonded goods within the year, or pay the duties at the end of the year—that the defendant had paid and did pay the duties answering to the tenor and effect of the writing obligatory. —Replication, that the goods were not taken out of the warehouse within the year, and that the duties were not paid at the end of the year: Rejoinder, that the duties were paid after the end of the year, and before the issuing of the scire facias—the rejoinder held bad on demurrer.

Scire Facias on the usual warehousing bond to the Crown, dated 1st January, 1810. The bond recited, that the defendant, in pursuance of the act of parliament, intended to lodge and secure under the joint locks of the Crown and the merchant, in a warehouse within the premises belonging to the London Dock Company, without payment, at the time of the first entry of such goods, wares, and merchandize, of the duties of Excise due on the importation thereof. The condition was, that if the obligors should pay the duties of Excise charged or chargeable on such [175] goods, &c. to be taken or delivered out of any such warehouse in which the same should have been lodged or deposited under the said act, for home consumption; and in case the same should not be taken or delivered out of such warehouse as aforesaid, for home consumption, on payment of the duties, or for exportation, within one year, from and after the day of the date of the bond: if the said obligors should, at the end of the said year, pay all and every the duties charged and chargeable on the said goods, wares, and merchandize, respectively, together with all charges that might be incurred by the officers of Excise, for or in respect of such goods, wares, and merchandize respectively, the obligation to be void.

The defendant pleaded, that he had paid, and did pay, all and every the duties of the Excise charged or chargeable on the said goods, wares, and merchandize, in the said writing obligatory mentioned, answering to the tenor and effect of the writing obligatory of him the said defendant, together with all charges that were incurred by the officers of Excise, for or in respect of the said goods, &c.

Replication, that certain duties of Excise amounting to 531l. 5s. of right due on the importation of the said goods, &c. were on the importation of the said goods, and before the making of the said bond or writing obligatory, to wit, on the said 1st day of January, 1810, at, &c. [176] chargeable and charged on the said goods, &c. by virtue of the statutes in that case made and provided, averring the warehousing and bonding on the said 1st January, without payment, at the time of the first entry of the said goods, of the duties of Excise due on the importation thereof. The replication then alleged, that the same goods, wares, and merchandize, were not, within one year from and after the day of the date of the said bond or writing obligatory, taken or delivered out of the warehouse in which the same were so lodged. Breach, that the obligors did not, at the end of the year, from the day of the date of the said bond or writing obligatory, pay all and every the said last mentioned duties so charged and chargeable as aforesaid, according to the form and effect of the said condition of the said bond or writing obligatory in the said writ of scire facias mentioned.

Rejoinder, that the defendant, after the end of the year, from the day of the date of the said writing obligatory, and before the issuing of the said writ of scire facias, to wit, on the 1st day of May 1816, did pay all and every the said duties in the said replication mentioned, so charged and chargeable, as in the said replication mentioned.

Demurrer, for that the said Thomas Barry, in and by his said plea so by him pleaded by way of rejoinder, attempts to set up, and relies on an [177] other and different defence than that by him set up in his plea by him above pleaded in bar, and hath departed from the said defence so by him set up in the said last mentioned plea: and that the said plea of the said Thomas Barry, so by him above pleaded by way of rejoinder, contains no answer to the said plea by the said Attorney General on behalf of his said Majesty, above pleaded by way of reply, and neither denies nor confesses, and avoids the same: and that the said plea, so pleaded by way of rejoinder, is evasive,

and tends to put in issue a thing wholly immaterial, and is in other respects uncertain, insufficient, and informal, &c. Joinder.

Walton, in support of the demurrer, having observed, that the object of the act was to relieve the merchant from the necessity of paying the duties on the first entry, and to give him a year to pay those duties, submitted, that by the terms of the bond, if he did not take out the goods, either for home consumption or exportation, within the year, he was, at the end of the year, to pay the duties. He contended, that either the first plea was, that the defendant did pay the duties at the end of the year, or that if it did not amount to that, it was bad: and that if the first plea was in effect an averment that he had paid at the end of the year, his second plea was a departure, or if not, that it was still bad—that if this rejoinder were good, the whole object of the act would be defeated, as a party might not take out his bonded goods for any number of years [178] after having given bond; and if the duties should be paid at any length of time afterwards, he would save the forfeiture of the obligation—but that in effect the plea of payment after the end of the year was a confession of the breach assigned.

Brougham, for the plea, contended, that the rejoinder was not a departure from the plea, because they both amounted to payment, and payment of the duties was all that could be required of the defendant, and that had been pleaded as answering to the tenor and effect of the writing obligatory. The whole year's duties are to be paid, but of course not till after the year. There must be a complete expiration of the year; and therefore payment at the end of the year must mean after the year has expired, if but for an instant. The terms of the condition must be taken to mean that payment must be made within a reasonable time after the end of the year.

The Court were of opinion that the pleas were insufficient, and therefore gave Judgment for the Crown.

[179] DOE, ON THE SEVERAL AND JOINT DEMISES OF RICHARD ELSMORE, AND BETTY his Wife, AND JOHN HALE, AND HANNAH, his Wife, *v.* COLEMAN AND OTHERS. Saturday, 28th November 1818.—A devise to H. H. for life: and from and after her decease, to such child or children of her body, “as shall be living at her decease; and in case she shall have no such child or children living at her decease, or such child or children shall happen to die before, he she, or they shall attain the age or ages of eighteen years, or be married,” devise over to a stranger in fee—held to give to the child of H. H. who should survive the mother a fee simple, notwithstanding there being no words of inheritance in the devise.—A fine sur cognizance de droit levied by the husband of one of the daughters of H. H. to the husband of another of her daughters, to the use of the husband of the former, in pursuance of a feoffment, with livery of seisin indorsed, is not of itself a bar by estoppel to a recovery of the premises by the other daughter of H. H. in an action of ejectment against persons claiming under the conusee.

This ejectment came on to be tried at the Summer assizes 1816, at Gloucester, before Mr. Baron Richards, when a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:—

William Browne, of Longhope, in the county of Gloucester, being seised in fee of the premises in question, by his will, dated 26th January, 1754, and duly executed to pass real estates, devised as follows:—“Then I give, devise, and bequeath, unto Susannah Fowle, all that my freehold messuage or tenement, &c. &c. To hold the said messuage, lands, and premises, unto the said Susannah Fowle and her assigns, for and during the term of her natural life, she paying yearly, out of the same, unto her said daughter Hannah Harding, the sum of six pounds, the same to be paid into her hands, for her own separate use and benefit, at four quarterly payments, by even and equal portions, that is to say, at Lady-day, Midsummer, [180] Michaelmas, and Christmas, the first payment to be made upon such of the said days as shall next happen after my decease. And from and after the decease of the said Susannah Fowle, then I give, devise, and bequeath, the same messuages, lands, and premises, with the appurtenances, unto the said Hannah Harding and her assigns, for and during the term of her natural life. And from and after her decease, I give and bequeath the same messuages, &c. to such child or children, whether male or female, as shall be born

of the body of the said Hannah Harding, and which shall be living at the time of her decease, if but one, to him or her alone, if more than one, to be equally divided between them, share and share alike; but my will and desire is, and I do hereby order and direct, that neither the said John Harding, nor any other husband that the said Hannah Harding shall hereafter be married to, and which shall be living at the time of her decease, shall not, from that time, have, receive, take, claim, challenge, or demand, any rent, profits, privileges, or advantage, out of or from all or any of the messuages, lands, and premises, before mentioned, but the same shall be immediately applied for the use, benefit, and maintenance, of such child or children as aforesaid. And in case the said Hannah Harding shall have no child or children living at the time of her decease, or such child or children shall happen to die before he, she, or they shall attain the age or ages of eighteen years, or be married, then, and in such case, I give, devise, and bequeath, the said messuages, [181] lands, and premises, before mentioned, with the appurtenances thereto belonging, to John Wilse, of the parish of Huntley, in the said county of Gloucester, and to his heirs and assigns for ever."

Hannah Harding, the second devisee in the above will, survived her mother Susannah Fowle, the first devisee, and entered into possession of the premises so devised to her as aforesaid. By her first husband John Harding, whom she survived, she had the several children stated in the following pedigree, who died as therein stated: and after his death, she married one Chapman, her second husband.

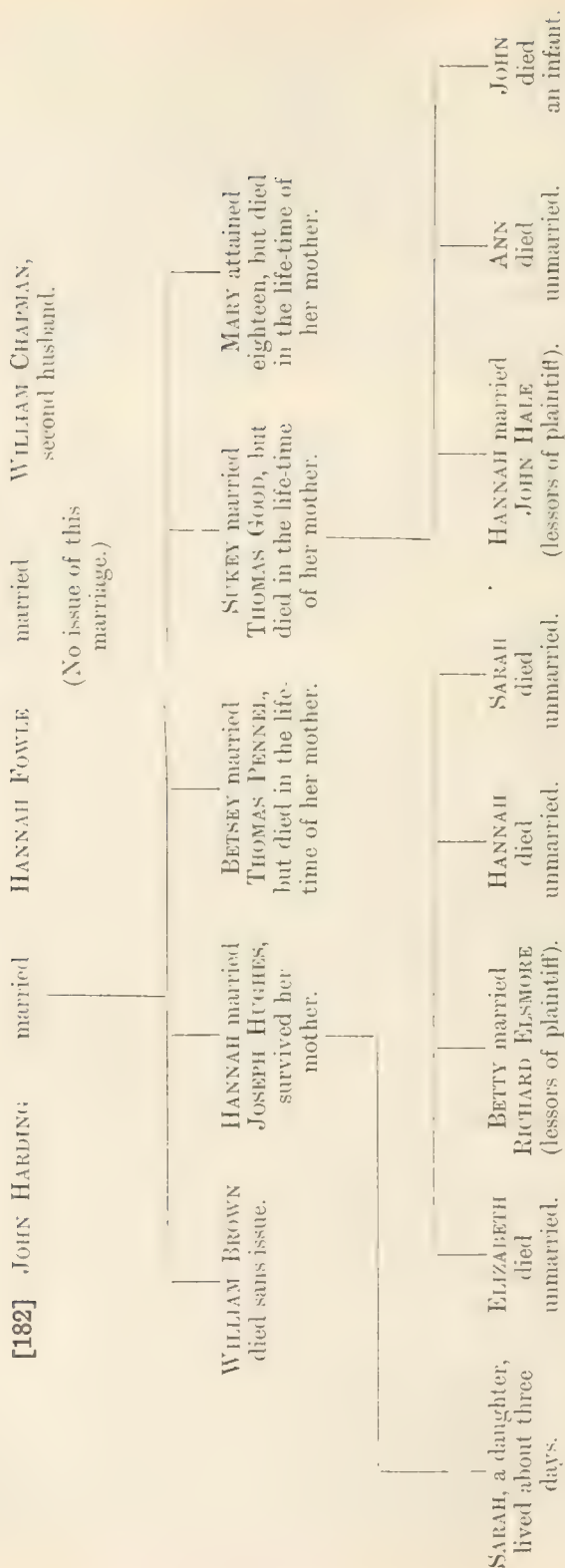
[183] The above-mentioned Hannah Harding had only one child who survived her, viz. Hannah, married to one Joseph Hughes, by whom she had a daughter and only child, who died when she was three days old. Upon the death of Hannah Harding, then Mrs. Chapman, the mother of Hannah Hughes, she and her husband Hughes took possession of the premises, and received the rents till her death, which happened on the 8th of March, 1796; and after her death, Hughes, by indenture of feoffment, of the 16th of June, 1806, whereon livery of seisin was duly made for the consideration of 10s., conveyed the premises to Richard Elsmore, one of the lessors of the plaintiff, and his heirs, but to and for the only proper use and behoof of Joseph Hughes in fee. By this deed, Hughes covenanted to levy a fine sur cognizance de droit come ceo, &c. with proclamations unto the said Elsmore, and his heirs, as of the then Trinity term, which, when levied, was declared to be to the use of Hughes in fee.

That fine was afterwards in that term levied by Hughes pursuant to the covenant. Hughes continued in possession of the premises until April 1812, when, by indentures of lease and release, he sold and conveyed them to the defendant Coleman, who, by himself or his tenant, has ever since retained the possession.

Joseph Hughes died about six months before the trial, upon which an entry to avoid the fine [184] was made by the lessors of the plaintiff, who afterwards, in right of their respective wives, (Mrs. Elsmore being the daughter of Betsy Harding, who was the daughter of Hannah Harding, the devisee for life, and who married Thomas Pennel; and Mrs. Hale, being the daughter of Sukey Harding, also the daughter of the above-mentioned Hannah Harding, who married Thomas Good,) brought this ejectment, which was defended by John Coleman for himself, and the other defendants his tenants.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover? If they were, the verdict to stand: if not, a nonsuit to be entered.

Puller, for the lessors of the plaintiff, submitted that in this case the question would be, whether the children of Hannah Harding took an estate for life only, under the will (as the defendants would contend,) or whether, as the lessors of the plaintiff contend, they took an estate in fee. That they did so take in fee, under the circumstances of this case, he insisted, was clear, from the doctrine deducible from the class of cases (from *Purfoy v. Rogers* (2 Saund. 388), down to *Marshall v. Hall* (2 Maule & Sel. 608)), establishing that where an estate is limited by will to a child of a prior devisee for life, when he (the child) attains a certain age, with a devise over in fee, he [185] takes an absolute fee on his attaining that age. The latter words in this will, giving the estate over to the children of the tenant for life, on their attaining the age of eighteen, or marrying, therefore operate to enlarge the former interest created by the preceding words of the devise: otherwise the words "which shall be living at the time of her decease," could have no effect. And he cited *Frogmorton d. Bramston v. Hobday* (3 Burr. 1618, *Doe d. Wright v. Child*, 1 N. R. 335), *Moor v. Fugge v. Housman* (Willes, 138),



Robinson v. Grey and Others (9 East, 1), *Doe d. Wright v. Cundall* (9 East, 400), and *Toovey v. Bassett* (10 East, 460), on all of which he commented in illustration of the position contended for in the present argument, as founded on those cases; and in all of which it was held, that the devisee, on attaining the appointed age, took a vested indefeasible remainder in fee, the devise over of the fee indicating the intention to give an estate of inheritance; for that the rule is, that a gift of a fee, on failure of a condition, implies that a fee was to be taken by the conditional devisee. And he contended, that it did not create any distinction in the fundamental case of *Purfoy v. Rogers*, that the devise over was to the testator's heir-at-law, and (as Lord Ellenborough noticed in *Toovey v. Bassett*) that distinction did not exist in *Frogmorton d. Holyday*, or *Doe v. Cundall*.

[186] A second point, which it was anticipated would be made by the defendant, was, that Elmore and his wife were barred by estoppel of the fine which had been levied by Hughes; but it was submitted, that in this case, a fine levied was not a bar where claim and entry had been made within six months.

Taunton, W. E. for the defendants, contended, that the children of Hannah Harding took only an estate for life: or that if they took a larger estate, still the lessors of the plaintiff were barred under the circumstances of this case, (or at least that only one of them would be entitled to recover,) in consequence of the operation of the fine; for the fine having been levied by Hughes, who was tenant by the curtesy and not a stranger, to Elmore, who accepted the livery of seisin, and was therefore privy to the title, he and his wife were estopped. So that even if Hannah Hughes took a fee simple, and if judgment should therefore be entered for the lessors of the plaintiff, it could only be for Hale and his wife, and for a moiety of the estates in dispute.

On the general question of whether Hannah Hughes took a fee, he contended that the present case was materially and essentially distinguishable, in many decisive respects, from all those which had been cited in favor of the propositions put in argument in support of the affirmative, on behalf of the lessors of the plaintiff.

[187] In *Purfoy v. Rogers*, the principal of those cases on which the subsequent determinations have proceeded, the Court did not determine the point, and the authority of that case rests wholly on the dictum of the reporter, appended by note at the end. The case itself, however, is quite different from this. In that case, the heir at law of the deviser had levied a fine to the use of an after husband of the testator's widow, to whom he had given his estate for life, with remainder over to her son (if she should have one who should attain the age of twenty-one) and his heirs before any such son was born, which was held to have destroyed the particular estate of the wife, and, by consequence, the contingency depending on it: and there too the remainder was limited to the right heirs of the deviser.

In *Frogmorton v. Holyday*, there was a charge of a legacy of 50l. on the devised property, and that was taken into consideration in the determination of that case; and although, in *Collier's case* (6 Co. 16), (which was cited for that point), it was held, that such a charge does not give a fee, Mr. Justice Wilmot got over that difficulty, by observing that there were other clauses in the will before the Court, which took it out of the distinction of that case. The decision there did not therefore turn solely on the words of the devise. In *Doe v. Cundall*, the judgment of the Court proceeded on there being words in the will [188] indicating an intention on the part of the testator to make such a devise as the Court, by their decision, gave effect to. Amongst other indicatory clauses, there was one, providing, that "if either of the devisees died before twenty-one, the survivor should be heir to the party so dying," importing plainly that the inheritance was contemplated. So also in *Toovey v. Bassett*, there were words in the will on which the Court might have decided that the party took an estate of inheritance.

In the case of *Moore d. Fagge v. Heaseman*, as far as this point is supposed to have been decided there, it might be a sufficient answer to say, that under the circumstances of that case, this question, as arising on the present facts, could not then have been before the Court. The question there depended on what estate Susannah Fagge would have taken under the devise, and that was clearly an estate of inheritance; and they adjudged that therefore the two sisters took a fee; nor was it at all necessary to that decision to pray in aid the devise over. The distinction arises out of the different circumstances and facts of the two cases.

The case of *Robinson v. Grey* is still more beside the present point. There the words, besides other very strong expressions of the testator's intention, were, "if all my said daughters shall happen to die without leaving any issue," words certainly of very much stronger import [189] than, dying before attaining a certain age, or marrying.

The case of *Marshall v. Hill* will, on investigation, be found to be in favor of the defendant's case, for there the Court, (most of the cases now cited for the lessors of the plaintiff having been brought before them,) must have considered, that where there was a devise of a remainder generally to a devisee, when he should attain twenty-one, and a remainder over, it did not necessarily give a fee, otherwise there would have been no necessity for reconciling the distinction taken, in that case, on the words of the limitation, that if the particular tenant "should die, leaving issue," being of a different meaning and effect from merely "having had issue," and it was said that the Court ought to look to all the circumstances of the case, and that case was accordingly not decided on the fact of the dying of the children before twenty-one. With that view, the certificate guards the opinion of the Court, by adverting to "the events which had happened" in the case, with regard to the limitation being qualified by the contingency of the particular tenant dying without issue.

It was admitted, that in most of the cases, the obvious leaning of the Courts was to the construction of similar words of devise giving a fee, but it was much pressed and relied on, that in all the cases, the words were much stronger, and more indicative of such an intention in the deviser, as the Courts, by their determination, gave [190] effect to: whereas there had been no case so decided, where the limitation was in the words of this devise only, and stood so naked of other language or circumstance as this devising clause. And here, therefore, it was submitted, it would be going very far to say, that a devise, so destitute of words of limitation, should be so construed as to give the devisee a fee simple, to the prejudice of him in remainder, and the heirs at law of the testator, who cannot be disinherited by any implication founded on a devise, without words of limitation of the inheritance.

Having thus noticed the distinctions said to exist between the present case, and those cited for the lessors of the plaintiff, the Counsel for the defendants then cited, on their part, the case of *Fowler v. Blackwell and Another* (1 Com. Rep. 353, Ca. 177), as precisely in point. In that case, the testator devised, in these words:—"I give to my wife Jane all my freehold lands in Canenden," &c. (the lands in question). "I give to my son George my freehold lands in Canenden, after my wife's decease: and if it shall happen that my son George should die before he attain the age of twenty-one years, then the said lands shall descend to my son Richard and his heirs for ever." Richard was the testator's eldest son and heir, and George was his younger son by a second wife. George attained twenty-one, and devised to his sister, the wife of the defendant, and her heirs, and after-[191]-wards died, in the life-time of his mother. The lessor of the plaintiff claimed under Richard, and whether George had any estate in fee, or for life, was referred to Mr. Justice Eyre, who, in direct opposition to this dictum of Saunders, which was cited to him on that occasion, determined that George did not take a fee; because there was no limitation to the heirs of George, holding that no one may take against the heir without an express devise, and therefore judgment was given for the plaintiff in the action of ejectment which had been brought.

He contended, therefore, that in this case, the children of Hannah Harding did not take a fee for want of words of inheritance in the limitation.

On the other point—that Elsmore and his wife in all events were barred by the fine working an estoppel,—it was contended that they at least could not set up any claim against the fine levied by Hughes, pursuant to the covenant into which he had entered by the deed of feoffment whereby he accepted a tortious fee.

[The Court suggested, that it did not sufficiently appear that Elsmore was a party to the extent contended for, and that if he were not it would be too much to say, that a remainder-man might be so got rid of.]

[192] It was then urged, that the livery of seisin indorsed made Elsmore a party, or at least privy to the fine, and he was therefore the conusee, and had acknowledged the fee to be in Hughes, which would be an estoppel, even though the remainder were contingent: *Shep. Touchstone*, 14, c. 274. 1 Inst. 252 a. *Tick v. Edwards* (3 P. Wms. 372), *Wheble v. Lower* (Pollexf. 54), and it makes no difference whether he

were conusor or conusee. If tenant for life levy a fine to tenant for life in remainder, it works a forfeiture of both estates: *Smith v. Abell* (2 Lev. 202), and *Margaret Podge's case* (9 Co. 106 b.). If therefore it should be determined, that on the authority of the class of cases cited for the lessors of the plaintiff, Hannah Hughes took an estate in fee-simple, yet the lessors of the plaintiff can only recover the moiety of the premises demised in right of Hale and his wife.

Puller in reply contended that the fine so levied was no bar even to Elsmore under the circumstances, and certainly not as to his wife who knew nothing of it, if her husband did, which did not appear from any of the facts of the case, but whether he be considered as her husband or a stranger she could not be bound, and she is in point of fact the real lessor of the plaintiff.

On the other part of the case he relied on the former arguments, denying the existence of any [193] substantial distinction in the present case from those before cited on the part of the lessors of the plaintiff.

Cur. adv. vult.

RICHARDS, Chief Baron, now delivered the judgment of the Court.

[Having stated the material facts of the special case.]

This is certainly, as it has been truly described by the counsel for the defendant, a more naked case than any of those which have been cited in the argument, for the clauses of devise in all of those have other words more in the nature of words of limitation, than are to be found in this will.

The question is, whether Hannah Hughes as one of the children of Hannah Harding surviving her mother, took an estate in fee without words of limitation, and it turns on the following clause.

[His Lordship read the devising clause (ante, p. 180) from the words, "And from and after the decease of the said Susannah Fowle, &c." to the limitation of the remainder over in fee to "John Wilse, of, &c. his heirs and assigns, for ever."]

[194] There being no words of limitation, *primâ facie* there was no estate of inheritance given by the devise to the children of Hannah Harding; but there being afterwards a proviso, that in case Hannah Harding should have no child or children living at the time of her decease, or that her child or children should die before attaining the age of eighteen or marriage, the estate should go to John Wilse in fee, it is therefore contended that the child of Hannah Harding who married and survived her mother, took an estate in fee in the devised premises.

It is clear that John Wilse was not to take any interest unless the children of Hannah Harding died before eighteen or marriage, he is therefore entirely excluded by the facts of this case, and no question arises on the devise to him. The single point is, whether the married child of Hannah Harding took an estate for life or in fee.

The case has been very fully and ably argued on both sides, and all the authorities in any way bearing on the question, have been brought forward and discussed.

[His Lordship then stated from the case the facts.]

It is clear that Hannah Hughes, who married and survived her mother, took an estate for life in the devised premises; but it is contended, that she took an estate in fee according to the rules of law by which such devises are to be con-[195]strued with regard to their legal operation and effect, and in support of such a construction very many cases have been cited.

The first was that of *Purefoy v. Rogers*, 2d Saunders, and which is certainly a strong case in favour of the lessors of the plaintiff. But it was urged on the part of the defendants, that there, not only the words of the devise were altogether different, but that there was an ultimate remainder limited to the right heirs of the testator. On an attentive consideration of those words however, I cannot perceive any difference in the general sense as affecting the limitation, nor can I think, that the estate being given over to the heirs of the testator, creates any distinction from cases where it is given over to any other person. We must look to the words of the devise for the intention of the testator, and if we can find it by fair inference we must execute it. As to the rule that an heir at law shall not be disinherited by implication, cases have been put where, although there was not a necessary implication, it has been held sufficient to give a devisee the fee simple, and that was the opinion of Mr. J. Willes, as stated by him in *Moore v. Fagge v. Heasman*.

In *Purefoy v. Rogers*, the principle is laid down with sufficient accuracy for the

present purpose. By that principle all the subsequent cases down to *Marshall v. Hill*, in *Maule and Selwyn*, (it would be mere pedantry to state them more [196] fully) have been wholly governed: and the doctrine deducible from them supports a legal construction of this will in favor of the lessors of the plaintiff.

It has been justly observed, that the dictum in *Purefoy v. Rogers*, was not adverted to by the Chief Justice in giving his opinion in *Moore v. Fagge v. Haseaman*, and that as far as what fell from the Judge on that occasion went to decide the present point, his opinion in that respect was wholly extra-judicial: but however that may be, that opinion has in many subsequent cases been considered as law, and determinations have been accordingly founded on it by the Courts.

All the cases cited on behalf of the lessors of the plaintiff, have been attempted to be distinguished from this. [His Lordship then examined the grounds of distinction taken and relied on for the defendants in the argument, noticing particularly, that the word "heir" as used in some of the cases, was not employed so much as a word of inheritance as of mere designation of person: and observing, that whatever effect the charge of the payment of money on the devisee might have, that circumstance was not considered conclusive by Lord Mansfield, in the judgment delivered by him in *Frymorton v. Holgham*, and that all the other distinctions taken, did not affect the substantial points determined in the several cases.]

[197] The principle of all that class of cases on which the lessors of the plaintiff rely, (continued his Lordship) is decidedly in their favor, so much so, that the Judges who decided those cases must have determined this, as we, proceeding on the same principle, now do, in favor of the present lessors of the plaintiff.

On the other hand a case has been cited from Comyn's Reports, (*Fowler v. Blackwell*) which is certainly in point against the lessors of the plaintiff: but that case appears to amount only to a dictum founded on a proposition which is not law, and is therefore not entitled to respect, conflicting, as it does, with the spirit of all the determinations in the other cases which have been cited, and they are certainly in favor of the construction of this will which has been adopted by the lessors of the plaintiff.

It is quite clear that in this case the stranger to whom the estate was devised over, was not to take it, but in the event of there being no children of the tenant for life living at the time of her death. As between the children of Hannah Harding and the ultimate remainder-man, there can be no doubt, and if the fee were once given to the children of Hannah Harding, it would be sufficient. We are therefore of opinion, that Hannah Hughes having married and survived her mother took a fee in the devised premises, and consequently the judgment must be for the lessors of the plaintiff.

[198] Another point made in this case, but not very much relied on, was that the fine levied by Hughes operated as an estoppel against him as the conusee; but it is quite clear that a fine levied under the circumstances attending this fine cannot so operate: it does not appear that it was levied with the knowledge of the persons interested in the premises.

Postea to the plaintiff.

THE ATTORNEY GENERAL v. TOWNS. Friday, 27th November 1818.—Evidence.

The master of a homeward bound vessel coming up the Thames, proved to have hired and sent off a boat and men, accompanied by one of his own crew, to bring away certain boxes of foreign and British glass lying on the sands on the Essex coast, to be landed at Woolwich, which they find and bring as far as Gravesend, where the whole is seized by the Custom-house officers;—held to be sufficient evidence for a jury, of a being concerned in unshipping foreign glass without payment of duty, and in unshipping British glass shipped for exportation, subjecting the master of the vessel to the penalties for both those offences, although the whole was one transaction.

The first count of this information charged the defendant with having incurred a penalty of 100l. under the 17th Geo. III. c. 39, s. 25, for being concerned in unshipping foreign glass without payment of the duty, and

The third charged him with having incurred another penalty of 100l. under the 27th section of the same statute, for being concerned in unshipping British glass after

having been shipped for exportation; and it averred the entering and shipping for the purpose of obtaining the drawback.

[199] On the trial, at the Sittings after last Trinity Term before the Lord Chief Baron, the jury found a verdict for the Crown on both those counts.

Jervis, in the present Term, obtained an order to shew cause why the verdict should not be entered on the first count only, or why there should not otherwise be a new trial, on the grounds, 1st, that the transaction charged was single and entire, and could not be made the basis of the two distinct penalties for different offences sought by the first and third counts of the information, both of which ought to have been severally and distinctly proved; and 2dly, that it had not been given in evidence at the trial that the British glass had ever been shipped in any British vessel for exportation, or that the drawback had been allowed on such glass by the Customs.

The Chief Baron reported that it had been in evidence, that the defendant, who was master of the brig "Unity," while proceeding homeward up the River Thames from Amsterdam, engaged two of the witnesses to bring to Woolwich in their boat, the boxes of glass, which he described as lying on the sand below (the Chapman's Head) on the Essex coast. The witnesses, accompanied by one of the defendant's men, brought away the boxes, which they found, as they had been directed, on the sand within low-water mark; but they were boarded off Gravesend by the Revenue officers, who seized their boat and the boxes [200] which contained the glass, and were the subject-matter of the present information.

The Attorney General and Dannecey now shewed cause, insisting that the facts in evidence were matter for the decision of the jury, and that those facts, aided by the record of condemnation of the goods, justified the verdict which had been found; that it was not necessary, in such charges of relanding glass shipped for exportation, to shew that there had been an actual shipment of the specific article on board a particular vessel, or that the drawback had been actually obtained; but that, under the circumstances proved against the defendant, a sufficient case was established to throw the onus on him to shew what glass it was that he had sent the witnesses for, and that his possession, in their hands, was legal.

Jervis and Littledale contended that there had been no sufficient evidence given to support the third count of the information, as it had not been proved that the glass had been shipped for exportation and the drawback allowed (the allowance of the drawback not being a matter of course), and that it had been afterwards laid on land, all which, they submitted, was indispensibly necessary to sustain the charge.

On the other point they adverted to the following cases on the game laws, *Cripps v. Duden* (Cowp. 640), [201] *The King v. Lord* (7 T. R. 153), *Marnott v. Shaw* (1 Com. 275), and *The Queen v. Matthews* (10 Mod. 26), where it had been determined, under certain circumstances, that only one penalty could be incurred in one day for one and the same transaction.

RICHARDS, Lord Chief Baron. It is contended that there was not reasonable evidence before the jury to warrant their verdict. I should have thought them very unreasonable, if, under the circumstances proved, they had not given a verdict for the Crown.

GRAHAM, Baron, concurred, being of opinion that the very suspicious circumstances of the transaction, warranted the verdict.

WOOD, Baron, of the same opinion, observing, that reasonable evidence was all that was necessary to support such a charge and that evidence of the circumstances, in proof, was sufficient: for no one could suppose that the goods had been exported without an allowance of the drawback.

GARROW, Baron. The question was properly referred to the jury, and I think that the evidence was strong enough to sustain the verdict which they have found.

It would be impossible to furnish proof in any case, of goods of this description being part of [202] any particular bulk that had been shipped for exportation, on which the drawback had been allowed.

Per Curiam. Rule discharged.

BIRDWOOD v. HART. Saturday, 28th November 1818.—Costs. Where the rule for judgment, as in case of a nonsuit, is discharged on the plaintiff's peremptory undertaking, no sufficient reason having been given for not proceeding to trial

pursuant to notice, the defendant is entitled, in this Court, to the costs of the application.

Wilde shewed cause against a rule which had been obtained by Selwyn for judgment, as in case of a nonsuit against the plaintiff for not proceeding to trial pursuant to notice.

The Court discharged the rule, on the usual condition of the plaintiff giving a peremptory undertaking to proceed to trial at the next Assizes.

Rule discharged, with costs.

On the part of the plaintiff it was submitted, that it should be part of the order that the costs abide the event of the trial.

It being insisted on the other hand that, according to the practice of this Court, the defendant was entitled to the costs of the application where [203] the rule was discharged on a peremptory undertaking, without sufficient excuse on the part of the plaintiff for not having proceeded to trial, the Court referred that point to the officers (the Deputy Clerk of the Pleas and the senior Attorney), who certified it to be, that such rules were discharged with costs.

Order confirmed.

BRAY, ALEXANDER, HOLME, AND BLEASDALE, v. HINE AND FOX (Assignees of Bridgman, a Bankrupt). Saturday, 28th November 1818.—Where the town agents of a country solicitor (since a bankrupt) had received papers from him, belonging to his client for the purposes of the client's business, they have a lien on them as against the client for the amount of money due from him to the solicitor, and from the solicitor to them, on account of business done in the cause.—And where the client had, after the solicitor's bankruptcy, paid the agent so much money to obtain such papers, although an action had been previously brought against him by the assignees for the recovery of it, the Court granted and continued an injunction against the action, on the ground of the agent's lien.

[Applied, *Lawrence v. Fletcher*, 1879, L. R. 12 Ch. D. 862.]

The present question—as to the extent of the lien of the law-agent of a solicitor, on papers belonging to the client, for his bill for agency business,—arose on a motion made by the defendants to dissolve the injunction which had been obtained in this case, restraining the assignees from proceeding at law to recover money paid by a client of a bankrupt, solicitor to the plaintiffs (his town agents) on account of money due from the client to the bankrupt, and from the bankrupt to them: against which motion cause was now shewn on the merits.

[204] The bill stated that the plaintiffs Alexander, Holme, and Bleasdale, solicitors in partnership, were agents of Bridgman, (a country attorney) the bankrupt—that before his bankruptcy Bridgman had become indebted to them for agency business and disbursements, to the amount of 155l. 5s. 7d., including therein a chancery suit between the plaintiff Bray and Woodrow the defendant therein: that on Bleasdale quitting the partnership, the other partners applied to Bridgman for payment of their bill, but he did not pay it. In November 1817, Bridgman was declared a bankrupt; and at that time he owed Alexander and Holme 135l. 0s. 3d. over and above the former sum, and they insisted that they had a lien for the money so due to them on all papers deposited in their hands by Bridgman; and particularly on the papers and proceedings in their hands in the said cause of *Bray v. Woodrow*. By an order of the Court of Chancery made in that cause, it was ordered, that Bridgman should deliver to Bray his bills of costs in that and other causes; and that they should be referred for taxation to a Master, and that Bray should pay to Bridgman what should be found due on such taxation, who was ordered on his part to deliver up to Bray all books, papers, &c. in his custody belonging to Bray, and in case Bridgman should be found to have been over-paid, he was to refund the surplus. On that occasion it was agreed on by all the parties, and by the defendant Fox, on behalf of himself and [205] the other defendant Hine, that the sum of 130l. was due and owing from Bray to Bridgman, which Bray was desirous of paying on receiving back the papers according to

the order, but that the plaintiffs Alexander and Holme would not deliver them up till they should have been paid the 130l. in so far satisfaction of their demand on Bridgman, insisting that their lien entitled them to receive that money. Bray paid them the 130l. and received his papers. The defendants (Bridgman's assignees) had thereupon commenced an action at law against Bray, to recover the money so paid to the other plaintiffs as being due to the estate of the bankrupt.

It was therefore prayed, that it might be declared that the plaintiffs Alexander and Holme were entitled to a lien on all the papers, &c. belonging to Bray in their hands, as agents to Bridgman, for the amount of his debt to them, and to receive the money due from Bray in part satisfaction thereof—and for an injunction as to the action at law.

The defendants in their answer admitted, that something might be due from Bridgman to Alexander and Holme, but denied that they had any lien on the papers of Bray, which had been placed in their hands by Bridgman, for any sum of money due from Bridgman to them, or at most for any greater sum than should be due to them in respect of the particular cause of *Bray v. [206] Woodrow*; and they denied that so much as 130l. was due to Alexander and Holmes in respect of that cause: they also alleged, that the money was paid to them by Bray, after the present action had been commenced against Bray for the recovery of it, and that the payment was made by collusion between Bray and the other plaintiffs, under an indemnity from the latter in order to defraud the estate of the bankrupt, in procuring payment of the debt due to Alexander and Holme from the bankrupt to the prejudice of the general creditors.

Jervis having obtained the usual order nisi to dissolve the injunction,

Dauncey and Richards now shewed cause on the merits.

They contended, that the agents in town of a solicitor employed in the country, had a lien against him on the papers of the client deposited with them for the purpose and in the course of conducting the client's business; and they cited the case of *Ward v. Hepple* (15 Ves. 298), wherein the present Lord Chancellor so held, and *Ex parte Steele* (16 Ves. 164). They also adverted to the cases of *Farewell v. Coker* (2 P. Wms. 460). *Taylor v. Lewis* (2 Ves. sen. 111). *Wilkins v. Carmichael* (1 Doug. 105). *Hollis [207] v. Charidge* (4 Taunt. 807). *Ex parte Pemberton* (18 Ves. 282), and the cases noticed in Cooke's Bankrupt Law, p. 401, and they urged, that the assignees of Bridgman could not do what Bridgman himself could not have done; and that as he could not have compelled a delivery of these papers by his agents without first paying their demand, so his assignees could not. They were in the same situation as Bridgman himself would have stood with respect to his agents in town, and a solicitor's necessary employment of an agent for conducting his client's business, was binding on the client, whose responsibility was pledged to the agent for their just demand for transacting his business.

Jervis and Teed, in support of the motion, contended that the plaintiffs had no equity to support the present injunction; for that the subject-matter of the bill, (if it were any answer to the defendants demand at law), might be used in the defence at law, where the lien of the plaintiffs Alexander and Holme, (if any existed), would be recognized and upheld by the Court.

They relied much on the distinction in the present case from those which had been cited for the plaintiff, founded on the circumstance of the latter being all cases between the agent and the attorney while solvent; whereas this was a direct claim of lien by the agent against the client of an attorney (a bankrupt) between whom there was no [208] privity or direct contract; and they contended that the former was in all cases left to his remedy against the attorney by whom he is employed. They then submitted that the fact of there being no case deciding that an agent had any lien under similar circumstances was alone almost conclusive against the proposition of law contended for by the plaintiffs; for it was a question which must have very often arisen, as the circumstances were of daily occurrence, and the point, as the Lord Chancellor observed in *Ex parte Steele*, has never been determined. It was also ultimately pressed, that a decision in favor of the plaintiffs would afford opportunity and encouragement to fraud and collusion between parties in similar situations.

[It was here suggested by the Court, that if Bray had brought an action of trover against Alexander and Holme for these papers, he must have proved a previous tender of their demand, or he would have been nonsuited at the trial.]

The Court, considering the question to be one of first impression and of great importance, took time to deliberate.

RICHARDS, Lord Chief Baron, now delivered judgment.

[Having detailed the material facts and circumstances of the case.]

[209] The bill of costs of Bridgman (his Lordship observed) was not, in fact, taxed as between him and Bray, one of the plaintiffs, because it was agreed that 130l. was due from Bray to Bridgman, and that sum (it is stated) Bray was desirous of paying, that he might regain his papers to enable some other attorney to proceed with his cause; but Bridgman having handed them over to his agents the other plaintiffs, it became necessary to apply to them for them, and they refused to deliver them up, unless they were paid what had been so acknowledged to be due from Bray to Bridgman for conducting the suit between the former and Woodrow. They did not demand from Bray all that was due from Bridgman, his solicitor, to them as his town-agents, but only the precise sum admitted to be due from Bray the client, to Bridgman the solicitor, on account of a particular cause, and on which alone Alexander and Holme claimed the lien. And there we find the material distinction in point of fact and circumstance in the present case from all those that have been cited on this question

To obtain his papers from Alexander and Holme, Bray, of necessity, paid them the sum so demanded from him, a sum which it is not denied that he would have been bound to pay to Bridgman, if he had not become a bankrupt and had had the papers in his possession. Now, if the assignees of Bridgman have still right to recover that money at law, Bray would clearly [210] be obliged to pay the money twice over: for Bridgman certainly had a lien on the papers for that sum, and Bray must have paid him the money before he could be entitled to demand them from him, and Bridgman did not lose that lien by giving over the papers to Alexander and Holme, to whom, as his law-agents, he delivered them for the purpose of transacting the business to which they related. They therefore also became entitled to retain them till their bill should be paid, and Bray had no means of compelling them to deliver the papers up to him until he had first satisfied their fair demand.

Bridgman it appears owed Alexander and Holme a much larger sum of money, and as between them, Alexander and Holme had a lien for all that was due to them from him, and he could not have compelled them to give up the papers without first paying them the whole which he owed them. Do not they then stand in Bridgman's place as against Bray, to the extent of Bridgman's demand against him on this account? If they do not Bray would be benefited by the circumstances which have taken place in a manner by no means agreeable either to equity or sound sense.

We therefore think it perfectly clear, that Alexander and Holme had a good title to a lien on these papers for the sum in question, which has been paid to them by Bray, at least so far [211] as to entitle him to have the action commenced against him for the present restrained. So that whatever we may hereafter think it necessary to do when this cause shall come to a hearing, we are now clearly of opinion that the injunction which has been obtained must be continued.

Bridgman never lost his original lien by any thing which he did: and by transferring the papers to the plaintiffs his agents, he must have given them the same advantage of lien against his client as he himself had against him. Bridgman's assignees cannot therefore be entitled to recover against Bray this money which Alexander and Holme would certainly have been entitled to retain these papers for, as against Bridgman; if they were, their recovering in this action, after Bray had paid the money in discharge of such lien, would be manifestly unjust, for the effect of it would be to oblige Bray to pay the same money due, on the same account, to two different persons.

We are therefore of opinion that the injunction which has been obtained must be continued.

The authorities which have been cited on this question, although they are not precisely in point, undoubtedly are, as far as they apply to the present case, entirely in favor of the plaintiffs.

[212] The first is that of *Farwell v. Coker*, in Peere Williams. That and the subsequent cases of *Ward v. Happle*, and *Ex parte Steele*, are quite sufficient to establish the right of lien now contended for. In the last it is expressly stated to be determined that the agent in town has a right to intervene with his claim of lien, as

against the solicitor, giving to the agent a right, in equity, to be paid the money due to him to the extent of his lien against the solicitor.

Injunction continued.

The end of Michaelmas Term.

[213] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, SITTINGS AFTER MICHAELMAS TERM, 59 GEO. III. GRAY'S-INN HALL.

MEMORANDA.

During this Vacation Sir Wm. Grant, Knt. resigned the appointment of Master of the Rolls, and was succeeded by

Sir Thomas Plumer, Knt., his Honor relinquishing the Office of Vice Chancellor of England, to which

John Leach, Esq. one of His Majesty's Counsel in the Law, Chancellor to His Royal Highness the Prince of Wales, and Chief Justice of Chester, was immediately appointed.

[214] EX PARTE PEARSON AND ANOTHER. IN RE MACCLESFIELD SCHOOL.

Wednesday, 16th December 1818.—The Court will not interfere to regulate a voluntary charity supported by contributions, where some of the trustees complain of the acts of the majority of them, as being adverse to the intention of the former and others of the contributors, where the conduct of the acting trustees is free from positive imputation.—Where there is a trust deed in such cases, the Court will not vary its terms on the application of persons suggesting that they are not such as all the contributors intended they should have been.—A proviso in such a deed, that gratuitous teachers should attend to instruct the school, and that no doctrines should be taught there contrary to those of the church of England, held not to be contravened by the appointment of a dissenting minister, at a salary, to read lectures in the school-room (part of the building erected by the original trustees, for the purposes of the charity), when not used as a school, the subscribers contributing the amount of his salary.

The object of the petitioners in this matter was stated in the prayer of the petition as follows:—That the trustees, acting in the conduct and management of this charity, might be ordered to produce the trust-deed for the inspection of the petitioners—that the trusts might be ordered to be performed under the directions of the Court—that the appointment of a chaplain with a salary, and the using the upper part of the building (which had been erected for the purpose of the school) as a chapel, might be declared to be contrary to the trust, and directed to be discontinued—and for an account of the application of money received by the treasurer on the part of the charity.

The undisputed facts, as stated and deposed to on either side, were that the school had been originally established in 1796, by a voluntary subscription among the clergy and principal inhabitants of the town, which had been set on foot by an individual, for the purpose of instructing the children of the poor in the principles of religion, according to the doctrines of the established church, and in the elementary branches of useful education. For that purpose certain rooms had [215] at first been hired in the town of Macclesfield, till the year 1813. In the early part of that year, the erection of a building for the purposes of the school was commenced. That from the time of the institution of the school, and down to that period, the school was conducted by a committee of gentlemen of the town, a superintendent, visitors, and teachers, all of whom rendered their services gratuitously. The committee (consisting of seven persons, in addition to the two clergymen of the town) were annually chosen by the teachers, and it was their duty to regulate the pecuniary affairs of the charity. A sum of 3967l. had been raised by subscription of the town's people, and by weekly collections made in the school from the teachers and scholars during two years, for the purpose of defraying the expences of the building, which, however, cost

5639l. and the remainder of the sum so expended was borrowed from certain friends of the institution, who regularly received interest for the loan. The petitioners, and other friends of the church establishment, became subscribers. Early in the year 1814, a deed for investing the school-house and premises in trustees was executed, whereby a plot of ground on which the school-house was built, with the school-house and all the appurtenances, were assigned to trustees, for the residue of two several terms of nine hundred and ninety-nine years, upon trust, to borrow such money as should be sufficient to defray all the expences attending the indenture, the rents, the reparation, and support of the building, &c. &c. By that deed it [216] was declared that the said trustees should stand possessed of the premises, upon further trust that they should from time to time, during the said terms, suffer the said building to be used as a school for the education and religious instruction of the children of the labouring poor residing within the township of Macclesfield, and the adjoining and neighbouring townships, by persons of good character, who should not be allowed to teach any thing contrary to the great and leading doctrines of religion, as defined in the Articles, Homilies, and Liturgy of the church of England, under such rules, orders, and regulations for the management and conduct of the said school, as then were, or should or might from time to time, and at all times thereafter, be formed and made by a committee to be annually chosen according to the then existing regulations, which were or should be set forth in the minute books of the committee and teachers' meetings, but for and during so long time only as such committee should be enabled to carry on the said institutions, by means of gratuitous teachers, and when such an application of the said building should become impracticable, either from an insufficient number of scholars, or a want of funds to carry on the institution, or otherwise, then the trustees should thenceforth permit and suffer the said building to be used as a dispensary or hospital, or in any other manner, or for any other purpose whatsoever, which to them should appear to be the most beneficial and conducive to the interest of the poor inhabitants of Macclesfield, and the [217] adjoining and neighbouring townships, provided that the trustees should not be at liberty to convert the edifice or building, land or premises, to any other use or purpose, so long as one hundred and fifty scholars should attend the school, and gratuitous teachers be procured to instruct them; but it was thereby declared, that it should be lawful for the majority of the committee for the time being, to permit the upper room, or any other part of the building, to be used as a lecture-room, or rooms for meeting for any religious, charitable, or other laudable purpose, so as not to interfere with the regular and proper use of the said building, for the purposes therein before appointed.

After the execution of the deed, the acting trustees, and a majority of the committee, appointed a minister, not of the established church, to be chaplain to the institution, at a salary of 170l. per annum, whose duty it was to preach three public sermons weekly at the school, and to deliver a monthly lecture, which sermons and lectures were attended by adults, as in the ordinary case of a public place of worship.

Dancey and Spence, for the petitioners, insisted that such conduct on the part of the acting trustees was in violation of their trust, and the original objects of the institution, which were wholly the establishment and maintenance of a public parochial Sunday school, to be ministered to by gratuitous services, and that the appoint-[218]-ment of a preacher with a salary tended to diminish the amount of the voluntary subscriptions, by which the institution was supported, and which formed the revenues of the charity, and that it was a misapplication of the funds and of the building (part of the expence of erecting it being still unpaid), and contrary to the provisions of the trust-deed. And they urged, that the appropriation of the school-room to the purpose of a meeting-house, would subject it to the poor's rates, and interfere most materially with the use of the building as a Sunday school.

They also submitted, that the appointment of any preacher, not of the established church, or who did not use the same form of worship, was in direct breach of the provision that the children of the school should be educated in the tenets of that church, and that no religious doctrine not agreeable to the Liturgy should be taught there.

On all or either of those grounds, they contended that this was a case which called for the interference of the Court to bring back the administration of the funds, and the premises which had been subscribed and dedicated to the purposes of this establishment, to what they insisted was their original destination and object, by

controuling the conduct of the acting trustees in respect of the acts complained of, and by altering, if it should be necessary, the terms and provisions of the trust-deed, to meet and give effect [219] to the obvious intention of the promoters and benefactors of the charity.

Martin, Agar, and Wingfield, who were counsel for all the trustees, except the petitioners, contended, that the Court had not jurisdiction to interfere, as they were called upon to do by the present petition (the prayer of which they submitted was unprecedented in practice) in a case of a charity unendowed with any possessions or fund, and wholly supported by voluntary contribution; and they cited the authority of *The Attorney-General v. Fowler* (15 Ves. 85).

They then submitted, that even if the Court had jurisdiction, the facts before them did not warrant the exercise of it in the controul of the trustees who had the conduct of the charity in care, urging that this was not an excluding charity, or confined to any sect or denomination of Christians, but was general, for the benefit of the children of poor parents—that there was not the slightest imputation on the trustees; on the contrary, the charity flourished under their management, and increased yearly in the number of children educated in the school, from five hundred till they amounted to upwards of two thousand—that the appointment of a minister to officiate as chaplain was distinct from the primary and present object of the school, and his salary supplied by funds not affecting the money subscribed for [220] that purpose, while the appropriation of the building to the accommodation of such as chose to attend the service, was so arranged as not to obstruct or interfere with the business of the school—and that even if the person who should be appointed to the office of preacher to the institution were a protestant dissenter, he, as being protected by the law, would be qualified by law for the exercise of the functions of that appointment, and which therefore a Court of Equity could not restrain.

They then contended, that the Court was bound by the terms of the trust-deed, whatever the trustees might be; for but for that deed it could not have jurisdiction: and that there was nothing in the deed to restrain the trustees from doing what they had done, but that, on the contrary, it authorized their acts. It was therefore submitted, that the petition ought to be dismissed, not only on the ground of the Court having no jurisdiction, but also on the feebleness and total failure of the petitioners' case.

[The Court here suggested that the onus lay entirely on the petitioners to substantiate their charges of mismanagement of the trusts, and misapplication of the funds: and they declared, that even if the deed should be proved to be contrary to the intention of the subscribing parties, the Court had not the power to order an alteration on this petition. The further hearing was then postponed, with a recommendation that [221] the parties should, in the mean time, try to come to some amicable arrangement, but that not being effected, and]

Dauncey having been heard in reply,

RICHARDS, Lord Chief Baron, gave judgment. This Court being called on to interfere with respect to this particular charity, must not fail to recollect that it has no existence except from the daily and voluntary contribution of the subscribers, who may withhold their subscriptions to-morrow, when there would be an end of the institution altogether. If we had any jurisdiction in a case of this description, it would be a most injurious thing to make an order now, in its nature decretal, in a case wherein, before that order should reach Macclesfield, the institution might in consequence be put an end to. But without entering into the consideration of that part of the subject, although it is extremely important, it is material to consider the nature, foundation, and object of this charity, supposing it permanent. There is a deed expressly declaring the intention of the subscribers, and I conceive that the Court can only proceed on that deed, and that we have no jurisdiction to correct it upon a petition, and that, even if it were not in fact in its terms agreeable to the intention of all the parties, we could not set it right. But supposing that we could do so, we have in the present case no evidence before us that the deed is in any respect improper, or contrary to the intentions of the parties. Then let us see [222] what the deed, which is the ground on which we are bound to proceed, imports.

[His Lordship read that part of the deed which has been already stated.] Now, it may not be very impertinent to say, that for myself I should be extremely grieved if this could be construed to be an establishment not agreeable to the doctrines of the

church of England. From education, from habit, and I will venture to say, from long consideration of the subject, I conceive our church establishment to be the best in the world; but there is nothing repugnant to it in this institution, even as stated by the petition; it is not contrary to law, and there is nothing in the conducting of it which we can find fault with, even according to the statements of those persons who are its adversaries.

It is clear it must be conducted according to the deed so as best to effect its object, the education and religious instruction of the children of the labouring poor. Now the deed is not contravened at all, unless it can be shewn that doctrines have been taught there contrary to the great and leading principles of our religion, as defined in the Articles, Homilies, and Liturgy of the church of England.

I know that there are dissenters who do not teach any thing contrary to those principles, and it is not to be presumed that any person does teach contrary to the doctrines of the church of [223] England merely because he does not happen to be a minister of that church, in point of education, or to be in orders. There is not the least evidence that the doctrines taught here were in any degree contrary to the great and leading doctrines which are the foundation of the service of the church. We find that by an express clause it is declared, "that it shall be lawful for the majority of the committee to permit the upper room, or any part of the building, to be used as a lecture room or rooms, for meeting, for any religious, charitable, or other laudable purposes, so as not to interfere with the regular and proper use of the building," giving them authority to do the very thing which has been made the subject-matter of complaint. The deed goes on to say, that the trustees shall be paid all the sums received by the treasurer. Then it is sworn that the chaplain is not paid out of the funds intended for the education of the children, but out of separate funds, and surely, if the committee can apply the room for the purpose for which it has been used, they may be at liberty to pay the man who performs the service there.

If this were an institution founded with permanent funds for the education of the poor, no doubt the trustees could not apply these funds to other purposes, but as the funds are supplied out of the pockets of the subscribers, who know the purpose to which they are to be devoted, those persons may, certainly, apply them to any [224] purpose, and the committee may allow them the use of this room, even according to the deed, for the accommodation of those who might be desirous of using it as a place of meeting for religious worship, provided there be not promulgated there doctrines adverse to those of the established church, and such accommodation do not interrupt the business of the school.

It appears quite clear that the appointment of the person who preaches does not encroach on that part of the charity, the care of which is the only subject-matter of this petition to which we can attend; and has not any person who contributes to the benefit of this charity a right to say, I will give one-half to the children, and the other half to the benefit of the person who preaches to the institution? Under these circumstances, it seems to me, first, that this is a voluntary charity, with which the Court does not know how to deal; and secondly, that upon the construction of the deed itself, by which their conduct is to be wholly directed, there is nothing in evidence to shew that the acts of the respondents have been, in any degree, contrary to the directions of that deed. We must, therefore, dismiss the petition.

GRAHAM, Baron. I am very much inclined to think that this is that species of charity (if it can be called a charity at all in the legal sense of the word) to which the jurisdiction of this Court was never intended to apply. This is not what [225] it must have been supposed to be, one of those constitutional permanent charities which the law of the land places under the care of the Sovereign. But even admitting that it were so, I am quite clear, for the reasons which have been given with great weight and force by the Lord Chief Baron, that any interference on our part, on the present occasion, would have the effect of cutting up by the roots, a laudable voluntary charity which, without reference to any system of religion, has been founded upon the best and purest principles, having, for its object, to furnish such education to the children of poor persons as might guide and be of service to them in life, whatever might be the peculiar tenets of their religion, and the assumption of any interference on our part (besides arrogating to ourselves a jurisdiction which does not belong to us, that of pronouncing our judgment as to what is orthodox doctrine, and what heresy), would, undoubtedly, be to act altogether beyond our ordinary functions, and that

extent of jurisdiction, which the public good requires of us. But it is quite clear that the conduct of the persons managing the concerns of this charity, is such as has met with general and universal approbation. But in order to dispose of the present petition, the Court must look to what was the original foundation of the charity. Now, in the first place, who are the parties who call upon us to interfere? They are only two trustees out of a very considerable body of men, probably the most substantial people in the [226] opulent town of Macclesfield. The two petitioners are stated to be very respectable persons, but we have had no complaint on the part of those who ought, unquestionably, to be the most ready to take the alarm at any thing by which they considered the Established Church was likely to be endangered, as the bishop of the diocese (to whose province the question more particularly belonged), or the residing, or any of the neighbouring clergy of the established church.

But, looking to the origin of the institution, it will be impossible to entertain the least doubt in this case. Referring to the affidavits, it is quite clear that this was never intended to be an establishment for religious education, founded upon the principles of any one particular sect. That was not the intention of the founders. The object of this charity was the education of the children of the labouring poor of Macclesfield of every description, whatever might be the religion of their parents, and it is perfectly well known that in such a town as Macclesfield, the parents of children to be instructed will be persons professing all the various principles of faith to be found among the different denominations of the christian religion, and therefore the school was originally founded upon what is called the Lancasterian system. I hope an institution of this kind will never afford just ground of jealousy to the members of the Established Church. The institution was, from its origin, intended to ex-[227]-tend to persons of different sects; and when the building was erected at a great expence, and trustees appointed by a deed, it was understood that this building should be employed as a place for the instruction of children of parents of every description. It was perfectly well known that those who were to attend it must, very frequently, be children of parents whose religious tenets might not be in strict conformity with those of the members of the Established Church, but in the deed of trust there has been introduced a cautionary clause to this effect; that the conduct of those who had the instruction of children committed to their care, should be thus far guarded, not that they should be compelled to use the Liturgy of the Church of England, but that they should teach nothing that was contrary to the Liturgy and the ruling doctrines of that Church.

I do not see that this use of the room at all interferes with the regular business of the school; probably there may be some little interruption two or three times a week by the attendance of preachers, but for that there is a provision in the deed. It is admitted that the upper part was not necessary for the school, and it is provided by the deed, that it shall likewise be applied to religious purposes, consistently, certainly, with the regulations of the school, and so as not to interfere with the original object of the establishment. It appears that what has been done, has [228] been done by a great majority of the trustees, and is sanctioned by the deed of trust. It appears upon the affidavits that these subscriptions for the preachers are totally different and distinct from the subscriptions for the school, and that they are kept distinct. Such persons as do not choose to subscribe to a preacher, may withhold their subscriptions, or direct them to be applied solely to the school. I am therefore quite satisfied that there are no grounds stated in this petition to induce us to give the relief that is prayed for; and I am persuaded, that if the Court were to accede to the application, the only effect would be to destroy the charity which has existed for a great number of years, and been attended with the highest advantage to the town of Macclesfield.

GARROW, Baron. I entirely concur in the opinions which have been delivered, and in which, I understand, my Brother Wood likewise concurs. The object of this institution, in the first instance, was to teach the ignorant children of the labouring poor.

I think it is a mistake to say that this, in its origin, was a Sunday school for the children of parents of the church of England only. That a great number of persons contemplated it as such there is no doubt, but there is a provision in the trust deed which is inconsistent with such an idea, for it is provided that those children whose [229] parents dissent from the forms of the established church, shall be permitted, and are directed to frequent the places of worship at which their parents, or those

who instruct them, shall wish them to attend; and therefore, certainly, it was contemplated that many children were to be sent there for the purpose of being instructed, and it was not to be exclusively confined to members of the established faith. The association of persons of different sects in the same school might produce benefits which those who founded the institution did not foresee, I do not therefore, perceive any ground for the interference of this Court, according to the prayer of this petition.

Petition dismissed, without costs.

[230] CORAM RICHARDS, LORD CHIEF BARON.

SMITH v. WOODROFFE. Saturday, 19th December 1818.—The Court refused to order an affidavit to be taken off the file for irregularity, on the objection of its having been sworn before the attorney for the party in the cause, where no circumstances of suspicion appeared, because it has hitherto not been contrary to the practice on this side of the Court.—But in consideration of the propriety of such a rule being established, the Court would not order the party to pay the costs of his application.—The Court directed that in future, affidavits were not to be sworn before the attornies in the cause.

Roots moved, that the affidavit which had been filed in support of the bill of interpleader in this cause, should be taken off the file, for irregularity in having been sworn before the solicitor for the plaintiff, which he urged was contrary to the practice of all the other Courts: and he cited the cases of *In re Hogan* (3 Atk. 812), *Re v. Wallen* (3 T. R. 403), *Goodtitle v. Badtill* (8 T. R. 638), and *Ex parte Brockhurst* (1 Rose, 145).

Having much pressed the impropriety of such a proceeding on principle,

The Lord Chief Baron expressed himself as follows. The only question is, whether the affidavit being sworn before the plaintiff's attorney is irregular, according to the practice on this side of the Court*. It certainly appears to have been the common practice here, and there is no case wherein such an affidavit has been rejected on that ground. The rule is no doubt a sound [231] and wholesome one, and is acted on on the other side of the Court. As it is not the practice here, however, it is not an irregularity in this instance, and it would be hard to turn the plaintiff round on this objection, when he has only pursued the common course. It is an objection certainly which I have heard made more than once, and if there were any suspicion about the case, or if there were any doubt that the plaintiff would not make another affidavit before another commissioner in an hour, it might be ordered to be taken off the file.

The question of costs being mentioned, his Lordship said, that there being perhaps matter of doubt as to the propriety of the practice, and it being certainly a course of proceeding which required alteration, he would not order the party applying to pay the costs, for the application was certainly not improper, and if founded on circumstances of suspicion, would have been attended to. He therefore

Refused the motion, but without costs.

The Lord Chief Baron afterwards (addressing himself to the officers of the Court) desired that it might be understood as a rule, that in future affidavits were not to be made before the attornies in the cause.

[232] CORAM RICHARDS, LORD CHIEF BARON.

PETCH, Clerk v. DALTON AND OTHERS. Wednesday, 13th January 1819.—Evidence.—Preponderance of conflicting evidence.—Effect of occupier's setting up a title in the impropiator, where he, being made a party by amendment of the bill, claims the right, but offers no evidence.—Quere whether a vicar is entitled to issues where there is conflicting testimony, except on a case of weightier evidence.—Costs.—Where a defendant in a tithe cause examines many witnesses, whose testimony is inadmissible to any considerable extent, the Court will give the

* On the other side of the Court, it has been held to be an irregularity. Vide *Batt v. Vaisey*, ante, vol. i. p. 116.

plaintiff his costs of the rejected depositions, independently of the result of the cause.

[For further proceedings see 8 Price, 9.]

The plaintiff, vicar of North Cave (York), claimed by this bill the tithes of calves, milk, foals, pigeons, turnips, and agistment.

The defendants, land occupiers, set up a defence of moduses of 1½d. for every cow renewing*, and 1d. for every cow not renewing, in lieu of the tithes of calves and milk; 2d. for every foal; and 1s. for every dove-cote, in lieu of the tithe of pigeons.

With respect to turnips and agistment they insisted, (denying the vicar's right, and that he had ever been endowed of those particular tithes), that if the tithes of such matters were payable at all, they were payable to the impropriate rector, who was entitled to 4d. a month for every twenty sheep depastured or agisted on turnips grown on lands within the township of North Cave, such sheep belonging to strangers, and not to occupiers of the said lands.

In consequence of that last defence, the bill was amended, and the impropriator was made a party defendant, who stated, in his answer, that [233] he was entitled to, and had received the tithe, as alleged by the other defendants.

The questions respecting the moduses, depended entirely on the weight of the evidence adduced in support of them.

On the part of the plaintiff, strong parol evidence of perception was read, and several terriers. Amongst the former, there was the evidence of tithe-renters and collectors, who deposed to having been, for a long time, collectors both of the rectorial and vicarial tithes, and that "they had received the tithes of hay, corn, wool, and lamb, for the rector, and all other tithes, including the tithes of agistment and turnips for the vicar; and that in estimating the respective values of the rectorial and vicarial tithes at the time when they agreed to rent the same, they considered the tithes of turnips and agistment as being vicarial tithes, and that such vicarial tithes would not have been worth the sum at which they were rented, exclusive of the tithes of agistment and turnips." They also deposed "that the rector (Burton, one of the defendants) had expressly stated that he was entitled to the tithe of hay, corn, wool, and lamb, and that he did not profess to be entitled to any other tithes within the said township."

The plaintiff, amongst the terriers produced by him in evidence, put in one of 1716, wherein [234] the tithe of turnips was, *inter alia*, mentioned as due to the vicar. That terrier however also mentioned wool and lamb as due to him. Several other successive terriers, down to 1770, declared the vicar to be entitled to all manner of tithes, except hay, corn, wool, and lamb.

On the part of the defendants, the occupiers, (for the impropriator offered no evidence), there were also produced certain terriers, somewhat differing from those selected on the part of the vicar. The first was without date, but signed by a former vicar, stating the vicar to be entitled to tithe throughout, &c. (the townships of the parish now in question) "of pigs, geese, ducks, turkeys, dove-cotes, orchards; and 2d. for each skep of bees, and of all roots, small seeds, and flowers; item 5s. per acre of hemp and flax; item" (the moduses set up), with the addition of 2s. for every mill cum multis aliis; the last dated in 1777, only enumerated nearly the same articles.

The defendants parol evidence (which consisted of the depositions of a great number of witnesses, three only of whom were not occupiers, and therefore alone admissible, one of which latter was merely the person verifying the authenticity of the terriers) went to deny the payment, as far back as living memory, of tithe of agistment and turnips to the vicar, and asserted payment of both those tithes to the impropriator by a commutation of 1d. per score, per month, for [235] sheep fed or agisted on turnips grown on the lands in question, and that the same was due and payable therefore, whether belonging to parishioners or inhabitants, or to strangers, who did not pay tithe of wool of such sheep.

On this evidence it was contended for the plaintiff, that having established his general right, he was entitled to a decree for the tithes sought; for that as to the money payments, the documentary evidence and usage shewed they were not moduses, but merely compositions (instancing the payment of 5l. a crop for rape seed).

* A cow having had a calf within the year. *Layng v. Yarborough*, ante, vol. iv. p. 391.

As to the defence of title in the impropiator; that (it was urged) was destroyed both by the evidence of the terriers, and the usage, none having been offered, either documentary or parol, of the alleged right of the lay rector, of sufficient weight to oppose successfully that adduced in favour of the vicar's claim, and if the rector were not clearly shewn to be entitled to the particular tithes, there was, as to them, no sort of defence.

On the other hand it was insisted, on the part of the defendants, that the defence was proved, or at least so far rebutted the evidence on behalf of the plaintiff, as that they would be entitled to issues.

Martin and Roupell for the plaintiff.

[236] Dauncey, Spranger, and Barber for the defendants.

Cur. adv. vult.

RICHARDS, Chief Baron, this day delivered judgment.

[Having stated the parties and pleadings], his Lordship first took up the case on the evidence which he considered on both sides in detail.

The plaintiff's evidence being concluded, the Lord Chief Baron observed, that all the tithes, turnips and agistment, in question, must belong, either to the vicar, or the impropiator, for no exemption is attempted to be set up: the first inquiry therefore will be, whether, on the evidence, they were shewn to be in the rector, or the vicar? Adverting particularly to that part of the evidence which has been stated here, his Lordship said there is therefore proof of actual perception of tithes of those matters by the plaintiff, and the rector himself does not affect to give any evidence of his right, in support of his claim. I am the more particular and minute in dwelling on the evidence which I have read, because this is a question depending wholly on the proof of usage, and as far as I have gone, the plaintiff has certainly made out a very unusually strong case by his parol evidence alone, and one which demands extraordinary attention. Then he produces terriers stating him to be entitled to all small tithes,—expressly all,—excepting only wool and lamb.

[237] The great difficulty in this case arises from the same person having been so long accustomed to receive both the rectorial and vicarial tithes, and that difficulty can only be solved by ascertaining what it is, which, in point of fact, belongs to the rector, and what to the vicar; and that is to be done by taking the witness's understanding of what were the several rights of each, and further by the apportionment of the rent paid by the tithe-takers, confirmed by the rector's own representation of his rights.

But it happens that I am bound to hear and to believe, judicially, all the evidence offered on both sides: and strong as the plaintiff's case is, and confirmed also as it is by the terriers, the defendants have also given evidence which has great claim to attention. They have also adduced evidence of non-payment of those tithes to the vicar, and of payment to the impropiator. They also produced terriers, stating the vicar to be entitled to certain tithes speciatim, and to certain money-payments corresponding with the moduses set up by the defendants. They, however, also go in that respect, and others to establish the right of the vicar to the tithes; but then they are evidence to a certain extent in favor of the moduses. Some of them are signed by former vicars, though one indeed, rather confirms the plaintiff's general title to all the small tithes.

Here, however, I cannot help expressing my very great regret to find that of so many witnesses [238] which have been examined for the defendant, to prove the usage relied on by him, two only are admissible for that purpose. All the rest are occupiers of land within the parish, and therefore clearly their evidence cannot be read here. Now that is certainly a case of extreme hardship on a plaintiff who is obliged to take copies of such depositions, although they are, after all, of no use to any party. I shall, most assuredly, endeavour in this case to make the party who has been the author of so much inconvenience, bear, at least, some of it, in the expence of which it must be the cause. It is more particularly burthensome on clergymen, who are, at most, but tenants for life, and not always so long, and this sort of burthen must not wantonly be imposed on them.

Out of the evidence offered, however, enough may be found to support the terriers put in by the defendants, and the customary payments there enumerated may be good moduses. At least, there is sufficient evidence to prevent my taking implicitly the vicar's terriers, particularly as his predecessors have signed the terriers produced by the defendants. It is impossible for me to say, to which the controuling credit is to

be given. I shall therefore order the customary payments for the cows and the foal, to be tried.

I am not aware that a vicar is entitled to issues as of course, and I know that till of late years [239] it was not so settled, but in the present case he is entitled, and may take issues if he chuses.

With respect to the tithe of turnips and agistment, the witnesses for the plaintiff negative the answers; and on the evidence being read by him, I think that he is entitled to an account of those tithes, and shall decree accordingly in favor of the vicar, with costs.

As to the payments to be tried, the costs and further directions to be reserved.

With respect to the pigeons, it does not appear that any of the defendants have taken any quantity therefrom; therefore there can be no inquiry directed as to them.

On the subject of the costs of the depositions by the defendants' witnesses, I must order that the defendants pay the plaintiff his costs of all such of them as could not have been read, and must be paid to him independently of any further consideration of the cause.

Decree accordingly.

[240] CORAM RICHARDS, LORD CHIEF BARON.

HALL AND ANOTHER v. MALTBY. Wednesday, 13th January 1819.—It is fraud in contemplation of a court of equity, to remove sheep fed in one parish to another place, just before the shearing and lambing seasons, and then driving them back again without accounting for the tithes in the parish where they were depastured. —As to what proof is sufficient to support a charge of fraud, and what is not a satisfactory answer to such charge, see the evidence on the part of the plaintiff, and the allegations in the defendant's answer. —It is most material in equity pleading, that all the evidence intended to be relied on at the hearing should be founded on some allegation distinctly put on the record, of the fact which it is calculated to support, or otherwise it will not be admitted on the hearing. Thus, proof of a declaration by the defendant that "he would endeavour to prevent the tithe-owners from getting their tithes," was rejected wholly because the plaintiff had not, in his bill, charged such declaration to have been made by the defendant.—A custom that the land-owner should take the two best out of every ten lambs, and the tithe-owner the next best, held bad.

This bill was filed for an account of tithes, and particularly of agistment and of the lambs and wool from ewes and other sheep charged to have been fraudulently driven off the defendant's farm, and to have lambed and been shorn in other places not liable to tithe.

The plaintiffs were lessees of the prebendaries of Stowe in Lindsey, and Conyngham cum Stowe in Lincolnshire.

The defendant was an occupier of a farm and lands in the parish.

The bill, after the usual statements of title on the part of the plaintiffs; and of occupation of land and taking and non-render of titheable matters on the part of the defendant, charged him with fraud in having kept great numbers of ewes and other sheep on his said farm and lands in Normanby until they were ready to lamb and [241] be shorn; and that he then drove them off from his said farm and lands in Normanby (a township of the parish within which the plaintiffs claimed the tithes) into an adjoining parish to a farm which he held and occupied there, called Coates, and which he alledged to be tithe free; that he there kept his said sheep until the ewes had dropped their lambs, and until the other sheep had been shorn; that he then drove them back with the lambs, and kept and depastured them on his said farm and lands in Normanby aforesaid, without paying to plaintiffs the tithe of such lambs, or of such wool; that the defendant purposely and designedly drove the said sheep, ewes, &c. out of Normanby aforesaid, to lamb and be shorn in the adjoining parish, to defraud the plaintiffs of the tithe of lamb and wool; and that he refused to make to plaintiffs any compensation for the value of such tithes.

The defendant in his answer admitted the plaintiffs' title generally, but denied their right to the particular tithes sought, excepting for the agistment of certain

sheep, in the answer after mentioned, and other titheable matters alleged to be covered by moduses.

The answer then stated that the defendant had, for some years past, occupied, and enjoyed, and resided upon a certain farm called Coates, which was tithe-free, consisting of about 800 acres, not situated in any of the townships liable [242] to pay tithe to the plaintiffs, two miles distant from that part of the lands occupied by defendant in Normanby, where the farm buildings of defendant were situate, and where the defendant depastured his sheep: and he alleged that he had, for six years then last past, occupied in the said township of Normanby, on his own account, and still held certain farms and lands containing 350 acres or thereabouts, and had, for two years then last past, held another farm within the township of Normanby, consisting of about 150 acres, but had not, during any part of the six years then last past, resided on any part of such farm and lands situate at Normanby, but at Coates, as before mentioned.

He then stated that he, in each and every year since the respective times last aforesaid, had and kept on his said farm and lands such number of cows as was mentioned in the schedule, and no more, and which had produced such number of calves, and had yielded to him such quantity of milk as there set forth. He also pleaded a modus of 2½d. for every cow having a calf, in lieu of the tithes of calves and milk: and 1½d. for every milch cow having no calf, in lieu of the tithes of milk: such two last-mentioned payments being respectively in lieu and satisfaction for all tithes of calves and milk arising, &c. yearly and every year within the said township of Normanby: and also that from time, &c. a custom had prevailed within the township of Normanby for the owner of the tithes for the time being to receive and [243] accept the tithes of lambs dropped in the said township, in manner following, that is to say:—"on the 3d day of old May, in each and every year, the owner of such lambs hath been accustomed to take the two best out of every ten: and the tithing man or owner of the tithes, the third best;" the tithes of which lambs so dropped in the said township of Normanby, defendant had always been ready and willing to set out and render for plaintiffs in their respective proportions, at the time and in the manner last aforesaid; although (he admitted) he had, for one or two years, and not more, to avoid litigation and for no other reason, permitted the plaintiff (Hall) to receive and take the tithe of lambs as aforesaid in the month of August, insisting, nevertheless on the custom set forth.

He then set up a modus of three farthings for every sheep that had died within the said township in each year: and the like sum for every sheep removed out of the township after Candlemas in each year, and without being shorn, in lieu of the tithes of wool of such sheep so dying or being removed.

The answer then stated that the defendant resided at Coates, about two miles from that part of the farm and lands occupied by him in Normanby, where his farm buildings were situate, and where his sheep were depastured: and that such sheep only as were in that behalf specified in the schedule, and which [244] had produced such quantity of wool, and of the value as is there mentioned, had been shorn in each and every year within the said township of Normanby, since the plaintiffs became entitled to the tithes thereof: but that all the other sheep of the defendant had been fed in the said township of Normanby during the same time, and had been removed therefrom to the defendant's farm at Coates, and had been driven back into the township of Normanby at certain times in the schedule mentioned and specified, and not otherwise, having been so fed, removed, and driven back for the reasons thereafter mentioned, and by no means for the purpose, or with the design or intent to defraud the plaintiffs of tithes of lambs and wool, or of any part thereof (referring to the schedule for the number of sheep and ewes so removed as aforesaid, and the quantity of wool, and the number of lambs, and the value of such wool and lambs respectively); and he stated that he depastured and kept his sheep during the winter on winter-feed, and that Normanby was not sufficiently productive for their nourishment and support during the time they were lambing, and that he grew no turnips at Normanby aforesaid or early artificial grasses, but that he did at Coates: that he had no sheep-cots at Normanby, and that for the protection of the sheep at lambing time such cots were set at Coates only: that the grass at Normanby was much more fit for the fodder of cattle than for the feed of sheep, and was therefore made use of by him for the former purpose; that about the month of March, it be-[245]comes necessary to clear the

lands at Normanby, for the purpose of taking in grazing beasts, such lands being much better adapted for the feed of beasts than for that of sheep, and that the time when the said lands at Normanby were fit to depasture and feed the sheep of defendant, was not generally until the months of May and June; that a considerable number of the defendant's sheep, and such number as the course of the husbandry of defendant enabled him to keep at Normanby at the shearing time, were clipped in the said township of Normanby:—and that the defendant never had removed any of his sheep from the township of Normanby for any or either of the reasons in the bill mentioned, but as aforesaid.

He then pleaded a modus of 2d. for every sow which had pigged in Lent, in lieu of the tithe of the pigs of such sow; and that it had been the immemorial custom within the said township of Normanby, for the owner of the tithes for the time being to receive and accept the tithes of the pigs of all sows which had not pigged in Lent, in the same manner as before stated as to the lambs: and a modus of 1d. for foals.

On the part of the plaintiffs, a witness deposed to the following facts, which were very particularly adverted to by the Lord Chief Baron in delivering judgment, as being conclusive evidence of constructive fraud in equity.

[246] He stated that he was and had been collector of the tithes for about six years; that in the year 1812, the defendant kept about one hundred ewes on his lands in Normanby, and that they all lambed there that year; that the defendant refused to pay the tithe of all such lambs as were lambed before Lady-day in that year, alleging, that as he was then tenant to the then owners of the tithes arising within the several townships of Normanby, Stowe, Shirton, and Bransby, which tenancy did not expire until Lady-day, 1812, he was entitled, as such tenant, to the tithes of such lambs as were lambed before that time; that the defendant offered to pay tithes for such lambs as were lambed after Lady-day in that year, but that the plaintiffs refused to receive the tithe of such lambs only, contending that they were entitled to the tithe of all the lambs, whether lambed before or after Lady-day in that year, particularly as the defendant, on entering upon the said tithe at Lady-day, 1809, received the tithe for all lambs, whether lambed before or after Lady-day in that year.

He also deposed, that the defendant had kept on his said farm and lands in Normanby in and during the year 1813, about two hundred sheep, but he could not set forth how many of them were ewes; that all such of the said sheep as were ewes, were kept, fed, and depastured in the said township of Normanby during the whole of that year, and that several of the said other sheep were kept, fed, and depastured in the said [247] township of Normanby until the summer of 1813, and were then sold off as they became fat; and that the remaining part thereof were kept, fed, and depastured in the said township until the latter end of the month of October following, when they were removed from the said township of Normanby into other townships or places to be fed on turnips; that such of the said sheep as were ewes did, in the year 1813, produce about seventy lambs, and that such lambs were dropped or fallen in Normanby; that the defendant did, in the year 1813, set out and render to the plaintiff William Hall, tithes of the said last-mentioned lambs; that the defendant did keep on his said farm and lands in Normanby aforesaid, in and during the year 1814, seventy-five ewes and one hundred and six other sheep, and that such ewes as had not lambed at Lady-day, 1814, were removed from the said township of Normanby at or about Lady-day, 1814, before they had dropped their lambs, into the adjoining parish of Coates, where they remained until about the middle of June, 1814, and were, together with the lambs, then removed back from Coates to Normanby, and there kept, fed, and depastured during the remaining part of that year, and that such of the said other sheep as were two years old, were, after being shorn, kept, fed, and depastured in the said township of Normanby until the month of July, and were then either sold off unshorn, as fat sheep, or removed from Normanby into the adjoining parish of Coates, and there shorn, and afterwards sent to market and sold, [248] and that the remaining part of the other sheep, being one year old, were kept, fed, and depastured in the township of Normanby until the month of October, and were then removed from Normanby into some other township or place for the purpose of being there fed on turnips, from whence they were removed back to Normanby in the following spring; that in the said month of June, 1814, the deponent counted one hundred and twenty-six lambs which had been brought back from the adjoining parish of Coates, where the same had been dropped or fallen that year, into Normanby:

that the defendant refused to pay to plaintiff Sir John Beckett, tithe for such lambs as were lambd before Lady-day in that year, alleging, that as he was tenant to Sir John Beckett, for his share of tithes arising within the several townships of Normanby, Stowe, Shirton, and Bransby, and which tenancy did not expire until Lady-day 1814, he was entitled, as such tenant, to the said Sir John Beckett's share of the tithes of such lambs as were lambd before Lady-Day, 1814, but that he offered to pay to plaintiff, William Hall, his share of the tithes of such last-mentioned lambs as were lambd before Lady-day 1814; and that the plaintiff (Hall) refused to accept the tithe of such last-mentioned lambs only, alleging that he was entitled to tithe of such lambs as had dropped from the ewes which had been so removed from Normanby to Coates after Lady-day in that year, as well as to the tithes of the lambs which had been lambd in Normanby before Lady-day:—and that [249] defendant also refused, for the reasons aforesaid, to pay to plaintiffs, or either of them, the tithe of such of the said lambs as were dropped from the ewes which had been so removed from Normanby to Coates.

The witness deposed to nearly the same effect, as to a similar practice of the defendant on his farm and lands in Normanby, during the years 1815, 1816, and 1817, and that defendant did not, in the said years 1812, 1813, 1814, 1815, 1816, and 1817, or any of them, set out and render to and for the said plaintiffs, or either of them, or any person on their, or either of their behalf, to the knowledge or belief of deponent, tithe of such lambs, or make or pay any compensation or satisfaction for the tithe thereof, or for the agistment of such sheep.

The same witness also swore that the defendant, during the several years 1812, 1814, 1815, 1816, and 1817, a short time before shearing time, did drive away all the fat sheep, about eighty in number in each year, from his farm in Normanby aforesaid, to the parish of Coates, before such sheep were shorn, and that such sheep were immediately shorn there, and then sold off as fat sheep; that the lambs in each of the said years, (the numbers of which were set forth in deponent's answer to another interrogatory,) were, towards the latter end of each year, driven by the defendant from his farm in Normanby aforesaid, to some other place out of the said township, and that [250] such lambs, after being clipped in the parish of Coates in the following year, were driven back by defendant to his said farm at Normanby, except that in the spring of the year 1817, the lambs of the preceding year were brought back to the township of Normanby, and fed on turnips there for a short time, when they were again removed, before shearing time, from Normanby into Coates, where they were shorn, and after being shorn, were brought back into Normanby; and that the defendant did not, in any of the said years, set out or render to or for the plaintiffs, or any person on their behalf, the tithe of the wool of such sheep and lambs, or make or pay any compensation or satisfaction for the same.

The deponent then stated that the defendant did not, in the several years 1812, 1813, 1814, 1815, 1816, and 1817, respectively, or in any or either of them, pay to plaintiffs, or either of them, any compensation or satisfaction for the agistment of any number of sheep and lambs kept, fed and depastured in the said township of Normanby in those years, or any of them; and he swore that it was usual and customary for the farmers or occupiers of land in Normanby, who kept ewes there, to wean or separate the lambs from their dams at or about Lammas-day in each year, at which time the said lambs were about four months old.

The deponent also swore that the defendant did, some time in the year 1814, in his presence [251] and hearing, say or declare to plaintiff Sir John Beckett, that whilst he (the defendant) was the tenant or occupier of the said Sir John Beckett's two-third parts of the tithes of Normanby, Stowe, Shirton, and Bransby, it was not worth his, (the defendant's,) while to remove his ewes from Normanby into any other place to lamb, but when he had to account for the whole tithes, he would try what he could to prevent the tithe-owners, or either of them, from getting the tithes.

The defendant gave evidence of the money-payments, and of the customs pleaded by him.

Dauncey and Roupell for the plaintiffs, after taking objections to the laying of some of the moduses, contended, that as to the custom respecting the tithing of lambs, it was bad, because lambs are not legally titheable till the 1st of August, or till they can be weaned: citing *Croft v. Blake* (2 Gwil. 530), and *Heaton v. Legal* (ibid. 630); that the modus set up for sheep dying or removed out of the township of Normanby, could

not be a modus for agistment: *Garnons v. Barnard* (2 Gwil. 1462-8); and that it was also void for its uncertainty, *Phillips v. Symes* (2 Gwil. 654); and they insisted that the customs of tithing the lambs and pigs, as stated in the answer, were illegal, because they abridged the common law right of the tithe owner, who was thereby entitled to a choice of the ten parts, and therefore could not be established.

[252] On the charge of fraudulent removal, they urged that the fraud being fully established, both by the proof of the practice, (referring to the evidence,) and by the defendant's own declarations of a fraudulent intention in so removing the sheep, the plaintiffs would be entitled to an account of the tithes of such sheep, or, at least, an issue to try the question of the fraud, citing *Boys v. Ellis* (2 Gwil. 647), as an instance where the Court entertained great doubt on the same point, and urging that the facts proved in this case, made it a much stronger one than that was.

[The Lord Chief Baron. You have not alleged in your bill the fact of any conversation on the subject of the defendant's fraudulent intention in removing the sheep having taken place; and I shall therefore put that part of the evidence out of the case, according to the sound rule of pleading adopted by all Courts of Equity.]

Martin and Richards, for the defendant, insisted, on the other hand, that the moduses were good and well laid, and that the customs were not contrary to law.

In support of the Candlemas payment, they cited the case of *Boscawen v. Roberts* (3 Gwil. 946); and *Ellis v. Saul* (4 Gwil. 1334); submitting that the time of the render of tithes of lamb was a matter depending on the custom of the county, and they [253] urged that that was here proved to be, as stated in the answer.

It was admitted (in answer to an inquiry by the Lord Chief Baron) that there was no case establishing that a custom of allowing the owner to choose the best two out of ten before the clergyman might choose, but it was submitted that there was nothing illegal or fraudulent in such a custom, if it should be proved to exist.

On the question of fraud, in the conduct of the defendant in removing his sheep, as stated in the bill, they contended that a farmer was entitled to remove his sheep, and they submitted that the defendant had satisfactorily removed the ground of that charge by his answer on the record, and that as to the evidence of his declaration of an intention to defraud the tithe-owner, such a declaration, even if made, could not now be set up in evidence against his positive oath; and that fraud being wholly a question of fact, could not be decided by the Court without an issue; and they submitted that the case of *Ellis v. Boys* was an authority in favor of the defendant, because the Court had there decided that there must be strong and direct proof of the fraud charged, whereas in this case fraud had not been proved.

Danney having replied,

The Lord Chief Baron intimated that his opinion at present was, that the payment at Candle-[254]-mas could not be maintained as a modus; and that the custom of allowing the owner the first choice of the two best lambs, was contrary to law.

Cur. adv. vult.

12th January.—Lord RICHARDS, Chief Baron, now delivered judgment:—

[Having stated the object of the bill, and that it was not necessary to enter into a statement of the points of title, because they were admitted by the answer.]

The chief defence is, that there are several moduses and customs of tithing, applying to specific tithes.

The answer first sets up a modus of 2½d. for every cow having a calf, in lieu of the tithes of calves and milk; 1½d. payable on Easter Monday, for every milch cow having no calf, in lieu of the tithe of milk; 2d. for every sow which had pigged in Lent; and for every sow which had not then pigged, when the pigs should be three weeks old, the owner of such sow and pigs having taken the two best of every ten, the tithe-owner is to take the third best; and 1d. for every foal within the year.

[255] I do not find that there is any evidence offered to contradict those money payments, and I think that there is proof sufficient to support them.

I must therefore give the plaintiffs an opportunity of carrying on the inquiry further, by issues, or the bill must be dismissed.

The other prescriptions, pleaded as moduses, are under different circumstances. With respect to lambs, the defendant insists that there is a customary mode of rendering that tithe (his Lordship stated it). It is obvious that this does not fall within the legal notion of a modus. The answer does not, indeed, affect to call it

a modus, which is, in legal language, a money-payment, or other distinct compensation, in lieu of titheable matters. This, therefore, is not a modus. It is, if anything, a manner of paying tithes in kind: for it proposes to the parson to take one in ten; but it is a departure from the legal course of rendering tithes. It is not more beneficial to the parson. On the contrary, there is no consideration for the custom moving to the tithe-owner, nor is there any provision made, under the custom, as stated, for any lambs under or above the number of ten. In every view of the case, I must say, I cannot consider it as a legal mode of rendering the tithe. It is one which would deprive the parson of his common law right. An account, therefore, must be decreed of the tithe of lambs in kind.

[256] As to the pigs dropped, not in Lent, that alleged custom is liable to the same objection; there must therefore be an account decreed as to them also, for the same reasons: for I think it is impossible to maintain that these customs are a proper mode of rendering tithe. Instead of giving the plaintiffs a tenth at his choice, as is the common course of tithing, you thus exclude them from the opportunity of choosing one of them, which is quite contrary to the mode established by the common law.

Then as to sheep, the defendant also pleads moduses of three farthings for every sheep that had died in Normanby within the year, and for every sheep removed out of the township after Candlemas, without being shorn, in lieu of the tithe of wool. Now I find infinite difficulty in conceiving how these payments can be considered as moduses covering the tithe of wool. The tithe of that article does not accrue until shearing time, and this money payment is pleaded to be payable at Candlemas, which would be before the wool tithe would be due. It cannot, therefore, be a modus in lieu of the tithe of wool. Suppose the animal should live beyond Candlemas, yet die before shearing time, in that case, as this modus is set out, there would be no provision for the clergyman for the feeding of such sheep, and therefore there must be an account of that tithe, and also of the tithe of agistment of sheep removed before they were shorn, except such as were fairly removed to Coates, the defendant's other farm.

[257] Then arises the point with respect to the question of fraud, with reference to the sheep removed. The bill charges that the conduct of the defendant, in that removal, was calculated to defraud the plaintiffs, and that it was adopted for that purpose. Unquestionably, if that charge were established, the plaintiffs would be entitled to the tithes of such removed sheep, as much as they would have been if the sheep had continued on the Normanby farm, for without doubt, if you take away the animals for awhile, for the purpose of defrauding the tithe-owner, he is not to be a loser by such a practice: and a Court of Equity would take care that justice should be done to him.

Now that question depends entirely on the evidence. It is clear that the farmer may remove them under some circumstances, and that he cannot, under others; and the question therefore is, what are the circumstances in this case?

His Lordship read the whole of the evidence already detailed as to that part of the case.

It is quite clear that great numbers of lambs were kept in each year at Normanby for a given period of long duration, and then, after a certain season, removed thence to Coates, and kept there awhile, for a shorter time; they were then brought back again to Normanby, and there kept and fed for a time, as stated by the witness: and on the evidence given, I think it is very difficult to [258] say that there is not fraud in such temporary removals as have been proved in this case, that is, in the sense in which we consider fraud in a Court of Equity. It appears, that until the year 1813, the defendant farmed the tithes of Normanby himself, and that the shearings, before that time, were made in Normanby, but that in subsequent years, when his tenancy ceased, he then removed the sheep to be shorn, to Coates, just before the tithe was becoming due, that is, just before shearing time. Then, after they were shorn, they were brought back again to Normanby. The same thing was done with the ewes about to bring forth lambs. They were brought away from Normanby to Coates a little before they were expected to lamb: they dropped their lambs in Coates, and afterwards they and their lambs were brought back again to Normanby.

This certainly, therefore, appears to be a very strong case of fraud, and, as it seems to me, when I observe that there is not one word of evidence to disprove the

fraud, as charged by the bill, and there is not the least attempt to explain it, quite irresistible.

I, however, entirely lay out of this case, all that the witness has sworn, as to the declaration of the defendant concerning the fraud, and his confessing that it was his intention to defraud the tithe owner; and my reason is, because there is nothing of that kind stated in the bill, so that the defendant could have had no [259] opportunity of answering or explaining it, and he could not therefore have been aware that any such matter was intended to be proved, and in cases of fraud, declarations of a fraudulent purpose are often the very gist of the case. He had no sort of intimation of it, so as to enable him to cross-examine the witness on that fact. I am the more anxious to state that we are not now to be allowed to enter upon that part of the evidence in this case, there being no ground laid for it by the allegations in the bill: because I wish to have it make a due impression on those who are in the habit of drawing pleadings in equity, in order that they may take care that that which is the gist of the cause should be stated on the record, for it is too much for a defendant to be overpowered by evidence which he could have no idea, from any statement in the bill, would be brought forward at the hearing, when he might otherwise, perhaps, have been able, if he had been aware of it, to explain it to the satisfaction of the Court. This, however, I am aware is a delicate matter for the consideration of the pleader, as it is often dangerous to reveal the evidence intended to be used, but the bill and answer have very great effect on the decision of every cause, and although we would wish to avoid prolixity, and all unnecessary matter, generally speaking, yet it is indispensibly necessary to state a defendant's declaration of fraud on the record, if it is intended to be used against him on the evidence at the hearing. In this case, that declaration not being mentioned in the pleadings, cannot be suffered [260] to be given in evidence in the cause: for if that acknowledgment were proved to be true, there would be no necessity for any further proof on the subject.

In the present case, however, I think the evidence of fraud is abundantly strong, without reference to the evidence of the defendant's declaration, which is not warranted by the pleadings. I am of opinion, under the circumstances which appear by clear legitimate evidence, the fraud is here sufficiently apparent: but I must repeat, that although, generally speaking, it may not be necessary to state on the record, declarations by the defendant, yet in a case, charging fraud, where such declarations are often the gist of the cause, great injustice would be done to the party if evidence were received of such declarations, where they are not charged in the bill.

In the case of *Evans and Bicknell*, the Lord Chancellor, very soon after he came to the Great Seal, so determined, on occasion of an attempt to introduce evidence of this kind, without previous intimation to the party against whom it was to be used, by alleging it in the bill. He has held the same opinion, I believe, ever since, and no man can differ from him in thinking that such a thing cannot be done. For that reason, as I said before, I put this evidence entirely out of the question.

There must be an account of the tithe of lambs, and of the wool of such sheep as were removed in [261] the several years mentioned in the bill before they were shorn, and of the agistment of such sheep, except those which were removed to Coates to be shorn.

Decree accordingly.

CORAM RICHARDS, LORD CHIEF BARON.

IN RE CHERTSEY MARKET. EX PARTE WALTHAM AND OTHERS. Thursday, 13th January 1819. —Jurisdiction. On a petition presented by inhabitant householders, under the stat. on account of a misapplication of the funds of a parish charity by the trustees, where the application does not extend to regulate or alter the charity, or to carry it into execution, this Court has jurisdiction, although the charity be established by royal charter.—Parties. The Court will not entertain charges against one or more of trustees, on the ground of their being the acting trustees, and that they are alone complained of, unless the others or their representatives, are also brought before the Court.—The Attorney General is not a necessary party to such a petition; it is sufficient that he certify his allowance of it.—Semble, that proof of the general (though not universal) appro-

bation of the parish is sufficient to justify the bonâ fide conduct of trustees, where they have a discretion to exercise, and the Court will not interfere, where their acts have been so approved: and if in consequence of the decayed state of an old market-house built originally on ground given by the charter for the purpose, a new one be rebuilt by them, with such general consent, the trustees may remove it to any more convenient place, *infra villam*.—*Laches*. The death of some of the trustees and great delay in bringing forward charges against their representatives, is preclusive against petitioners.—*Costs*. A petition open to the objections stated, held to be vexatious, and was therefore dismissed with costs.—*Quere* what shall be a dedication of private property to the public good?

The petitioners were three inhabitant housekeepers of the town or village of Chertsey (Surrey).

[262] The petition, which was filed in 1818, after setting out the letters patent of Queen Eliz. (by which her Majesty granted to certain trustees, their heirs and assigns, power to hold an additional weekly market, and an additional yearly fair, and Court of Pie Poudre in the village of Chertsey, for improvement of the village, and the relief of the poor there: having recited that her Majesty had also granted a vacant piece (an acre) of waste ground, described by its appurtenances, for the purpose of the said fair and markets, and for building a market-house thereon, and stalls and standings thereon, or elsewhere within the manor, to hold, &c. to the trustees, to apply the profits to the use and relief of the inhabitant poor, paying 2s. a year for all services and demands whatsoever:) stated, that by indentures of lease and release of the 10th and 11th December, 1789, William Dundas, of Chertsey, only surviving feoffee and trustee under a former deed of feoffment, granted to certain new trustees the same premises for the same purposes, and upon the same trusts; that soon after the grant of the letters patent a market-house of certain dimensions and description had been built on the said spot of ground, and that large tolls were derived from the influx of business done there: that John Brown, one of the trustees in the said indenture of 1789, had been continually the acting trustee or manager of the trust-estate: that in 1809, Brown, without the concurrence of any of the then surviving co-trustees in the deed of 1789, and against the express objection of some of them, and particularly of [263] William Goring, under the indemnity of certain persons (not trustees) interested in the destruction of the market-house, caused it to be pulled down: and that he had sold the materials, and applied the proceeds to his own use, the market-house being at that time only in a small degree out of repair; that Brown, being afterwards alarmed by the general complaint of the inhabitants, set on foot a subscription, and having collected a considerable sum of money, built a new market-house in the town of Chertsey: but that it was merely a small open building without a court-house, which the other had had, and in all respects very inferior to the old one, tending in consequence to the decay of the market, and the abolition of the ancient Court of Pie Poudre, which had been formerly held there once a fortnight.

The petition also stated that the new building had been erected on premises which were the property of individuals, (Messrs. Porter) for their private benefit, and not on the site of the old market-house (the ground granted by the charter), and

That Brown had applied a very small portion of the money received by him during the exercise of his trust arising from the tolls, &c. to the use of the poor, and had appropriated the remainder to his own use.

The petition then stated that Brown died in 1812, leaving sufficient assets: that since Brown's death, Goring, the only surviving trustee, [264] had appointed certain other persons to be new trustees: that during the life of Brown some of his co-trustees had received part of the profits of the said market, and part of the subscription money, which had not been applied to the relief of the poor; and so also of the new trustees: and the petition concluded by stating particular instances of consequent decay of the market, and failure of the profits which it alleged to be attributable to the removal and inferior accommodation of the new building.

The petitioners therefore prayed, that it might be referred to the Deputy Remembrancer, to inquire and state the value of the materials of the old market-house pulled down by the said John Brown, and how much money he received from the sale of such parts thereof as he had sold, and if he had converted any part thereof to his own use, and what was the value thereof. And that the Deputy Remembrancer might

also inquire and state what were the dimensions, state, and condition of the market-house and court-house at the time the same was so pulled down, and what sum of money would then have been sufficient to repair the same, and what sum of money would be required for rebuilding the same upon its former plan, site, and dimensions.

And that the personal representatives of Brown might be directed to pay into Court on account of the charity estate, the value of the materials of the said old market-house and court-house; and that such sum of money as the said Deputy [265] Remembrancer should report to be necessary for rebuilding and re-instating the said market-house and court-house on the same plan and site, and in the same state and condition as they were in when the same were pulled down.

And that an account might also be taken of the tolls due, and other profits or sums of money possessed or received by the said John Brown in his life-time for or on account of the said trust estate; and also of his payments for or on an account of the said trust-estate, and that they should be ordered to pay what should appear to be due from the estate of Brown to the trust-estate, into the hands of the Deputy Remembrancer, to the credit of the charity estate: and that an account might also be taken of the sums of money and property possessed and received by William Goring the elder, for or on account of the said trust-estate, previous to the 8th day of July, 1813, and of his payments on account of the said trust-estate, up to the same time; and that he might be ordered to pay into the hands of the Deputy Remembrancer, to the credit of the said trust-estate, what, if any thing, upon taking the accounts should appear to be due from him thereto: and that an account might also be taken of all the sums of money or other property of the said trust-estate, possessed or received by the trustees named in the indenture executed by Goring or by any of them, or by their or any of their order, or for their or any of their use, since the date and execution of such indenture; and that the said last-mentioned trustees [266] might be ordered to pay to the said Deputy Remembrancer to the credit of the said trust-estate, what if any thing upon taking such accounts should appear to be due from them to the said trust-estate.

And that the said Deputy Remembrancer might be directed to enquire into the trusts of the said charity, and to approve of a proper scheme for rebuilding the said market-house and court-house, and for restoring the said Court of Pie Poudre, and for building shambles or sheds in the said market; and for re-establishing a morning market in the said town and village of Chertsey; and also for applying the rents and profits which should henceforth arise from the said trust-estate according to the original trusts thereof; and that all necessary and proper directions might be given for effectuating all those purposes: and that the costs of this application might be paid to the petitioners, either by the representatives and out of the assets of the said John Brown, or out of the funds of the said trust-estate, now in the hands of the present trustees.

The petition was supported by the affidavit of the petitioner, verifying the allegations. Other affidavits were made to the same effect, and several by persons bringing poultry to the town for sale, who stated that they had been inconvenienced by the want of shelter afforded by the old market-house.

Affidavits were also filed by the representatives of Brown, on their part. The most material [267] of them, in point of the facts detailed, (admitting much of the matter of the petition) stated that for fifteen years and more, previous to the year 1809, the market-house and market-place, (being nothing more than a vacant space of ground, surrounded or inclosed by wooden pillars which supported a building consisting of one room, of the same dimensions as the vacant space beneath,) was let to one Edward Wright, a fellmonger, at the annual rent of 7l. 12s. being the best rent which could be got for it, and its value; that the said fair and markets, and all the tolls, pieceage, stallage, customs, profits, commodities, and emoluments belonging to the same, were let to the said Edward Wright, for the annual sum of 5l. making together the annual rent of 12l. 12s. —and that adjoining the said market house, and forming the side thereof next to the church, was erected a cage or prison, for the confinement of disorderly persons.

That the deponents had resided in the said town of Chertsey for a considerable number of years last past, and during all that time they did not remember or believe that the said room or building over the said market place was ever used for a court-house, or that the magistrates of the district ever assembled there for the purpose of

transacting any public business, or for any other purpose : or that any Court of Pie Poudre was ever held therein, or that it was ever used or required for the purpose of the markets or fairs, or that any pitched market was ever held in the market-place beneath the said room or building, or that persons from [268] the surrounding country, were accustomed to bring the produce of their lands and commodities into the said market house for sale ; but that on the contrary, the said market had from time immemorial been a sample market for grain : and that few other commodities except poultry were exposed for sale on the market days : and that the sellers of fowls did not use the said market-place for the sale of their poultry except in wet weather ; but such sales generally took place in a street in the said town of Chertsey, called Guildford Street, nearly opposite to the said market-place : that a few years previous to the year 1809, (in which year Brown first became the acting manager of the trust property,) the parish church of Chertsey having become ruinous and falling into decay, an act of parliament was obtained for taking down the body thereof, and rebuilding the same, which was accordingly done at an expence of above 12,000*l.* and the same was completed in the year 1809 : that at that time the said market-place and room over it which adjoined the church-yard, and were very close to the body of the church, and obstructed the view, and darkened some of the windows, and also projected to a considerable distance into the public street and highway : and were greatly out of repair, and would have required a considerable sum of money to put them into complete repair : that the cage or prison adjoining the same had also become ruinous and insecure ; and that the said market-place (which was very seldom used for the vending of commodities therein) had become the evening rendezvous of a number of [269] idle persons, and consequently a nuisance to the town, and particularly to the church.

Other affidavits were filed in support of many of the material facts alleged against the petition, in some of which it was stated, that the subsequent rebuilding of the new market-house, and the plan of it, had been effected on the request of the principal inhabitants, and that it had proved in all respects more commodious and beneficial than the old one, and that it had been entirely, or in part erected, on the ground granted by the said charter : that the sum necessary for defraying all expences had been raised by voluntary contributions, to which all the principal inhabitants had subscribed : and that the parish assembled in vestry, had also voted a considerable sum out of the poor's rates for the same purpose.

23d November. Dauncey, Agar, and Duckworth, for the petitioners, stated that this application to the Court was founded on the 52 Geo. III. ch. 101. Being about to read the affidavits filed in support of the petition,

Jervis and Beames, for the representatives of Brown, the trustee whose acts were the subject-matter of the complaint of the petitioners, and the foundation of the present proceeding, submitted that the Court had no jurisdiction in this case under the act of Parliament on which the proceeding was founded : for that Courts of Equity had no other or larger jurisdiction [270] given in summary applications of this nature, than they had in the case of the more formal proceeding by information : and that according to the practice of such Courts as established by a series of authorities, in cases of charities endowed by royal charter their jurisdiction extends only to compel trustees to account for the funds which have come to their hands, and not to regulate or control the charity or the conduct of the persons to whom the management of it has been entrusted.

In the case of *The Birmingham School* (*Eden v. Foster* (2 P. Wms. 325)), it was determined, that where the King is the founder of a charity, his Majesty is the only visitor; and this is an attempt to make the Court of Exchequer visitor in the present instance. They also cited an *Anonymous case* from Mod. Rep. to the same point (12 Mod. 232). In the leading case on this subject, *The Attorney General v. The Governors of the Foundling Hospital* (2 Ves. 47), it is declared to be established law, that a Court of Equity has not a general jurisdiction to regulate or controul charities founded by charter, and that such jurisdiction is limited and confined to cases of mere waste of the revenues of the charity.

In *The Attorney General v. Smart* (1 Vez. sen. 72), and *The Attorney General v. Middleton* (2 Vez. sen. 328), it was held, particularly in the latter, that where there is a charter with proper powers, a Court of Equity has [271] no jurisdiction to interfere in its regulation, and in that case Lord Hardwicke said, that he was not disposed to extend visitatorial powers ; and, in case of Royal Charters, the King and his heirs are

the only visitors (*Anon.*, 12 Mod. 232. Co. 2 Inst. 68). They referred also to the case of *Ex parte Rees* (3 Ves. & Bea. 10), where the Lord Chancellor, having said that the mode of proceeding by petition was, in certain cases, inconvenient, refused the petition which had been presented in that case.

[On its being also objected that the Attorney General should have been a party to this petition, the Lord Chief Baron said, "The course of the Court is, as I have reason to know, for the Attorney General to certify his allowance of the petition, and that is sufficient."]

Lastly, they submitted that the act of Parliament having been passed in 1812, and the conduct complained of having taken place in 1809, unless the act were retrospective in operation, it could not authorize this proceeding.

Dauncey and Agar, on the other hand, contended, that if any of the authorities cited had established that there were certain cases wherein a Court of Equity could not interfere, still this was a case which all those authorities admitted was within the jurisdiction of the Court; as this was a charge of gross breach of trust in destroying the trust property (for a trustee has no right to [272] pull down buildings) and misapplying the funds. As to charities of royal foundation, being amenable to no other visitor but the Crown; that is only where the objects of the charity had not been defined, and the interference of a visitor would be therefore necessary to direct the application of the funds; and even there, if afterwards the trustees should misapply them, a Court of Equity might interfere; and they insisted that the building a market-house was not in itself the establishment of the charity.

They also submitted, that the act of Parliament had pointed out a form of proceeding in such cases as this, and in the present instance that form had been strictly pursued.

The Lord Chief Baron. I shall not now determine whether this Court has jurisdiction or not; but as at present advised, I cannot distinguish this case from many wherein the Courts have interfered. That question had occurred to my mind, and I shall reserve the consideration of it. I was of counsel in *The Foundling Hospital case*, and I remember that some of the first men at the bar of that day were not satisfied with the judgment. With respect to the account, I must have the facts; therefore the case must go on. The main question will be, whether the Court can interfere to remedy what has been done with respect to the market-house, the rest is almost matter of course.

[273] The counsel for the petitioners then proceeded with the facts of the case, and contended, that the market-house was, by the express terms of the grant, directed to be built on the old site, and that the trustees, whether on the ground of its being a nuisance to the church, which was built afterwards, or for any other cause, or even with the consent of the parishioners, had no right to remove it: and, that in doing so, they had been guilty of a gross breach of trust. They cited *Ex parte Greenhouse* (1 Mad. Ch. Rep. 92), as being a case very similar to the present, where the Lord Chancellor held, that the pulling down a chapel and converting the materials and the burying ground to other uses, was a breach of trust.

They then urged, that the fact of the new market-house having been built on private property, from which the trustees might therefore at any time have been ejected, was in itself a waste of the trust property, and was alone sufficient to induce the Court to institute an inquiry, removing at once all objections on the ground of want of jurisdiction; and they urged, that that was a breach of trust, which no implied acquiescence from length of time could cure, as no acquiescence could justify such a wrong, and therefore the Court should grant the relief prayed.

Martin and Hutchinson for the present trustees, objected preliminarily, that the representatives [274] of the three deceased persons, who were co trustees with Brown, at the time when he had the management of the charity, ought to have been brought before the Court, the more especially as two of those then had given their consent to the pulling down of the market-house.

Jervis and Beames, for the representatives of Brown, on the merits, contended, that the building the new market-house on the land of private persons by their consent, was a dedication to the public of the ground, in the nature of a dedication of land to public use as a highway; and that it could not be resumed: and that should an ejectment be brought to recover the possession, a Court of Equity would enjoin the action, or the Judge who tried the cause would direct the jury to presume a grant; and that therefore that part of the charge was unfounded. On that point they cited

the case of *The Trustees of the Rugby Charity v. Meryweather* (11 East, 375, in notis), in which Lord Kenyon referred to a case where a dereliction of property in ground which had been used as a public road for six years, was held sufficient to presume a dereliction of a way to the public. They also cited the cases of *The King v. Lloyd* (1 Campb. 260), and *Woodger v. Hadden* (5 Taunt. 125), (in which last Mr. J. Chambre was of opinion, that there had been a dedication, although the rest of the Court thought not; but the other Judges so held, merely because the street had not been perfected;) as in point, to [275] shew that the trustees had a right to remove the building.

Having recapitulated the objections taken in the first instance of the want of jurisdiction, the length of time which had elapsed, the absence of proper and necessary parties, they contended that there having been a new market-house erected and applied to the purposes of a market, distinguished the present case from that of *Ex parte Greenhouse*, and rendered it totally inapplicable. And they insisted that the original grant of the ground which was the site of the old market-house, did not impose an obligation on the trustees to build it there, nor restrain them from erecting it in a more commodious place within the village, if they should afterwards have an opportunity of doing so; and that the change of site having been assented to by the inhabitants, it was neither an infringement of the charter nor a breach of duty in the trustees. They then cited the case of *Curwen v. Salkeld* (3 East, 538), and *The King v. Cotterell* (1 Barn. & Ald. 67), as establishing the right to remove a market-place to any more convenient spot within the limits of the grant.

On the point of Goring's dissent having been expressed, they urged, that he ought to have done more than merely express his dissent,—he should have applied to a competent Court to protect the charity by coercive measures.

[276] On the evidence of the facts in the cause on either side, they insisted, that the petitioners had made out at the utmost a very feeble case, and that even that had been very satisfactorily answered by the affidavits opposed to it: and they adverted very particularly to their contents: and urged finally, that if Brown had committed any error, it was one of judgment merely, and that his conduct having been *bonâ fide*, and with general consent, would alone be sufficient to protect a trustee*.

Dauncey having replied,

The Lord Chief Baron, after having strongly expressed his disinclination to give the relief sought by the petition, and his doubts of the practicability of the Court interfering under the circumstances of the case, took time to consider it.

13th January.—RICHARDS, Lord Chief Baron, now delivered judgment, stating the petition, and the letters patent.

The charter was certainly the foundation of this charity. On the question of the Court having jurisdiction, we must observe that the present [277] application does not require the interference of the Court to regulate the charity; the object of it is not to alter or carry it into execution on any principle of *ex pres*; but it is purely directed against the trustees, on a charge of mis-application of part of the charity funds by what they have done. I therefore think that it comes within the jurisdiction of this Court, and that that jurisdiction is not touched by the objections founded on the authorities which have been particularly pressed against it by the counsel for one of the trustees.

Under this grant the trustees had beyond all question power to build a market-house. One was accordingly built by them, and I think, according to the true construction of the instrument, it was then properly built on the spot in question. There was no discretion to place it in any other situation, though there was a discretion as to putting up standings and stalls in any other place. There was no market-place there at that time, nor were there any funds set apart for building one, nor does it appear with what property, or by whom or with what fund the market-house was erected. It is singular enough that the market-house was to be built on that particular place, while the stalls and standings were to be in any other place. We know perfectly that the stalls and standings are as important a part of a market as the market-house itself. I should hardly suppose, therefore, that it could have been considered a matter of any particular [278] importance where the market-house should stand; but still

* At the close of the argument, the counsel for Brown's representatives informed the Court that Messrs. Porter would release to the trustees their right to the premises said to be their property, to obviate all difficulty on that score.

it was directed by the charter to be built on the ground given, and the market-house was in fact erected there. By divers mesne conveyances the premises were from time to time transferred, and by deed of the 10th and 11th December, 1789, they were conveyed to divers trustees (fifteen in number), among whom was John Brown, the person of whose acts this petition complains.

It appears that Brown, in 1809, built a new market-house. The petitioners complain that it is in every respect inferior to the old one, in consequence of which a much less quantity of commodities have been from time to time brought to the market, and they also complain that there is no court-house, by reason whereof the court of Pie Poudre cannot be held on the market-days, and fair-days, as formerly. The first ground of complaint is (as it is stated, and perhaps truly), that the new market-house is not built on the ground mentioned in the charter, but on ground which is the property of Messrs. Porters, brewers. Then the petition proceeds to state, that the trustees have received large sums of money which they have misapplied and not accounted for.

Now, in the first place, I must observe, that all the then trustees, beyond all question, if I could administer relief, should have been made parties to this suit. I am required to carry into execu-[279]-tion the charter, and to call for the rents and profits of the charity estate: for that purpose I must call upon all who have, or might have, received them. I cannot say that Brown shall account for his proportion, I must have all who were concerned in the trust before the Court: but as I do not intend to give any relief, I do not think it necessary now to insist on the necessity of the other trustees being made parties.

On the 21st September, 1812, Brown died, and the respondents are his personal representatives. It is said that Goring possessed himself of the outstanding funds, and paid them over to the new trustees. Under these circumstances the Court is called upon to administer relief.

The affidavits in answer to the petition state, that the late surviving trustees, who were in existence at the time when this building was pulled down, all concurred in the act, except Goring, but that Goring took no steps to prevent it.

Now, it is quite clear that he might have prevented it, for he might have applied to a Court of Equity for that purpose, and it was in his power, by such a proceeding, to have taken the matter out of the hands of these persons who were misapplying the funds. He has, however, not done so, nor has he even joined in this petition.

[280] It is stated, that all the rest except Goring consented, and that would certainly make it important that they should be parties.

This new market-house, it seems, was built by subscription amongst the people in the neighbourhood, and a considerable contribution was raised for that purpose. Now nothing can shew the general concurrence of the inhabitants more plainly than such a subscription; for those who paid their money, and gave the plan the sanction of their name, evinced, by pretty strong evidence, their entire approbation.

But that is not all; the parish was applied to, and they also contributed, for the vestry gave money for the purpose out of the poor's rates. I will not stay to inquire whether the vestry had a right to give the parish money away for such a purpose; but they did so in point of fact, and there was no complaint made of their giving it in a way that the law does not warrant. That shews that the thing was done with the concurrence of the parish generally. 400l. was expended on the erection of this building, and it is stated as one of the principal causes of the general approbation expressed by the parish at pulling down the old house, and erecting a new one, that the old one had become a great nuisance to the church. I am bound to take it that it was so, because it is so sworn, and not contradicted. It appears that the old building had become the harbour of idle, dissolute, and disorderly persons, [281] who assembled there in church time, and therefore it was extremely fit and proper, in point of decorum and decency, that it should be removed. This building then having been erected by persons who laid out their money for the purpose, it does seem to me to be proved, that all the people in the neighbourhood approved of pulling it down for some reason, whether it was because it had become a nuisance, in consequence of the riotous conduct of the people who assembled about it, or whether it was, in consequence of the altered state of society, no longer of use as a market-house, to the extent that it had before been. I cannot therefore say, that to pull it down was a breach of trust, or of the duty which the trustees owed to the founder of the charity. The trustees might

perhaps have been originally bound to build the market-house on the particular spot pointed out and granted by the charter, but they were not, I think, restrained from removing it to any other place which they might think more fit for it, in the sound exercise of their judgment and discretion, in after times.

Thus, the whole appears to have been a transaction not disapproved of at the time by any person interested in it, except Goring—he, it is said, expressly disapproved of it, yet he had the power to have prevented it, and he did not—he does not even now complain, for he is not one of the petitioners.

[282] Then, with respect to the charge of the improper use made of the materials which formed the old house, a great deal is said in the petition, and very little in the evidence. The petition also says a great deal about the Pie Poudre Court, and so on, but in the evidence there is to be found one complete answer in point of fact with respect to all the allegations, and one which made a great impression on my mind, on account of the respectability of the testimony. It is stated, and particularly in the affidavit of Mr. Clarke, the chamberlain of the city of London, (who also swears, that he has been an inhabitant of the parish fifty years,) that during all that time he never saw or heard of the room which was over the old market-house having been used by the magistrates as a court-house to transact public or judicial business in, or that it had been ever used as a Court of Pie Poudre: and he and others say, that in their judgment and belief, the taking down the old market-house was a great improvement to the town. Now, in this place, where I am sitting as a Judge, I should not perhaps know any difference between this gentleman and any other witness; but still when I see that he is a person of distinction and character, for he is the chamberlain of the city of London, and a justice of the peace for the county of Surrey, and has lived in this place for fifty years, I confess that the affidavit of a person of his description weighs more with me than the affidavits of these petty traders, who are brought forward to support the petition.

[283] It being admitted, (as I think it must be) that the trustees had a right to pull down the old building and to erect another, the question is, whether it must necessarily be built on the spot granted. There is no definition of the very spot on which any new building shall be after erected in the letters patent, so that that objection is very questionable, even if it be true that this market-house is not built on the place which the Queen pointed out. But I am not clear upon the evidence as to that being the fact. I understand, however, that if it shall appear that the ground upon which any part of the building stands, does belong to Messrs. Porters, they are willing to release it to the trustees, in order to obviate all difficulty on that part of the case. I think it right that the trustees should accept of their offer. They will convey it by a grant by bargain and sale, enrolled of course. I am not, however, satisfied that this is built on any ground that is not part of the spot designated by the charter.

Another objection was, that this market is not of the same dimensions as the former one. But there is nothing in the letters patent that requires that the market-house should be of any particular dimensions, shape, or convenience. The duty of the trustees was to erect a market-house, which market-house they might afterwards alter, destroy, or replace. They are the judges of the size and whole plan. It was built according to their discretion, and if they were to build another, they had a right to do so on any new [284] plan, always using due discretion. That they have used due discretion appears obvious, for they have had the concurrence of all the principal inhabitants of the place, as evidenced by the subscriptions of all those who concurred. In fact, the whole parish concurred, for through the medium of the vestry, a sum of money has been given by the parish for the purpose of this building, to the erection of which, they were not compellable to pay any thing. Now, supposing this to be built upon the particular spot, and I do not see sufficient evidence to enable me to say that it is not, there is an end of that part of the case. That difficulty may be obviated at once by accepting the offer of Messrs. Porters.

The whole case then amounts to this: Here is an old building erected in the reign of Queen Elizabeth, or soon after her death, and which has continued standing till the year 1809. It had consequently become pretty old. It is sworn, that it had become inconvenient to the parish, and particularly with respect to the church, and that it was a nuisance which in my opinion was a great inconvenience indeed. It was in the power and within the scope of the authority of the trustees to pull it down

and build another in the room of it. It is equally clear that the parish consented to it, for they assisted them with money in building another, and by so doing certainly evinced their concurrence in the act done by the trustees. That being so, it seems to me that this petition is a peevish proceeding. Then [285] it does not attempt to affect the other trustees, and I said before, that I could not relieve the petitioners without having the other trustees before me, every one of whom, except Goring, concurred in the act of Brown, but even if they had not so concurred I should still insist on having them before me; for those who did not act, were as much trustees as the acting trustee, and are equally responsible with Brown, who was only a joint trustee with fourteen others. They select Brown singly, however, because he was the acting trustee; but all the others are equally amenable in the eye of the law.

Then it appears, that this market-house was erected in 1809, and that Brown died in 1812, yet this petition is not presented till 1818, so that there is a lapse of nine years after the erection of the building, and six years after the death of the person who pulled down the old and erected the new house, before any application is made to the Court. Now it is inconsistent, and even unjust, to proceed against the estate of a person who died so many years ago. Many reasons might have been assigned by Brown which his executors or administrators are not able to disclose. He might have stated many facts that might have been decisive as to his conduct in his favor, and which may be impossible to be shewn by his representatives. Then am I to assist petitioners who come at such a distance of time as renders it impossible for the party accused to make a defence which he might have made, had the petition been brought [286] forward earlier. It seems to me to be (I repeat) an extremely peevish application. It also refers (I must repeat) solely to the representatives of the personal estate of Brown, though he was only originally a co-trustee with fourteen others, all of whom are equally liable, and even Goring himself on the ground of his personal negligence. Brown erected the new market-house, with the concurrence of all the other trustees. No step has been taken since 1809. No complaint has till now been made that the trust money had been expended improperly; the subscribers to the new building had the satisfaction of seeing the application of this money, and six years after that application of it, and in the absence of those who ought to have been parties, and against the acting trustee only, who is dead, and whose personal estate ought to be protected, is this petition directed. That estate may have been applied in payment of debts and legacies in a regular course of administration, and the administrator would be obliged to call it all back again. Under these circumstances then, and taking into consideration all the case, having read the affidavits on both sides, I am perfectly satisfied with the decree which I shall make, that this petition be

Dismissed, with Costs.

[287] *CORAM* RICHARDS, LORD CHIEF BARON.

THE ATTORNEY GENERAL v. LINDEGREN. Friday, 15th January 1819.—Public Accounts. If a public Board enter into an express contract, in distinct terms, with a person of competent ability, for the undertaking of a difficult and hazardous state enterprize, and the performance of a confidential service under government, on behalf of the public, in consideration of a stipulated remuneration, by way of commission on the prime cost of purchases made by him: this Court will not (on an official information filed against him by the Attorney General, after his accounts have been allowed by the public office,) entertain any question involving merely the propriety or prudence of the contract itself, or the excess of the remuneration agreed to be paid to the individual for the performance of the particular service. Jurisdiction. But the mere passing of the accounts of a public officer, by the auditors of the department under which he has been employed, does not preclude the Court (in a proper case,) from decreeing an account in respect of allowances contrary to reason and equity, and not brought to the notice of the Board when his accounts were passed. Thus, where the public functionary had received gratuities and presents from foreign agents, on the amount of their commission, equal to one per cent., he was ordered to refund the whole, notwithstanding that practice was also proved to be the usage of the trade: the custom being contrary to reason and equity, and subservient to fraud,

and the fact not having been brought before the Board when the accounts were passed.—Interest (on Public Money). *Semble*.—A public servant to whom money is from time to time imprested, is not chargeable with interest on occasional balances in his hands, and certainly not where the amount is trifling, the occasions unavoidable, and the time of holding such balances, short.—Agents of Government. In all respects, public Boards are the constitutional organs of the Government, and its efficient agents, and their acts bind the Crown.—Extra Charges. Where an individual employed to make purchases abroad, or in person, on behalf of government, for which he is to be paid *bonâ fide* a commission by way of per centage on the amount, engages mercantile men resident in the foreign country, to the advantage of the service, for which he allows them to charge a per centage agreeable to the established usage of the trade, which he treats as part of the prime cost in charging his own commission in his accounts :—such per centage held not to be improperly charged to government, nor to be payable by the individual out of his own commission.

This was a bill filed against the defendant for an account of money received by him by way of imprest, and of his disbursements in making purchases for government, under the authority of the [288] Navy Board, of hemp, and fir in Russia: praying that he might be declared to be not entitled to certain commission charged by him, and to be himself chargeable with expences for freight, and insurance on articles shipped therewith on his own account, and for the interest on balances in his hands: and to be accountable to the public for presents and gratuities received by him, from persons through whose medium such purchases were made.

The information stated in substance, that the defendant was, in the beginning of the year 1795, confidentially employed under written instructions, in the form of letter, from Sir Anthony S. Hammond, the then Comptroller of the Navy, to proceed to Riga, for the purpose of making large purchases of hemp and masts, to counteract the schemes of the French, who were at that time pursuing the same course; and in order to provide a due supply of those articles for the use of the British Navy. The defendant's orders, (dated 9th January, 1795,) after prescribing a certain line of conduct to be adopted by him, stipulated, "that for the due execution of the proposed service, he was to be allowed his travelling expences and a commission of five per cent. on all the purchases which he should make," and he was thereby authorised (stating that it would be absolutely necessary) to engage Thornton and Son, Russia merchants in London, to transact the necessary business of the [289] undertaking here. They were to be paid in consideration, a reasonable commission for their trouble, and were to be furnished with navy bills upon imprest whenever purchases made should require it.

The defendant accordingly entered into a corresponding agreement in writing, under seal, with Thornton and Son, who undertook to assist him, as agents or attornies, by granting him letters of credit and recommendation to their friends and correspondents abroad: and to transact all the necessary business here of freighting ships, corresponding and insurance of cargoes, and in doing whatever should be required for forwarding the delivery of stores purchased by the defendant into his Majesty's dock-yards. They on their parts were to be duly supplied with navy bills, on demand, for the purpose of defraying the necessary expences, and to be allowed a commission of two and a half per cent. on each invoice containing the amount of prime cost, and all charges and expences relating thereto. That agreement was executed in the presence of Sir A. S. Hammond, who witnessed and signed it in signification of his concurrence.

During the time of the defendant's employ, from 1795 to 1799 continually, Thornton and Co. had been furnished by government with money, on account of the defendant, to a very large amount, as his agents.

[290] The commission charged by the defendant, on the prime cost and charges, on stores delivered in his Majesty's dock-yards, for himself, for the year 1795, was after the rate specified in his letter of instructions, and also the commission on account of Thornton and Son. In addition to those charges, there was also charged two per cent. in each invoice, at the foot of the account of the hemp purchased by him for commission paid to the house of Thorley and Co. merchants, of Riga, through whom the defendant made his purchases, and four per cent. on the purchases of masts, and that not as a specific charge, but as part of the prime cost of the articles purchased.

The defendant's accounts so charging government, were passed in each year, and allowed by the Navy Board, but (as the bill stated) without their being informed of or adverted to the commissions charged by Thorley and Co. having been introduced therein, in manner before-mentioned: and the defendant was cleared of his impost on each occasion, to the full amount of his account.

In the month of June, in the same year, the commissioners of the navy, by a letter, (adverting to his former instructions) apprized the defendant, that in consequence of his purchases being likely to be of much greater extent than had been at first intended by the board, he was to consider two and a half per cent. thenceforth, as an equivalent for his trouble for all purchases [291] of hemp which he should make in future, beyond the quantity which he had been originally instructed to buy. The commission allowed to Thornton and Co. was likewise reduced to one and a half per cent.

The defendant afterwards made other purchases on those terms (charging such commission specifically), Thorley and Co. still continuing to charge in each invoice two per cent. on account of their commission, and which the defendant still treated as part of the prime cost.

On all the defendant's purchases of masts and fir, he had charged an allowance to Thorley, Morison, and Co. of four per cent. and on all such purchases of either article, as he had made of the French agent at Riga, he had charged no commission, on account of the Russian agents, but those purchases were made at somewhat advanced prices.

The bill charged the introduction of the allowance to Thorley and Co. into the invoices as forming part of the prime cost, to be a fraud, and that therefore the defendant was indebted to his Majesty, to the amount of such commission.

The bill also stated that ships carrying masts are chartered for a sum certain for the voyage, and that such ships are not able to load more than two-thirds of a cargo of masts, so that there [292] is always a considerable space occupied with what is called broken stowage (consisting of fir timber, lath and fire wood), all of which the defendant brought home on his own account, and which were credited to him by Thornton and Son, without paying any freight: and also that he had shipped spars and wainscot logs in the same way, without giving the Board credit for the freight, or paying any part of insurance of such things.

The bill then stated that in an account opened by the defendant with Thornton and Son, on the above transactions, entitled "disbursements for naval stores imported," there was contained a charge of interest to a considerable amount, on sums advanced, in payment for such stores, whereas the defendant had, at the same time, a considerable sum of money in his hands, which he had withdrawn from the custody of Thornton and Son, and that the defendant had since charged all such interest to the public. And that the defendant had, at various times, received large sums of the public money from Thornton and Co. and had also other sums, (the balance of naval stores imported) carried by them to his private credit, all which had been applied for his particular benefit, and for which (the bill charged) he ought to pay interest to the public.

The information finally charged that the defendant had received from time to time, divers presents or gratuities in money, fir, timber, &c. to the amount of many thousand pounds, from [293] Thorley, Morison, and Co. all of which ought to be accounted for to his Majesty, for the benefit of the public, and

General errors and overcharges.

The answer (admitting for the most part, the material facts of the bill,) insisted that it was absolutely necessary for the defendant (in order to effect the service on which he was employed to the best advantage), to apply to and make use of a commercial house at Riga, connected with the trade in the articles which were the object of the defendant's employment: for that otherwise he could not have made the requisite purchases, or at least not on so advantageous terms.

The answer then alleged, that the usual commission payable to commercial houses at Riga, so connected, was two per cent. for purchasing and shipping hemp, and four per cent. for timber, and that it was the usual course of the trade to charge such commission in the invoices, at the foot thereof, as composing part of the prime cost: and that every item was fairly and distinctly stated in the accounts delivered in, in the ordinary course of business, amongst which was the charge of commission by Thorley and Co. on every quantity purchased: and the defendant claimed the benefit of such accounts having been passed and allowed, as if he had pleaded the same.

[294] The answer then stated that the usual course of charging the several commissions was, that Messrs. Thorley and Co. drew bills on Thornton and Son, as the defendant's agents, for the invoice amount of the article purchased, including their commission, to pay which bills, and their own and this defendant's commissions, Thornton and Son received money from government.

The defendant denied that any of the sums of money charged by him or by Thornton and Son, for commission, in respect of the hemp purchased, were inserted as specific charges in the defendant's accounts, for either of the several years, during which he had been employed, and alledged that in every account so delivered in by him to the commissioners of the navy, he (the defendant) debited them with the prime costs, duty, freight, and charges, of each cargo or parcel of hemp, as per Messrs. Thornton and Son's accounts, accompanying the same, and then added the charge of his (defendant's) commission per cent. thereon; that the accounts of Thornton and Son included the commission charged by them, together with the freight, duty, insurance, and other charges, on importation, and referred to the invoice of Messrs. Thorley and Co., at the foot of which they, (Thorley and Co.) regularly and uniformly charged their commission of two per cent. on the amount thereof, as is usual in all cases of hemp purchased and shipped at Riga, on commission, all which invoices accompanied the accounts of [295] the defendant, and of Thornton and Son when delivered to the Navy Board.

With respect to the broken stowage, the defendant, in substance, admitted that he had paid no freight for that which he had necessarily shipped, because the safe stowing of the masts required such materials* to be employed for that purpose: but the answer stated that the Board had, except in one instance, (and that was particularly referred to) refused to take it on their own account: and that any advantage arising to the defendant from the sale of the materials so used on their arrival here, was not more than would have covered the amount of his commission thereon, if it had been disposed of, on account of the Board: and that if he had supposed that he should have been required to pay freight for such stowage, he would not have loaded it at his own risk: but that as to the wainscot logs, the defendant stated, that as far as he had himself been credited for freight, by Thornton and Son, he had paid the amount (on receiving their accounts) to the Treasurer of the Navy.

As to the charge of interest demanded for the balances of public money at certain times in his hands, the answer stated in effect, that sometimes it happened that Thornton and Son had [296] paid for purchases made by the defendant, beyond the amount of the money received by them for that purpose, by the Navy Board, and that on such occasion, he (defendant) paid them interest on such balance in their favour, and that on other occasions, when any balance, (which was always equally small) remained in their hands after such payments, he was in his turn allowed interest; and that the fees of office paid by Thornton and Co. on the sums received by them from time to time, from the Navy Board, (and for which no allowance had ever been made by the Board to the defendant, charged by them against him) amounted to more than any interest which the defendant could have made by any surplus of public money, at any time remaining in his hands.

On the subject of the gratuities and presents received from Thorley and Co. the defendant admitted that he had at different times received many such, amounting together to about one per cent. upon the purchases made by them, which accorded, as the defendant stated, with the established custom among merchants in that trade, and that any commercial house, or individual resident in England connected with houses in Russia, and through whose intervention such Russian houses executed any orders, was by such custom entitled to participate in the commissions, and the defendant therefore submitted that he ought not to be compelled to account to his Majesty on be-[297]half of the public, for such presents and gratuities.

In support of the information it was proved, by the evidence of mercantile men, that during the several years of the defendant's employment the usual commission allowed to the principal houses of trade at St. Petersburg was, on the purchase of hemp, three per cent. on the amount of the invoice—and on the purchase of masts

* Those materials are technically denominated dunnage, and if used bona fide for the purpose of stowing the main cargo, have been held not subject to duty on importation. Vide *The Attorney General v. Wilson*, ante, vol. iii. p. 431.

and fir, four and a half per cent., including the remuneration for the negotiation of the money to be paid for the articles—and that many houses there were allowed on the same articles only two and a half per cent. on the former, and four per cent. on the latter.

At Riga the commission allowed on purchases of hemp was proved to be as low as two per cent.

The witnesses also stated, that they could have during the same time procured for the Navy Board the same articles from Riga at a commission of two per cent. on hemp, and four per cent. on timber, calculated on the gross amount of the prime cost and necessary expences incurred before delivery, with some other minute charges under particular circumstances, and that it might have been done at the same rate by any house in the Russian trade in London.

It was also proved by a clerk of the office for bills and accounts in the Navy Office, that when [298] the original invoices of the articles purchased were delivered in to the office by the defendant, for the purpose of passing his accounts with the Board, it was not observed that Messrs. Thorley and Co. had charged any commission per cent. as part of the prime cost, and that if it had been observed, it would have been pointed out by him (as it was his duty to do), by an observation written against it, to the attention of the commissioners, but that it being overlooked, that was not done.

On the part of the defendant, it was proved, by the testimony of Sir A. S. Hammond, the Comptroller of the Navy, at the time of the defendant's mission, that it was necessary that the defendant should make the purchases which were the object of his mission, through the medium of a resident merchant at Riga—that that necessity was fully stated to the Navy Board on a subsequent occasion, when they found it necessary to make inquiries on that subject, by several eminent Russia merchants in this country, who were of opinion that the charges of the Russian house for commission were perfectly fair, and according to the established usage—that had such house not been employed, the purchases would have amounted to more by ten or twelve per cent. besides being attended with considerably greater difficulty, and much risk—that the commission so paid to the foreign house was always considered as a part of the prime cost of the article purchased abroad—and that the commissioners had [299] been therefore satisfied with and resolved to allow such charges.

The same evidence was given with respect to the charge for the masts; and the whole was confirmed by the testimony of eminent Russia merchants.

It was proved that the other timber loaded to stow the masts (and which is called dunnage), was necessary for that purpose, and that British ships could not safely load masts without. Evidence was also given by Sir. A. S. Hammond and others, that the defendant had offered all such dunnage to the Board, who had rejected it as unfit for any purposes of his Majesty's dock-yards, and that the subject of the defendant's not accounting for freight had been considered by the commissioners, and abandoned.

The Solicitor General, Jervis, and Wyatt, for the Crown, urged that the main question in this case, which was one of great importance to the public, was whether the defendant was entitled, by the terms or nature of his mission of state policy, entitled to charge the Government for the employment of other persons in performing the duties of the service for which he was personally engaged.

And they objected, on the facts of the case, to the charges of commission by Thorley and Co. as payable by Government at all—and more parti [300]cularly to its being charged as prime cost, whereby, besides its being a practice calculated to enable persons so employed to commit fraud to any amount on the public purse, which was too often considered open to any one who had opportunities of access to it, commission would thus be paid upon commission.

They next insisted that the defendant was liable to account to Government for the profits made by him on the dunnage, or at least for a proportion of the freight and insurance, and for the interest of the balances of public money from time to time in his hands.

And finally, that he ought to refund for the benefit of the public, the presents and gratuities which had been received by him from Thorley and Co. the Russian merchants.

And they urged, that although the Navy Board had passed the defendant's accounts, and allowed all those objectionable charges, it was what the Commissioners

as a Board were not authorized to do, and therefore the defendant was still liable to account to the Crown, by means of the intervention of this Court.

Dauncey, Martin, Abercrombie, and Shadwell, for the defendant, contended that as there had been no fraud, either actual or implied, charged or proved on the part of the defendant, and his accounts had been regularly and annually allowed [301] by the Navy Board, he could not now, at this distance of time, be called on to account, as required by the prayer of this bill.

As to the charges of commission, &c. to Thorley and Co. they relied on the practice of the trade, and the advantage accruing from it to the Navy Board, as proved by the evidence, and urged that it could never be held, that a person in the situation of the defendant, acting under a similar engagement, would or could be expected to defray such necessary charges out of his own commission, even if it were adequate to the payment of them.

The subject of the broken stowage they contended had been fully explained by the statements of the answer, and the evidence, and that that was also a necessary matter which it could not be expected the defendant should be at the charge of.

The demand of interest for balances in the defendant's hands, they submitted could not be supported.

The presents received were defended on the ground of the general usage of the trade, as established by the existing custom of merchants dealing in the particular subject of traffic, under the same circumstances. And they adverted to the public nature of the defendant's commission, [302] which they submitted was of a nature to be most liberally considered.

RICHARDS, Chief Baron, now delivered judgment—having stated the information and its object, and the result of the evidence on both sides, laying great stress on the vital importance of the commission on which the defendant was employed.

In the first place (said his Lordship) it is material to observe, that the employment out of which this investigation of the defendant's accounts arises, was not originally sought by the defendant, or applied for by him to Government; but it was proposed by the Navy Board to him in the first instance. The contract itself, we must also observe, was one which, from its nature and object, was founded on great confidence in the defendant's character for commercial knowledge, and skill, and private integrity, and it was one which was in its object and result of the most vital importance to the prosperity of this country, for on it depended at that time no less a care than the supply of the British navy with necessary stores—that navy which has effected so much for us in every respect—and which has advanced the maritime character, and established the internal security of the best interests of the nation.

But whatever were the advantages resulting from the policy of adopting the measures from which the defendant's employment sprung, there [303] was, in point of fact, an express contract made with him by the Navy Board, and the effect of that contract is now the only question for the Court. It is objected, on the part of the Board, that the contract entered into by them with this gentleman was an imprudent one: that the commission which the Board agreed to allow the defendant for his services was much too large: and that it might have been contracted for at a far lower rate of remuneration. Now even if that were so in point of fact, it is still a valid contract, and one which must, notwithstanding, if the contracting parties were competent to make the agreement, be carried into effect by this Court, called on as it is to pronounce on its validity, unless fraud, mistake, surprise, or some other reason can be shewn to warrant the interference of a Court of Equity.

It does not appear to me to have been necessary (as it was contended to be on the part of the Navy Board) that the defendant should go to Riga within a year. The letter of instructions adverts merely to the possibility of his doing so: nor is there any substantial objection made on the ground of any misconduct on the part of the defendant.

The engagement was in all events to be performed. Now, whether the engagement could have been performed more economically, or whether, in other words, the purchases entrusted to the defendant's discretion could have been [304] made for less money or not, that is an inquiry with which at present we have nothing to do.

It is only necessary to inquire what the contract was, and whether this gentleman was entitled under it to the commission per cent., which he has charged on the money expended by him.

Undoubtedly on principles of public policy, it would not be right to disturb contracts made by the public with persons in the situation of the defendant. Public confidence, in the dealings of the Government with persons in the character of this defendant, is of the first importance, and should be regarded above all other considerations; and that confidence ought not to be shaken in consequence of the result of any subsequent calculation and inquiry by the Commissioners of a public board, shewing that their contract has been injurious to the public merely on the ground of too great liberality in remunerating the service required and performed.

That observation is the more necessary to be made here, because one of the counsel for the Board has said, that there were persons to be found who had no objection to put their hands into the public purse, merely because it was considered open to the public.

I cannot, sitting here, admit any such thing; and it certainly cannot any where be considered as applicable to engagements of this nature, made [305] with persons in the situation of this defendant. The Navy Board could not make a contract of this sort with any common person who might offer himself to their notice. This was not an occasion calling on the Navy Board, in a spirit of strict economy, to go round and barter with every one who might be disposed to bid for the employment, with a view to cheapness; it was a matter of trust, of confidence, and delicacy. If any one has been in fault in the transaction, it is most assuredly the Navy Board, and they cannot be controlled, even if they could be considered as having acted imprudently; nor ought they, on the other hand, (if that honorable board could be supposed to be capable of any such attempts) to be permitted to take advantage of their own improvidence in such matters.

It was a time of war, and of great peril to the person undertaking the service, and the trust necessarily reposed in such person was one of the first importance, requiring in him very considerable talent and address, and he must therefore have been a man capable of great confidence. Then there is no imputation whatever on the defendant's integrity or ability; or his manner of carrying the engagement into execution. The sole objections are to the expenditure, and the defendant's charges for commission, and other less important matters.

His Lordship then proceeded to state the main facts adverted to in the pleadings, and given in evidence, and the terms of the contract.

[306] In 1795, the defendant delivered in his first accounts to the Navy Board. I do not know when that account was audited, but I have reason to believe that it was in 1796. He debits them with certain expences as the prime cost, referring to Thornton and Sons' accounts, and then charges his own commission specifically. Thornton and Son refer to the invoices of Thorley and Co. who charge their commission of 2l. per cent. as is stated to be usual in the course of that (the hemp) trade, and place it at the foot of the invoices.

In one word Lindegren hands over in the same manner every succeeding year to the Navy Board his accounts, charging for his own commission, and referring as before to Thornton and Son, and they to the invoice of Thorley and Co. where they are found to have charged 2l. per cent on the disbursements in Russia, all of which is thus distinctly brought under the consideration of the Navy Board.

Then the short question is, whether the defendant was bound to pay the commission so charged by Thorley and Co. out of his own per centage. Were it a common transaction between private merchants in this country, it would be so perhaps; but we must in this place construe all contracts according to their particular nature and object, and the situation and circumstances of the contracting parties. Now, viewing this contract in that way, we find from the evidence that the [307] additional charges complained of, have procured great advantages to the defendant's employers. Here it is obvious, that whenever the defendant should have made his personal appearance in the market, it would injure the purchase of the article by raising the price. It was therefore necessary, even on the ground of economy, that he should employ a Russian agent, and that agent of course must be paid according to the usual practice, and at the accustomed rate. It is agreed that a merchant here cannot even in common cases do business of this sort, and in this particular market, advantageously, without employing a resident merchant there as an agent also, not even if he should send over or go thither himself. That is proved to be the common and necessary course.

In employing an agent there, therefore there is no question, but that the defen-

dant was right. The only real question is, who (whether he or his employers) is to pay that agent.

A very particular part of the case is, that the accounts were sent to the Navy Board every year, and by them investigated; and the evidence bears the defendant out in the propriety of his conduct and his charges.

[His Lordship then referred to the various letters, and the evidence.]

[308] Sir A. S. Hammond says, that he found from honest information, that the course of dealing in such matters in the Russian market, was necessarily by means of employing an established mercantile house there as agent; and that their remuneration was uniformly considered as part of the prime cost, and he approved of the defendant's conduct throughout. Then the Navy Board, and that, as it appears year after year, have allowed the accounts, all of which state distinctly the fact of the employment of the foreign agent, and make the corresponding charge.

Now, supposing this were a transaction between A. and B. could this Court even then interfere to re-open these accounts under such circumstances? I certainly think not.

The next question is, whether the Government was bound by this contract of the Navy Board. The Government itself cannot make such contracts as these but through the medium of the Navy Board, and they are for such purposes a competent ministerial body—the constitutional agents of the public; and they are capable as such of binding the Government. Being so, if they enter into a contract knowing facts, which form the ground of the objections afterwards made to it, is it not binding? In this case the Navy Board, knowing all that is now brought forward, still continued to settle the accounts from time to time without making any of the objections which are now made.

[309] If the Navy Board had filed this bill, could I have relieved them? Certainly not. The commission allowed may have been too large; but that is what I cannot now inquire into here: we see that it was an engagement of peculiar difficulty and hazard, to what extent we know not. The Navy Board in fact made an express contract, and they have bound themselves by it; and therefore the Admiralty, their immediate superiors, and the Government, whose official organ for this purpose they were, are also bound by that contract.

On that part of the case therefore, I can give no relief.

As to the charge in the information which relates to the stowage, that being in all respects under the same circumstances, it comes under the same observations. The question of the broken stowage was as much before the commissioners as the question of the disputed commission: it was necessary and proper that there should have been such things loaded for the security of the valuable cargo, and the Board refused in general to take the stowage on its arrival in this country.

Then arises the question of interest which is certainly one of considerable nicety.

This is a claim of interest on the balances in hand of public money required to be paid by the person to whom it was imprested.

[310] Now the evidence, or rather the answer, shews that the defendant never had at any time more than a very trifling balance in his hands; and that but for a short time (his Lordship read the statement in the answer relating to that part of the case).

Really, in such transactions as these, it must sometimes happen that persons so employed have more money in their hands than they use; but unless something strong be proved against such persons, it is outrageous that government should charge them with interest on such money. Had the defendant trafficked with the balances in any way, or made interest by them, and it could be proved, it might be another thing, and such a case would, perhaps, deserve consideration; although I doubt indeed whether even in that case this Court could call on him to pay interest after his accounts had been passed under the circumstances of this case. The present, however, is infinitely too slight a case for the interference of the Court.

On that part of the case therefore, as on the former, I can make no decree.

With respect to the participation in the commission allowed to Thorley and Co. under the name of gratuities, I never had a doubt about the impropriety of it. On that charge therefore there must be an account decreed, and when it shall be ascertained what has been so paid by way of gratuity, or in the form of presents, the whole must [311] be paid back again by the defendant. That is a matter which never came before the Board, and as such practice has been attempted to be defended, on the ground that

it is according to the custom of merchants, I can only say, that I am sorry that any such custom should exist, for it is a custom which is contrary to every principle of equity, justice, and morality.

Decree accordingly:

Referring it to the Deputy Remembrancer to take an account of what had been received by the defendant, by way of allowances, gratuities, or otherwise, from Thorley and Co. in respect of his purchases and commission thereon—the defendant to pay what should be found to have been received by him on taking such account, and

As to the several other matters of the information, the Defendant to go without day.

[312] CORAM RICHARDS, LORD CHIEF BARON.

THE ATTORNEY GENERAL *v.* HOSEASON. Friday, 15th January 1819.—Where, in consequence of doubts as to the amount of salary and other terms, on which a public officer of merit continued to perform satisfactorily the duties of the service to which he had been appointed; the public board or office acting in the direction and controul of the particular department of Government under whom he was employed, required him, after his accounts were passed, to refund money considered to be over-paid to him, which had been charged by him according to an account framed on what he had long before communicated to the Board, as his understanding of the terms on which he was to be employed, and never contradicted by them; and, on his refusal, to re-open the accounts; the Attorney General filed an information against him in this Court, for the purpose of compelling him to do so: the Court refused, the questions proving to be quantum meruit—or utrum horum—to make any such decree—holding that it had no power to fix the value of the services of a public officer, or to compel him to make an election of one of two modes of remuneration.—An allowance of per centage on money disbursed is not a fee, gratuity, perquisite, or emolument, within the 25 Geo. III. c. 52.

The defendant had been appointed (10th June, 1801) his Majesty's naval officer (keeper of the naval stores) at the port of Madras, by warrant of the naval officer commanding on that station, (then Vice Admiral Rainier) at a salary of 200*l.* a year, with certain allowances for house-rent, office-charges, and stationery; and a per centage of one quarter (or 3*l.*) in the pound, on the amount of all his disbursements, on account of their service, being the same salary, &c. as his predecessor had had.

In consequence of the act of parliament of the 25 Geo. III. c. 52, for abolishing fees, gratuities, perquisites and emoluments received in public offices, and fixing the salaries of officers, a scheme of salaries was proposed by the commissioners to the privy council, as proper to be allowed to the civil officers and clerks of the several naval departments, as a compensation for their services, [313] and in lieu of their then salaries, fees, and gratuities.

The scheme was adopted by the council, and the regulations ordered to be officially promulgated both at home and abroad (generally); the salaries were directed to commence from the 30th June, 1801.

The defendant held the appointment till the 10th April, 1806, when he resigned.

The port of Madras had not been mentioned in the scheme: but the order in council, and the proposed regulations, were transmitted to the defendant there, by the commissioners of the navy, which he received and acknowledged by letter, 14th February, 1804. In that letter the defendant stated, that although no mention was made of Madras, yet, as the regulations had been forwarded to him, he should take it for granted, that the scheme extended to Madras, and should therefore in future, after having laid the scheme before the commissioner in chief, draw on them for 600*l.* a-year during war; (that being the salary fixed for the same appointment at the Cape) and for the arrears since the 1st July, 1801, till further instructions.

To that letter the commissioners returned no answer.

[314] In the mean time between the Defendant's first acceptance of the office, and the date of the above letter, he had made frequent applications to the commanding

officer of the station, for his authority to debit the commissioners of the navy in his accounts, with an increase of the allowance for house rent, and office expences, and stationary, and received his sanction for so doing. Afterwards, on occasion of receiving a letter from the commissioners, referring him to the regulation, prohibiting his acting as prize agent, he wrote a letter to them (4th June, 1803,) expressing his regret at his misunderstanding of the rule, and adverted to the open and well known practice of his predecessors in that particular as a precedent for his so doing; and he complained of the great inadequacy in all respects of his appointed salary (the 200*l.* per annum) and the privileges. To that letter the Commissioners gave no answer.

In the following February, having received the orders in council as before mentioned, and written the letter which has been already extracted, and having laid both before Admiral Rainier, the Commander in chief of the station, requiring that officer's consideration of the matter, and his authority to increase the salary of the appointed to 600*l.* a year—sterling, the Admiral approved the proposal, and accordingly authorized him to charge the Navy Board proportionally at the rate of 8*s.* the star pagoda, from the 1st July, 1801. That letter of the commanding officer was afterwards countersigned also by his successor on the station (Lord Exmouth).

In consequence of such sanction of his Commanders in chief, the defendant afterwards prepared his accounts, charging his salary at 600*l.* a year; and an increase of pagodas per mensem, on account of house rent and clerks wages, and an additional allowance per annum for stationary, which produced a letter from the commissioners of the navy, dated 6th April, 1805, directing the defendant's attention to the silence of the order in council, as to any increase of salary at Bombay or Madras; and observing that there had been no subsequent authority for any such increase. It then stated, that if the increased salary had been payable under the order of council, there would in that case have been no allowance chargeable for commission, house rent, and stationary, and they accordingly desired the defendant to abate from his next account the additional salary, and continue to charge the former till further orders.

The defendant, afterwards in consequence of dissatisfaction, tendered his resignation to the commanding officer, (Lord Exmouth) who wrote to him on the 12th March, 1806, accepting that resignation with expressions of approbation and regret, and of complete satisfaction with the justice of his accounts, and the reasons by which Admiral Rainier had been induced to authorize the increase of his salary and allowances.

[316] The Lords Commissioners of the Admiralty, on the recommendation of the Navy Office, by letter of the 12th May, 1807, apprizing their Lordships of the large increase of the defendant's allowances, which they justified as being no more than equivalent, and as having been approved by Admirals Rainier and Lord Exmouth, representing that his salary was only 600*l.* a-year, had, by letter of the 14th of the same month, directed the increased allowances charged, to be allowed as having been sanctioned by the commanding officers abroad, by whose opinion, in consequence of their opportunities of judging of the propriety of the augmentation of such allowances, they so determined.

In point of fact, the salary of 200*l.* a-year, with the increased allowances, amounted in the whole to something more than that of 600*l.* a-year without.

Under these circumstances (the defendant having drawn on the Navy Office for the amount of his accounts) the Navy Office (notwithstanding the letter from the Lords of the Admiralty, founded on their representation) by letter of the 9th of March, 1810, required him to refund the difference of salary between that charged in his accounts with government, (600*l.* a-year) and that originally allowed (200*l.* a-year).

The defendant refusing to refund, the Attorney General filed the present information against [317] him—praying that it might be declared, that the salary of 600*l.* a-year allowed the defendant for his services, was in lieu of all allowances for house-rent, office charges, stationary, and per centage, and that he was not entitled thereto—and for an account, in which all such charges should be disallowed.

The cause having come on to be heard, on the bill and answer, and evidence, stating and proving in substance the above facts,

The Attorney General, Jervis, Dauncey, and Wyatt, for the Crown, submitted that, under these circumstances, the defendant must be taken to have made his election to receive the increased salary, and to have done so on the terms annexed to it, the abolition of all fees, perquisites, gratuities, and emoluments, which (although Madras

had not been mentioned in the Order in Council by Government) he had virtually acceded to: and that therefore he was bound by the terms of that order. They insisted that the commanding officer of the station had no authority so to increase the naval officer's salary, without the assent and confirmation of the Lords of the Admiralty.

Copley, Serjt. Roupell, and Palmer, for the defendant, contended that the Court could not grant the prayer of the information, for that the defendant having received the sanction of the commanding officers of the station for what he [318] had done, and that as the Board had in fact confirmed that sanction, there existed no ground for calling on him to make his election, in a matter which had been already finally concluded.

Jervis replied.

Cur. adv. vult.

15th January.—RICHARDS, Lord Chief Baron, now delivered judgment, when his Lordship entered very minutely into the facts and circumstances of the case—the object of the information—and the ground of the defence. [Much of his Lordship's reasoning depended on and applied merely to the particular facts in evidence in the cause. The only general principles of law, as affecting the jurisdiction of the Court and the construction of the statute of 25 Geo. III. c. 52, deducible from his Lordship's determination in the present case, are comprehended shortly in the latter part of the judgment.]

The defendant's letters (observed his Lordship) convey to the Navy Board full notice of his construction, and his understanding of the applicability to himself, of the Order in Council and its new regulations, and whether he were right or wrong, they might have been explicitly answered. Indeed the letter to the Navy Office, expressing the defendant's intention to draw on them in future for a salary of 600*l.* a year, is the foundation of the present proceeding.

[319] He, however, accepted the new salary, according to his view of it, with the old allowances for house-rent, office-charges, stationary, and per centage, and those at an increased rate; but it is now contended that all such allowances ought in that case to have been curtailed.

I should certainly be inclined to construe the defendant's acceptance of the increased salary, if he had taken it under the Order of Council, as the Navy Office have done, and should have thought that he was not entitled to the allowances. It is extremely doubtful, however, with me, whether the per centage can be considered to be a fee, gratuity, perquisite, or emolument; for where a person so employed advances money for stores, or even where he gets them on credit, it is allowed him in the way of interest paid for money advanced by him. It is the produce of the employ of his capital, or his credit. The other allowances I think, however, are within the words of the act.

The first question is whether under the circumstances, the defendant is entitled to the salary of 600*l.* a year, with the former allowances. Now, if that depended entirely on the construction to be put on the correspondence, it would be extremely doubtful whether the Order in Council was applicable to the case of this defendant; in other words, whether he could be compellable to take the 600*l.* a year exclusively of the allowances; but there is other evidence [320] in this case. Lord Exmouth's letter only shews the high opinion which he had of the defendant; but the letters of the Navy Office, and of the Lords of the Admiralty, of 1807, are most materially in his favor. It appears from those, that the eminent naval officers commanding on that station—two persons certainly most competent to judge of the matter—did not consider the Order in Council imperative on this defendant. Then his accounts have been passed with these charges stated. They were framed according to the increased rate sanctioned by Admirals Rainier and Lord Exmouth, who both thought the salary and allowances inadequate to the service, and the latter, particularly, distinctly states that he thought the remuneration insufficient.

Then how can I say that the defendant was bound to accept the 600*l.* a year alone? I am not to consider the quantum meruit of public services of this nature, and to say what amount of compensation ought to have been paid to this or that officer. That is altogether matter of contract. The Board themselves never contradicted the defendant's own understanding of the terms of his engagement, as communicated to them by his letters, which was (and that under the authority of the commanding officer of the station) that he considered himself entitled to the increased salary and allowances;

and therefore this Court cannot now be called on to declare that that was a misunderstanding, and to set it right.

[321] I cannot consider the defendant bound to take the 600*l.* a-year exclusively ; nor can I so declare. I cannot now put him to a new election, and therefore I must dispose of this information as one on which I cannot act.

There is no dismissal in the case of the Crown : therefore the decree must be in point of words of form :

Let the defendant go without day.

ADLARD v. SMITH. Wednesday, 13th January 1819. The Court will order a person who has been in custody for any given time under an attachment for a contempt of its authority in disobeying an injunction : to be discharged on motion, if the portion of his imprisonment be shewn to its satisfaction to be commensurate with the degree of the offence, on the terms of paying the costs of his contempt ; notwithstanding the application be opposed on the part of the plaintiff.

Martin moved, on the part of the defendant in this cause, —who was in Lincoln gaol, under an attachment issuing out of the Court against him, for a contempt in not obeying a writ of injunction restraining him from ploughing certain pasture lands of the plaintiff, in his occupation as tenant, on which he had been arrested on the 23d of May last—that he might be discharged out of custody.

The affidavit of the defendant, after disclosing the circumstances of his case stated, that he had been in custody under the process, ever since the 23d of May, and that he had a wife [322] and children depending on him for their support.

It was urged that as the disobedience of a writ of injunction, was a contempt and an offence against the Court, the Court might, under circumstances, order a defendant, who had been, for any given period, imprisoned for that offence, to be discharged if they should think the measure of his punishment adequate to the degree of his offence. And it was pressed, that in this case where the defendant had been so long imprisoned for an offence against the Court, by contempt of its writ, if the Court should think the period of the defendant's confinement a punishment equivalent to that offence, they would have power to order his discharge, and that on motion.

Richards opposed the application, on the ground that the contempt for which the defendant had been committed was not merely that it was an indignity to the Court, but that the plaintiff was interested in the quantum of punishment awarded to the defendant, for a contumacy which affected his rights, and which he had filed the present bill to protect.

The Lord Chief Baron (adopting expressly the principle on which the application was founded, that the cause of the defendant's imprisonment being a contempt of the authority of the Court, the Court had power to regulate the measure of [323] punishment, declared himself of opinion, in the absence of precedent and practice either way, that this was a case wherein the Court should necessarily interfere on motion ; that the object of the order for the attachment could only be the vindication of the authority of the Court, by bringing a defendant to a sense of the respect due to it, and to enforce obedience ; and that therefore whenever the term of a prisoner's confinement could be shewn to be proportioned to the offence which gave rise to it, and to have produced the effect intended, the Court might interfere to discharge him : or otherwise the smallest contempt of Court, (if a vindictive and implacable plaintiff should have a right to oppose his own injury, to an application for such interference), might have the effect of causing a defendant to be imprisoned for life.

On that principle, his Lordship intimated that he was disposed to grant the application on certain terms, and because in this case he considered the defendant's punishment to be fully adequate to the offence of his contempt ; but as the motion was novel and would establish an important precedent, he desired that the order might be suspended till he had, in the mean time, taken an opportunity of consulting the highest authority.

It was afterwards ordered that on payment by the defendant, of the costs occasioned by his contempt, and of this application, to be taxed by the Deputy Remembrancer, he should be discharged.

[324] CORAM RICHARDS, LORD CHIEF BARON.

DRIFFIELD, Clerk, v. ORRELL AND GORSE. Saturday, 16th January 1819. —A modus of a sum of money, laid as payable in lieu of tithe of hay and all small tithes, is not supported by proof of the payment for hay and non-payment of hay in kind, or any small tithes, either in kind, or sub modo; and therefore an account was decreed, of all the other articles said to be covered by such payment so failing the defendants as a modus: the prescription having been pleaded more generally than proved. —Payments laid as moduses and proved to have been always paid within memory, and not opposed by evidence of their origin, held to be sufficiently proved to establish them on a defence of moduses, although all the witnesses called them compositions. A modus (established by evidence), held to be good (sed dubitanter,) although laid as payable by the owners of a particular estate, for all the lands within a certain district.

The plaintiff was vicar of the parish of Prescott, in the county of Lancaster. The defendants were occupiers of land within the township of Parr in that parish. The bill was filed for an account of hay, and small tithes generally.

The defendants admitting the plaintiff's general title, set up a defence of moduses. Having alleged in their joint answer that the defendant Orrell occupied a certain farm in the township called Parr Hall, and certain lands there, called the demesne of Parr Hall, consisting of one hundred and nineteen acres: and that the defendant Gorse occupied a farm there, consisting of about fifty-nine acres, forty-two of those being part of the demesne of Parr Hall, the boundaries and quantities of which were set forth in a schedule they stated that they had been informed and believed, that from time, &c. until plaintiff was appointed to the said vicarage, there had been paid, and of right had been, and then was due and payable to the vicar of the [325] said parish for the time being, or to the person or persons entitled to receive the vicarial * dues on Easter Monday in every year, by the owner or owners for the time being, of the said farm called Parr Hall, a certain annual sum of 13s. 4d. for and in lieu of the tithes in kind, of all hay yearly, had, made, or taken, upon and from off all lands within the said township of Parr, and for and in lieu of the tithes in kind of all titheable matters and things, the tithes whereof are usually reputed and held to be small tithes, yearly coming, &c. upon and from off all lands within the said parcel of the said demesne of Parr Hall.

They also set up the following moduses, as payable by the occupiers of lands within the said township of Parr not being within, or parcel of the said demesne of Parr Hall; 5d. for every married man residing on such lands, in lieu of Easter offerings for each married man and his wife; 1d. for every barren cow; and 1½d. for every cow not barren, in lieu of the tithes in kind of milk and calves of all cows on such lands; and 6d. for every colt, in lieu, &c.

[326] The witnesses examined for the defendants in support of the first modus of 13s. 4d. proved that no tithe of hay, or small tithes, had by them, or by any other person, to their knowledge, been paid for the lands within the demesne of Parr Hall, either in kind or sub modo.

Old deeds were also produced in evidence, wherein the 13s. 4d. was mentioned as payable to the vicar, for and as a prescription rent (some of them stating it to be a modus,) for the tithe of hay and all small tithes in Parr. And several receipts (from 1757 to 1815,) were put in, as given by the vicar to the proprietors of Parr Hall for that sum, stating it to be a prescription for tithe hay, saying nothing of other tithes.

The witnesses examined to prove the other sums of money set up as moduses, proved the uniform payments during memory; but they universally called them compositions, and stated that they were demanded as compositions. No evidence was offered on the part of the plaintiff, to impeach or vary the payment, or to shew their origin to have been since legal memory.

* An objection being taken, though not much insisted on, to a modus laid to be payable for vicarial dues, the Lord Chief Baron observed that that objection had been over-ruled in this Court, in the case of an answer, on grounds with which his Lordship declared himself satisfied. —Vide *Preest v. Brett*, and *Uthoff v. Lord Huntingfield*, vol. i. 237.

To that evidence the plaintiffs opposed the parliamentary survey and other ancient public documents wherein the tithes were estimated, and said to be payable to the vicar : and no mention was made of the demesne of Parr Hall, or of any [327] modus payable for the tithes due from that estate.

Dauncey and Roupell, for the plaintiffs, contended that the modus of 13s. 4d. set up, was not proved by the evidence as laid ; objecting that that money payment had not been proved to have been rendered in lieu of all small tithes : but of hay only : and that on the contrary, the receipts negatived so much of the application of the money payment by confining it to hay : and that the payment itself being chargeable on the owners of the estate, vitiated it as a modus, because it would be uncertain in respect of the person liable, and it threw such difficulties in the way of the clergyman, who was by law entitled to remit in the first instance to the person actually in the occupation of the land, as might render it in many cases which might be put, (such as the event of a disputed title, &c.) impracticable to obtain his legal right, which in the common course was always sufficiently clear, certain, and accessible.

To the other money payments they objected ; that though they were laid as moduses, they were stated by all the witnesses to be compositions ; and therefore were not supported by the evidence : and as an issue could not be granted to try a composition, there must be a decree for the plaintiff, on that part of the case.

Martin and Shadwell, for the defendants, insisted that the money payments, as laid, were [328] well pleaded as moduses, and had been sufficiently proved to entitle the defendants to issues : that the omission of the modus of 13s. 4d. in the ancient documents, was no proof of its non-existence, and that such negative evidence could not prevail against the positive testimony which stood uncontradicted ; that the question whether it covered hay only, or hay and all small tithes, was properly subject matter for an issue ; and that a modus being payable by the owners of the land covered by it, was good ; and had been so held in the case of *Ord v. Clarke* (6 Anstr. 638. 4 Gw. 1437).

As to the objection taken to the other payments, that they had been termed compositions by the defendant's witnesses, they submitted that that was a matter very subject to be mistaken by ordinary persons examined as witnesses, and ought not, therefore, to conclude a defendant, who had, in point of fact, a good defence of modus : or at all events it ought to be made the subject of a further inquiry, when better evidence might be given, or that which was now before the Court, might be more fully explained.

Dauncey having replied,

RICHARDS, Lord Chief Baron, delivered judgment.

The plaintiff's title, said his Lordship, being admitted, the question is, the validity of the mo-[329]-duses which have been set up by way of defence to his claim. As to the objection which has been taken to the first being laid as payable by the owner of the estate, which it is said to cover, I should certainly have considered that as at least a very doubtful point. It appears however, that there is a case which has decided that that is sufficient ; and as that is so, it may be better to abide by the determinations which we find, establishing a point, although they may not consist with the just sense of the thing, according to one's own particular view of it, than to disturb an established rule.

On the evidence, however, I think the first modus cannot be supported to the extent at which it is laid. It is alleged to be in lieu of hay and small tithes ; the proof is merely that no tithe of hay, and of other matters, usually called small tithes, have ever been paid by the occupiers of the lands, either in kind or sub modo : and that would certainly be insufficient, even if there were not evidence to shew that the modus is payable in lieu of hay only. As the prescription therefore is laid, it is larger than that proved by the evidence, so that it is thus not supported by the proof, and the plaintiff is consequently entitled to an account of the tithe of hay and all small tithes.

As to the other moduses, there is no objection made to their amount. The only question is, whether there is sufficient evidence to sup-[330]-port them. There is certainly proof of their having been uniformly paid for a very great length of time ; but then it is urged, that they are merely compositions, and that they are expressly stated to be so by the witnesses. But I think that that cannot be considered as invalidating a defence of modus, or as a failure of proof. It is said that there are no

cases wherein a money payment in lieu of tithes, which is expressly called a composition by all the witnesses called to establish it as a modus, has been sent to an issue. If there be not, I should be ashamed of the limits of my authority, if I could not make one. If indeed there were any case deciding the other way, I should perhaps abide by it, but I should do so with very great reluctance.

It was also said that no terrier had been produced in evidence in support of the moduses; but there is, I think, very sufficient proof without. I have the actual continued payment of the same sums, and acceptance of them by the vicars. They are small enough to be moduses, and there is no evidence varying the payment, or shewing when it was not made. I am therefore bound to say that there is sufficient evidence to enable me to decide here, in favour of those moduses.

As to the fact of parliamentary survey not referring to the moduses, there is nothing in that, when opposed to the proof of actual payment. Had that document, although it is certainly entitled to [331] great respect on some questions, even stated that there was no modus, it would not, as being on that subject *res inter alios acta*, be strong enough to overpower the positive evidence of actual payment, still less is the mere omission to mention it, sufficient.

Decree. An account of the tithe of hay arising within the township of Parr, and of small tithes admitted by the answer, arising within the demesne of Parr, with costs. Issues as to the other moduses.

THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF HEREFORD *v.* HULLET.

Tuesday, 12th January 1819.—It is not the practice of this Court, on the return of the certificate of commissioners appointed to ascertain lands, &c., to move to confirm that return, or to file exceptions. The course is, to set the cause down for hearing on the return of the commissioners' certificate, for further directions.

A commission had been decreed to issue in this cause, to ascertain which of certain lands, &c. in the possession of the defendant, belonged to the plaintiffs, as patrons and owners of the hospital of St Catherine's. The cause was ordered to be continued in the paper, till the return of the commission and certificate, and now came on to be heard upon the commissioners having made their return.

[332] Martin and Lovat for the defendant, now produced an affidavit made by one of the persons named as commissioners, stating several objections on his part to the certificate returned, and they objected that the plaintiffs should have obtained an order nisi for confirming the certificate, to enable the defendant to except to it, as is the practice in the Court of Chancery.

Dumcey and Pepys for the plaintiffs, submitted, that it was not the practice of this Court to obtain any such order, and that the cause had regularly come on upon the return of the commission for further directions; and that whatever objections might be taken to it could be urged in the present stage of the proceedings.

On the other hand, it was urged that the practice observed in the Court of Chancery, was the more reasonable, as it prevented all doubt, where some of the commissioners might not concur in the certificate sent up by the returning commissioners, as was the case here.

RICHARDS, Chief Baron, (having observed that there might be conveniences attending the mode now suggested, and mentioned his recollection of a case where two certificates had been re [333] turned by two sets of commissioners, and the Chancellor refused to act upon either, but ordered a new commission,) enquired of the Registrar as to the practice; who reported that the practice of this Court was to set the cause down for further directions, upon the return of the commissioners' certificate, which is then filed, and the clerks in Court have notice, as had been done in the present case, and that no previous motion to confirm that return was necessary.

The Lord Chief Baron then, observing that it was in all cases better to abide by

* Vide *Corbet v. Dureant*, 2 Bro. C. C. 261. From that case it appears, that the course in the Court of Chancery is to move to have the objectionable return suppressed. Sed Vide *Watson v. The Duke of Northumberland*, 11 Ves. 153, where Lord Eldon, in a case where two separate returns had been made, each by two of the four commissioners appointed, refused to act upon either, and ordered another commission to be issued, directed to five commissioners.

the established practice of the Court, which might be deliberately corrected if defective, on the return before him, made a Final decree.

[334] GENERAL ORDER. 20th January 1819.—Distinction to be observed in the paper of causes, between those wherein publication has passed, and where it has not.

That in future, in making out the general paper of causes for hearing after every term, the general order made on the 21st May, 1778, for having a separate column for causes in which publication has not passed be abided by: and that no cause be removed to the column for causes in which publication has passed, until publication has actually passed in such cause.

MEMORANDA.

In the course of this vacation, William Draper Best, Esq. one of His Majesty's Serjeants, and Chief Justice of Chester, was appointed one of the Justices of the Court of King's Bench.

J. S. Copley, Esq. Serjeant at Law, succeeded Mr. Serjeant Best, as Chief Justice of Chester; and

John Richardson, Esq. was appointed one of His Majesty's Justices of the Court of Common Pleas, having previously taken the degree of the Coif: his motto "More Majorum."

End of the Sittings after Mich. Term.

[335] CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, HILARY TERM, 59 GEO. III.

MEMORANDA.

During this Term, the following Gentlemen, having been appointed of His Majesty's Counsel in the Law, took their Seats within the Bar:—

As King's Serjeants: Mr. Serjeant Pell, Mr. Serjeant Copley. As King's Counsel: Giffin Wilson, Esq. of Lincoln's Inn; Michael Nolan, Esq. of Lincoln's Inn; Stephen Gaselee, Esq. of Gray's Inn. Patent of Precedence: Robert Mathew Casberd, Esq. to take rank next after Mr. Gaselee.

[336] CHARLES EMERY v. GEORGE EMERY. Friday, 29th January 1819.—Where a venue laid in Middlesex had been changed to Stafford on the usual affidavit, the Court refused to bring it back, on an affidavit stating that the goods (which had been purchased and paid for by plaintiff, as agent for defendant, and for which the action had been brought,) were partly paid for in London, and partly in Surrey, and were sent to Paddington, in the county of Middlesex, to be forwarded thence to defendant; the plaintiff undertaking to give material evidence in London or Middlesex: he must undertake to give material evidence in the county in which he originally laid it.

[S. C. 1 Y. & J. 501.]

Jones, D. F. had, on a former day, obtained a rule nisi to change the venue in this cause from Middlesex to Stafford, on the usual affidavit:

Against which, Sir Wm. Owen now shewed cause, upon an affidavit stating that the action was brought for goods purchased and paid for by the plaintiff, as agent to the defendant: that the goods were partly paid for in London, and partly in Surrey, and were sent to Paddington, in the county of Middlesex, to be from thence forwarded to the defendant. He cited *Collins v. Jacob* (3 Bos & Pul. 579), *Hunt v. Bridgford* (1 Taunt. 529), *Neale v. Neville* (6 Taunt. 565), *Savory v. Spooner* (ibid.), and *Powel v. Rich* (7 Taunt. 178), and contended that on the authority of those cases he was entitled to bring back the venue, on undertaking to give material evidence in London or Middlesex.

Jones, D. F. in support of his rule, cited *Henshaw v. Rutley* (1 N. R. 110), *French*

v. Coppinger (1 H. Bl. 216), and *Prier, Bart. v. Woodburne* (6 East, 433), where the Court dissented from the cases in the Common Pleas, and held, that the plaintiff was not entitled to bring back the venue, without undertak-[337]-ing to give material evidence in the county in which he had originally laid it.

The Court thought the rule of the King's Bench, more reasonable than that of the Common Pleas, which would oblige them to examine all the facts on affidavits, in order to see whether any part of the cause of action arose in a third county: that, according to the rule of the Common Pleas, a plaintiff having a cause of action in Northumberland, might bring his action in Cornwall, and prevent the defendant from changing the venue by shewing, that part of the cause of action arose in neither county, which would be highly vexatious, and might induce plaintiffs to lay their venues in remote counties, in order to increase the expence of defendants, and thereby constrain them to submit to the action.

They therefore made the

Rule absolute *1.

[338] EXCHEQUER CHAMBER, IN ERROR.

ANONYMOUS. Friday, 29th January 1819.—The Court of Error will not allow interest on affirmance of a judgment in an action on recognizance of bail, on the ground that the original action was on a promissory note—the bail being only liable for the sum sworn to and costs.

Littledale moved for interest on the affirmance of a judgment in an action on a recognizance of bail, on the ground that the action in which the plaintiff in error became bail was on a promissory note. But the Court,—inquiring whether he could produce any case where interest had been allowed in a similar action, and none being cited,—refused to allow it, observing, that the bail were only liable for the sum sworn to, and costs.

IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

DORMAN AND OTHERS *v.* SEARS AND OTHERS. Friday, 29th January. Gray's-Imm Hall, 11th, 13th, 16th, 17th, 20th January 1819.—Lucerne, tares, clover, and other artificial grasses, cut green and given, severed, to husbandry horses and cattle employed on the farm on which they are grown, are not therefore exempt by general custom from the render of tithes, unless the farmer have no other fodder or sustenance of any sort on the farm, on which such horses, &c. may be subsisted, without necessarily having recourse to such green food.

The plaintiffs in the present amended *2 bill (for an account of the tithes of lucerne, tares, clover, [339] and other artificial grasses, cut by the defendants, occupiers of land in the parish, for green meat), charged that the tithes of such articles were due to the plaintiffs, as lessees of the rectory of Dartford (Kent), and suggested pretences that such green meat was consumed wholly by horses employed in and about the cultivation and husbandry of their farms and lands: and that therefore the plaintiffs were not entitled to the tithes thereof: whereas the bill charged the contrary, and that the articles so cut, were not wholly consumed by horses employed in the cultivation of their farms, and that the quantities of such articles as had been so cut for green meat and given to such horses, were more than sufficient for their consumption; and that such parts as were actually so consumed, were unnecessarily consumed by such horses, and with an intent to defraud the plaintiffs of the tithes.

The bill also charged that the defendants, at the same time had a sufficient quantity of fodder for such horses, exclusive of the articles cut for green meat: that they, at that time, sold quantities of hay and fodder, the produce of their farms, which might have been consumed for food by their husbandry horses, and had also applied hay and fodder to other purposes than the support of their husbandry horses: and that they

*1 And see *Wood v. Perkes*, E. T. 59 Geo. 3. 2 Barne. & Ald. 618.

*2 Vide ante, vol. iv. p. 109, where this same case is reported for other points by the name of *Dorman v. Curry*.

had also, at the same time, sufficient pasturage for their husbandry horses on their lands within the parish—charging fraud.

[340] On this part of the case, the occupiers set up a defence of exemption, on the general custom, that for grass, &c. cut green and given to husbandry horses, no tithe was due or payable.

The answers admitted the giving the lucerne, &c. cut green to feed the defendants' husbandry horses kept and employed by them in tilling and cultivating their lands, and for agricultural purposes, within the parish, but insisted, that no tithes were payable for such green meat.

The defendants denied the particular charges of fraud, and stated that they had not sufficient pasturage of a proper quality upon their farms or lands for the support of the horses kept or employed by them for husbandry and agricultural purposes. They admitted that they had grown and had on each of their farms or lands, in each of the years when they gave the said articles so cut for green meat as aforesaid, to their respective horses in husbandry, a sufficient quantity of hay or other dry food (if by such dry food in the bill mentioned, were meant fodder) for such horses, exclusive of the said articles cut for green meat as aforesaid, as stated by the bill.

They alledged that it had been, and was the invariable practice with the farmers and inhabitants of or within the said parish of Dartford, to take advantage and procure a sufficient supply of green meat for horses employed in [341] husbandry and for agricultural purposes, whilst it could be had, such green meat being less expensive and more beneficial for their health: and that it had never been heard of, and never had been the custom or practice within the said parish for any farmer to keep his horses upon dry meat or fodder all the summer time.

They also admitted, that in each of the years when they gave the said articles so cut for green meat as aforesaid to their respective horses in husbandry, they had sold and otherwise disposed of some quantities of hay and fodder, the produce of their said farms and lands, as stated by the bill, but denied that such hay and fodder might have been properly, and to the best advantage, consumed for food by their husbandry horses, such dry food being much more expensive, and less beneficial for husbandry horses than the articles cut for green meat: and they alledged that therefore it was the invariable practice with the farmers or inhabitants of and within the parish, to procure a sufficient supply of such green meat whilst it might be obtained.

And they admitted that they respectively had, in each of the years when they gave the said articles so cut for green meat to their respective husbandry horses, used and applied divers quantities of hay and fodder, the produce of their said respective farms or lands, in or for the support or food of their sheep, cows, and other stock, and for other purposes.

[342] They denied that they, during, &c. had sufficient pasturage, of a proper quality, on their farms or grounds within the said parish, for their husbandry horses, as alledged by the amended bill: for that they had no pasturage or pasture-land, other than and except what was situated within, and part of Dartford marches, which marsh-lands were of a washy nature, so as always to be prejudicial to working or husbandry horses; and therefore such marshes or marsh-lands were seldom or ever used by defendants, or either of them, for the purpose of turning out their working or husbandry horses; but that the same were used or appropriated for the grazing of sheep and other stock and cattle, and for hay; and they submitted that such appropriation of such marsh-lands could not possibly be of any injury to the tithe-owners, as the stock grazed, and hay produced thereon, were liable to the payment of tithes, whereas the pasturage or husbandry horses thereon, as they were advised and insisted, would not be liable to the payment of any tithes, nor any compensation in lieu thereof, but would be exempt therefrom.

It was alledged and proved, that one of the defendants (Sparkes) had no meadow-land on his farm, and that he had not only sold no hay, but had been obliged to buy corn, straw, hay, and other fodder for his husbandry horses.

On this state of facts,

Martin and Roupell, for the plaintiffs, in sup-[343]-port of the only point now in dispute between the parties in this cause,—which (they admitted) was, whether grass or other green food, cut and carried, and given to husbandry horses, be exempt from tithes by universal custom, where the farmer has any other fodder of any description on his farm: or whether the custom if any such exist, be confined to farmers who

have not a sufficiency of pasture or grazing-lands : contended, that the word "fodder," as used in all the cases on the subject of the exemption, was to be construed as applying to all fodder, and if not, that it, at least, included hay.

To shew that the term, "fodder" was applicable both in its common and its legal sense, to all kinds of food, and even more particularly to dry food, as distinguished from green, they referred to Johnston's Dictionary, where it is defined to be "dry food stored up for cattle, against winter," and that signification of it (being a word of Saxon etymology, *Fodre*) is borne out by the German dictionaries : and to Cowell, who had, in his Interpreter (tit. Foder) considered it as applying to all kinds of food ; for he had derived it from *fodu* (Saxon), and had explained it by the general term, alimentum which would cover every thing capable of affording nourishment or sustenance.

They then submitted, that all the cases which had been determined in the courts of law and [344] equity, had affixed to the term the more comprehensive signification which had been given to it by the Glossaries and Dictionaries, and that none of the decisions had extended the exemption to cases where there was a deficiency of green food only.

The privilege itself, they observed, as insisted on, was not appendant to the particular species of food, but to the animals to whom it was given ; and if green food so spent was exempt, what was there, they asked, to restrain the exemption from extending to all other titheable matters given as food to horses employed in husbandry by the grower ? for the same policy would extend it perhaps to all other food, and certainly to hay ; whereas, if the exemption were founded on the total want of hay, and all other kind of food, the reason of it would be at once obvious and intelligible.

They then applied themselves to the authorities, commencing with an investigation of the decision in *Crawley v. Wells* (1 Roll. Abr. 645, pl. 7), (on which the seemingly adverse position stated in Watson's Clergyman's Law (p. 552), that "grass cut and given green by the farmer to his own cattle for their necessary sustenance, he not having grass sufficient to maintain them otherwise," was there said to be founded) to shew that that writer was not supported by the case cited, in the doctrine there [345] laid down by him, and to which he had referred as the basis of his proposition. That case, they submitted, was, on the contrary, as reported in Rolle, decisively in favor of the plaintiffs, against the claim of exemption set up by these defendants, because it establishes, that to support such a defence, it must be shewn that the defendant was, of necessity, compelled to resort to cutting down his green food, from absolute want of any other sustenance of any kind generally, for the support of his husbandry horses.

They cited, on the part of the plaintiff, the case of *Mantell v. Paine* (4 Gwil. 1504, and Wood. T. D. 560), as an authority, deciding that to entitle the farmer to the exemption claimed, he must have, at the time, no other food of any sort on his farm : for the result of that case was an order of reference to the Deputy Remembrancer to enquire whether the defendant, Yalden, had sufficient fodder to support his cattle used in husbandry, without the green fodder in the pleadings mentioned. And they referred to the case of *Perry v. Soam* (Cro. Eliz. 139. 2 Leon. 27, S. C.), (on which they placed much reliance), where Sir Edward Coke called this exemption a prescription in non decimando, observing that a man might as well prescribe to be discharged of hay.

They also adverted to the recent case of *Stevens v. Aldridge* (ante, vol. v. 347), (not then in print), where [346] Mr. Baron Graham (the Lord Chief Baron being absent, sitting in the Inner Court) expressed himself of opinion, that there must be a total want of fodder of any kind, to justify the farmer's exemption. It appeared also by that case, that Mr. Justice Park had so ruled at Nisi Prius, and Mr. Baron Wood had declared in bank, that the law had been properly so stated.

Dauncey, Shadwell, and Pemberton, for the defendants, on the other hand, contended that the word "fodder," as used judicially in the reported cases, as understood by the text writers on tithe law, and as explained by the compilers of the ancient glossaries, originally meant pasture, or the grass eaten by the mouths of cattle, from off meadow land, and not dry food : referring to Spelman, 235 *, and Junius t, tit.

* "Foderum, Saxones, pro pabulo & alimento dixerunt ; Angli hodie foder & food. Sed hoc de omnium animalium victu, illud de brutorum, &c. intelligimus."

† Etymologicum Anglicanum. "Fodder, food, pabulum, — alimentum. A. S. Fodder."

Fodder, where the word was expounded by *pabulum*,—*alimentum*. They submitted that it was, therefore, quite clear that the original word meant pasture, for that was the sense in which *pabulum* (from *pasco*), was used in all the classic authors. Thus Virgil, 3d *Georgic*, ll. 320-1 :—

“ . . . Victumque feres et virge lætus
Pabula.”

“ . . . Fuge pabula læta.”—(l. 385).

[347] Again, l. 481 :—

“Corrupitque lacus infecit pabula tabo.”

“Prætereà jam nec mutari pabula refert.”—(l. 548).

And in the first *Eclogue*, l. 50 :—

“Non insueta graves tentabunt pabula fœtas.”

So also in Ovid, *Met.* L b. 2, l. 212 :—

“Pabula canescunt.”

And in the same sense it is used in the *Æneid*, and by Catullus, Tibullus, and many other authors.

They then adverted to the position laid down by Watson, which, they submitted, was supported by the case of *Crawley v. Wells*; for that the word “sufficient” was a relative term, and its only antecedent in the report was “grass,”—observing that that which was the natural construction, was sanctioned by having been put on the sentence by a learned person who was conversant with the subject, in a treatise written to make the clergy acquainted with their rights, to which the position, as stated by him, was adverse; and to his they added the authority of Dr. Burn (*Ecl. Law*, vol. iv. p. 435). They then cited the dictum of Lord Chief Baron Comyns to the same point, as having stated in his *Digest*, tit. *Dismes*, H. 2, (thereby giving the sanction of his great name to the doctrine,) that “tithes shall not be paid for grass cut in a meadow, for beasts of the plough, if it be not made into hay,” citing 2 *Leon.* 28, and *Rol. Abr.*: and that, they remarked, is there stated to be the law, without any qualification on the ground of the farmer having a sufficiency of other fodder.

[348] They also cited the case of *Meade v. Thirman* (a), where tares cut green, and so given to husbandry cattle, were held exempt, observing that that case was also cited as law by Comyn, tit. *Dismes*, H. 1, p. 94; and they referred to the report of *Hayes v. Dorse* (Bunb. 270. 2 *Gwil.* 679), in *Bunbury*, and *Collyer v. Howse* (4 *Wood.* T. D. 440), in *Wood*, to the same point.

As to the case of *Mantell v. Paine*, they remarked that it was very meagre and imperfect, and could hardly be termed a decision. It was a case, besides, which appeared not to have been discussed or investigated so fully and thoroughly as such a new and important question deserved.

On the general policy of the custom on which the exemption was founded, they submitted that it was one which ought to be upheld, as its object was the mutual advantage of the tithe-owner and land-occupier. Husbandry horses being exempt from agistment-tithe, they might be turned into land sown with tares and vetches, which, when eaten by them, would give no tithe, yet they would tread down much more than they consumed, to the injury both of the farmer and the tithe-owner, in which case it would be better for both parties that part of the vetches should be cut and carried to the horses, than that such mischief should be sustained.

As to this species of titheable matter being [349] alone exempt, and hay and other dry food not being so, they submitted that all such food must already have paid tithe in the course of being gathered in, whereas the article in question was in the nature of an agistment-tithe, from which husbandry horses were exempt.

Martin, in reply, submitted, that whatever might be the classical meaning of *pabulum*, even if it were so limited as it had been contended to be, to pasture, the glossaries had carefully guarded against that being taken as the only sense of the word “fodder,” by adding to their exposition the term *alimentum*, than which, no

(a) *Cro. Car.* 393, and *Sir W. Jones*, 357.

word could be more comprehensive and general; and he repeated, that the larger signification was that which had been judicially adopted by the Courts as its legal construction.

He applied the same observation to the doctrine noticed by the Chief Baron Comyn in his Digest as had been made on the text in Watson's Clergyman's Law, that it was not warranted by the authorities referred to there; and he charged an absurdity and solecism on the report of the case of *Perry v. Somes*, in 2 Leonard, inasmuch as it amounted to an approbation of a surmise, which suggested, that for want of meadow and pasture, they had used to eat their meadows with cattle; and he observed, that in that case, the Court came, in effect, to no determination as to the tithes of the tares.

[350] That the doctrine contended for on the part of the defendants had never been considered as law, he submitted, was clear from its not having been acted on. The decision in the case of *Meade and Thirman*, in Sir W. Jones, was founded on local custom wholly, and not applicable to a discussion on the existence of an exemption, as a general custom, obtaining every where, tantamount to a positive and established rule of law; and he urged, that the case of *Mantell v. Paine* (a), on the contrary was an authority shewing clearly that the law was, that wherever a defendant had any sort of fodder, he could not insist on the exemption; otherwise the inquiry directed in that case would not have been, whether the defendant had any other fodder, but whether he had any pasture.

As to the case of *Hayes v. Dowse*, he observed that nothing had been decided there by the Court; that case, therefore, could not be regarded as an authority either way.

On the whole, he contended that the plaintiffs, being *primâ facie* entitled to tithe in kind of the article in question, the instant it was severed, the onus was on the defendants to shew themselves protected by some well founded right of exemption, and such they must make out their present claim to be, or there must be a decree for the plaintiffs.

[351] The Lord Chief Baron having required that the records should be resorted to in the case of *Mantell v. Paine*, and *Hayes v. Dowse*: abstracts of the pleadings in each of those causes (vide p. 363, post) were now furnished to the Court; when his Lordship observed that he should give them due consideration, as well as all the cases which had been cited before he delivered judgment: intimating at the same time a strong opinion against the defendants: for, said he, if the exemption be good in case of green food so applied, what is there, on principle, to prevent the extension of the non decimando to hay consumed by a farmer's husbandry horses! and therefore the serious consequences of a judicial decision of the question render it a matter deserving the most attentive consideration.

Cur. adv. vult.

29th January.—The Lord Chief Baron, now delivered judgment.

The only question now remaining to be decided in this cause is, whether the plaintiff is entitled to the tithe of the green meat, that is, the grass, vetches, and tares, which have been cut by the defendants, and given to what I will call their agricultural cattle—the cattle employed by them in husbandry on their farms.

That tithe is *primâ facie* due for grass, when severed from the ground, may be considered as a truism in law, and that has not, indeed, been dis- [352]-puted on the present occasion; but whether, under the circumstances of this case, it be titheable, is certainly a question which, as far as I can find, has never yet been expressly decided. We must, therefore, proceed upon principle, assisted by analogies deducible from the cases which govern this branch of the law, availing ourselves of such conclusions as may be safely drawn from them.

I understand that the facts, as admitted between the parties, rather than, according to my construction of the evidence, satisfactorily proved in the cause are, that in this case the quantity of green meat, if I may call it so, which was cut and carried away by the defendants, as charged, was not more than sufficient to feed the cattle employed by them in husbandry; but that there was also, at the same time, as much dry food, such as hay, for instance, on the farm, in their possession as occupiers, as would have been amply sufficient for that purpose.

The *primâ facie* liability of the articles which are the subject matter of this bill to

render tithe, however, being quite clear, it consequently lies upon the occupier, if he claim to be protected from the payment of it, to shew some ground of exemption. To that end he states, that inasmuch as the green food which was so severed by him for such purpose, was not more than sufficient to feed the cattle actually employed on his farm in agricultural labour, whereby they necessarily [353] contribute to the benefit of the tithe-owner by increasing the other titheable matters, no tithe is payable for it by force of custom; and that, notwithstanding he had, in point of fact, at the same time, a sufficiency of other food, such as hay, corn, and other dry fodder.

The tithe now claimed is in the nature of an agistment-tithe. On looking into the earlier cases, we find considerable doubt and uncertainty on the subject of agistment itself; for, although there is no doubt that the tithe of agistment was due from all time, yet it is equally true that that tithe has been long neglected, and not till very recently demanded in many parts of this kingdom; and it is even within my own professional experience, that the first suit which was instituted for many years for an account of agistment-tithe was advised, and I myself prepared the bill.

The first case which occurs on that subject is that of *Sherington v. Fleetwood*, in Cro. Eliz. p. 475. It is shortly thus:—"Godfrey moved that no tithes by the law are payable for beasts agisted, and so is Nat. Brev. 53; but all the Court held, that for beasts agisted for hire, or for dry cattle which are depastured to be sold, tithes shall be paid; but for dry cattle reared for the plough, or to be expended in the house, no tithe shall be paid for them: sed adjournatur." So that though the law was then as it is now, and must necessarily be, it was not, even at that time, a matter much agitated in the Courts.

[354] Then the first case that I find, which has any applicability to this, is the case which has been cited of *Perry v. Soam*, in the same book (p. 139), and it is also reported in 2 Leon. 27. It is a case which has been much relied upon in argument, and therefore I will state it at length. It was in the 30th and 31st of Queen Elizabeth:—"Prohibition against the defendant, parson of the church of Sherring in Essex, for that he had libelled in the spiritual Court for tithes of green tares eaten before they be ripe." (it does not appear how they were eaten, or whether they were cut or not, or whether they were agisted) "and for tithes of herbage of dry cattle, and for tithes of sheep bought or sold, and for churchings and burials: and surmised as to the green tares, that in the said parish they had not sufficient meadow or pasture for their draught cattle and milch kine; and in consideration thereof, they had used, time out of mind, &c. to pay the tenth shock of their ripe tares, but for the green tares which were eaten before they were ripe, in consideration they gave them to their cattle they were discharged of tithes for the same." Then follow other surmises which have nothing to do with the present question. As to the first, Lord Coke said, "it is no good surmise, for he may as well prescribe to be discharged of hay given to his cattle, and it is a prescription in non decimando, and he doth not prescribe for all tares, but for those given to his cattle, and hath not averred they were given to his cattle; so pursueth not his prescription, as 10 E. 4, 2, is that he ought." The report proceeds: "As to the first, the Court held it a good surmise, for [355] Wray, C. J. said, the matter is the want of meadow and pasture, and if he had said, for want of meadow and pasture they had used their meadows with their cattle, and for so much as they did eat, to pay no tithes, it had been good." Now, here it is very difficult to know what was really the object of this case, or whether the tares were cut and given to the cattle in a state of severance, for that does not, I think, appear at all satisfactorily in the report.

We find the same case, somewhat varying, also in 2 Leon. 27. Somes, parson of the church of Sherring in Essex, libelled in the spiritual Court against Perry, for the tithes of green tares eaten before they were ripe, and for the tithes of the herbage of dry cattle, and for tithes of sheep bought and sold, and for churchings and burials. Perry prayed a prohibition, and in his surmise as to the green tares, he said that they had used, time out of mind, &c., in the same parish, in consideration that they had not sufficient meadow and pasture for their milch kine and draught cattle to pay for the tithe of the ripe tares the tenth shock, but for their green tares which are eaten up before they are ripe, in consideration that they gave them to their cattle, they had used to be discharged of any tithe thereof: and the truth was, that four hundred acres of lands within the said town had used to be ploughed and sowed every year by the labour of draught cattle and industry of the inhabitants, and in consideration of which,

and that in the said parish there was not suffi-[356]-cient meadow nor pasture for their draught cattle, they had used to be discharged of the tithe of green tares eaten before they were ripe: it was holden by the Court that the same was a good custom and consideration, for the parson hath benefit thereby, for otherwise the said four hundred acres could not be ploughed, for without such shift to eat with their draught cattle the green tares, they could not maintain their plough cattle, and so the parson should lose his tithes thereof, and for the tithes of the green tares he hath the tithes of four hundred acres. There was a case lately betwixt the Lord Howard and Nicholas, where the suit in the spiritual Court was for the tithes of rakings, and a surmise to have a prohibition was made, that the inhabitants had used to till and sow their lands, &c. and they had used to be discharged of their tithes of rakings after that the shocks were carried away: and Coke, who was of counsel with the parson, durst not demur upon it, but traversed the prescription. Wray, Chief Justice. "The want of meadow and pasture in the parish is the great matter here, and there is not any mischief here, as if they had surmised, that for want of meadow and pasture they had eaten their meadows with their cattle. And it was held by the whole Court, that it was a good prescription." What was finally done in the case of *Perry v. Soam*, as stated in *Cro. Eliz.*, I can no where find.

Then there is a case of *Webb v. Warner* (*Cro. Jac.* 47) in [357] the 2d James 1st, which is correctly enough stated in *Burn*, vol. iii. 467, thus:—"When the inhabitants of divers marshes and fenny lands, who used to gather a rough hay called fenny fodder, for want of sufficient grass to sustain their beasts in winter, alledged, that they did this for the sustenance of their beasts, and the better increase of their husbandry, and ought therefore to be freed from the payment of tithes; the Court held, that this surmise was not sufficient, for one may not prescribe in non decimando; and in that it is alledged that they bestow it upon their cattle, there that is not any cause of discharge; for so they may prescribe for corn spent in their family, or for corn given for provender to their cattle, whereby no tithes should be paid."

The next case is that of *Crawley v. Wells*, upon which very great stress was justly laid, as being in favor of the plaintiffs. That case is to be found in 1 Rolle's Abridgment, 645, pl. 7. It is also introduced in Viner's Abridgment, vol. viii. (z.), pl. 7, p. 587, (although he does not cite Rolle, but it is clearly the same case, for it is an exact translation of the passage in Rolle), and in 2 Danvers and Dr. Burn's Ecclesiastical Law, vol. iii. p. 467. Dr. Burn has it thus: "It hath been resolved, that if a man cut grass, but before it be made into hay, but only put into swathes, he carrieth and giveth it to his plough cattle, for their necessary sustenance, not having sufficient for their sustenance otherwise; no tithes shall be paid thereof." And at the end he cites Rolle [358] and the case of *Hayes v. Dowse*, *Bunb.* 279. We therefore find this case repeated, if I may so say, in Rolle, in Danvers, in Viner, and in Burn. Now that case certainly involved the real question, which has been made in this cause; Viner translates the case exactly in the same words: "If a man cuts down grass, and before he makes it into hay," (there we have a cutting green: in the other cases that was certainly left equivocal, and this was decided in the 9th of Charles 1st, after those other cases), "being only put into swathes, he carries it away and gives it to his plow-cattle for their necessary sustenance, not having sufficient for their sustenance otherways, no tithes shall be paid thereof." The learned Counsel, who have employed great industry and research on both sides in this cause, have not been able to find that case reported in any other book, and my endeavours have been equally unsuccessful. The other books only copy it "not having sufficient for their sustenance;" "Sustenance," therefore, is the word used in Rolle (not fodder), and Viner, Danvers, and Burn, have so translated it from Rolle. Now that would bring the case to this point at once—what is meant by that word sustenance? There is certainly a passage in Watson's Clergyman's Law, which affects to give a definite meaning to the word sustenance, and if that which is there given to it by him were the true one, the question would be at once disposed of. In citing that case, however, the book certainly is not very accurate in more than one respect. It speaks of the case which is re-[359]-ferred to in Rolle, as having been decided in the second of Charles the First, instead of the ninth, (the true date), and calls it a decision of the Court of Common Pleas, whereas, in fact, it was decided in the Court of King's Bench; but what is more material, it refers to the case in Rolle's Abridgment, as the foundation of the position, so that it is built upon the same case, cited by the same name, as

is to be found in Rolle. When therefore the author of that book, a text writer, states a proposition, which he founds entirely upon a case which he quotes as his authority for it, I must look to the case itself, for I cannot take his construction nor his translation of it, but I must look myself at the report : and doing so, I find that it does not authorize his doctrine. It is perfectly clear, that Watson meant to rely entirely on the case in Rolle, and he does not offer any opinion of his own on the question, nor any reason why a given construction is to be put on the word "sustenance," but as one merely translating Rolle, he says, "If a farmer do cut down his grass, and only doth put it into swathes, and then carry it away and doth give it green to his own cattle, for their necessary sustenance, not having grass sufficient to maintain them otherwise, no tithes shall be paid thereof." In Rolle, however, the words are "and gives it to his cattle for their necessary sustenance, not having sufficient for their sustenance otherwise" *1. Now, if the author [360] of the Clergyman's Law, were correct in adopting the words "not having grass sufficient to maintain them otherwise," Rolle must be made to mean "sufficient green grass otherwise," which, as I understand it, seems impossible to be correct ; and therefore I must reject it. The passage is not intended even to be what Watson himself says, because he only means to give what Rolle states, and Rolle says no such thing.

Then other books and other authorities have been referred to upon which more stress has been laid, than they seem to me to be entitled to. First, in Comyn's Digest, title Dismes, H. 2, it is said, "tithe shall not be paid for grass cut in a meadow, for beasts of the plough, if it be not made into hay ;" without any thing more by way of qualification. He also refers to 1 Rolle and 2 Leonard, as his authority, and as I have already shewn, they certainly do not bear him out in that proposition, and he cites no other case in support of it. If indeed Comyns had stated this nakedly, without referring to any book, no doubt we should be bound to pay considerable attention to a writer of so great authority, but having made a reference, we must look to the case referred to, and if he be not justified by that authority, we are obliged to reject what he says, as in the case of Watson.

In the case which has been cited from Bunbury, of *Hayes v. Douse*, it is merely stated loosely, that "the Court seemed to think that [361] vetches and clover, cut green, and given to cattle used in husbandry, should pay no tithes." That would have been a very large and plain proposition certainly, had it been so determined, but in truth, this is a case which is very loosely reported, and one that ought not, as well as many others, to have been introduced into that book : because to say that the Court seemed to think one way or other, is nothing like a decision, even if it were possible for any one to say what the Court seemed to think. I have, however, had recourse to the record of the proceedings in that cause, from which it is manifest that the question in this case could not have arisen there, for there is nothing put in issue by the defendant's answer *2, which could bring this point [362] before the Court, because it is not stated in the pleadings that he gave the green meat to his hus [363]-bandry horses for their necessary support, or that he had not grass or other food for their sustenance without it. It is said that witnesses were examined as to that fact, but

*1 The words in Rolle are "Si home succide grasse, & devant que il fait ceo en feine mes solment mist en swathes il emporte & done al son plow avers pur lour necessarie sustenance, nemy aiant sufficient pur lour sustenance autrement nul dismes serra paie de ceo."

*2 EXTRACT from the Record of the Pleadings, and Decree in
Hayes v. Douse and Lavington.

The bill was filed Trinity Term, 2 Geo. 2, by the plaintiff, rector of Cheverel Magna (Wilts), for an account of the tithes of the arable land in the occupation of the defendants, sown with clover and vetches, which they were charged with having cut and carried away and converted to their own use, without setting out the tithe thereof, or making any satisfaction therefore to the plaintiff.

The defendants by their answers, severally admitted that they had cut clover and vetches on their farms and lands ; but they stated that they had set out the tithes of such clover, grass, and vetches, except of such part as they had cut and spent in small parcels while green, and fed with their plough cattle only, working in husbandry : not

if there were, their depositions could not have been read, because there was no allegation in the pleadings, to which such interrogatories could be applied. It is besides, most certain, that the proposition as stated nakedly in Bunbury, [364] "that vetches and clover cut green and given to cattle used in husbandry, should pay no tithes, is not law; because it is quite clear, according to Watson and all the cases, that it can only be in the event of there being no green grass at least: Bunbury refers to a great number of cases in the margin, *Meade v. Thirman*, from Cro. Car., and Sir William Jones, *Perry v. Soum*, from 2 Leonard, 27, Cro. Eliz. 139, which I have read,

alleging any insufficiency otherwise, either of grass or other fodder, necessary for their sustenance: and they submitted that no tithe was payable thereof.

The plaintiff replied, and the defendants rejoined, and the cause being at issue, witnesses were examined on both sides.

Some of the witnesses for the plaintiff were examined, as to whether the defendants had had sufficient grass, without resorting to the green clover; and they stated that they had.

Some of the witnesses examined to the same point, on the part of the defendant, stated that they did not know whether the defendants had sufficient; others that they believed they had not; and others again, that they had.

Laue nono die Febii, 1729^{mo}.—Under these circumstances, the cause came to a hearing, and counsel was heard on both sides, (among whom was Bunbury for the plaintiff), when the Court ordered the bill to be

Dismissed with Costs.

Mantell v. Paine, Yalden, and Others.

It appears by the record of this case, that the plaintiff by bill for tithes, charged that Yalden the second defendant, had taken and carried away various titheable matters, without setting out the tithes, and that he had "mowed and carried away, great quantities of clover and artificial grass, and made use of it for fodder and various other purposes," without, &c.

The defendant (Yalden,) by his answer, admitted cutting clover, grass, and other artificial grass, "all of which (he alleged,) were cut for the necessary use and support of his horses used in husbandry on his said farms, (within, &c.) and were eaten and consumed by his horses used in husbandry [* as green food or fodder;"] and he insisted that no tithe was due to the plaintiff, in respect of such articles cut for such purpose.]

It further appears, from the answer of the defendant Yalden, to the third interrogatory exhibited to him on his examination before the Deputy Remembrancer, under the reference to him to enquire whether Yalden had sufficient fodder to support his cattle used in husbandry, without the green fodder in the pleadings mentioned; that he swore that "he had upon his said farm or lands, (during, &c.) dry food and fodder, consisting of hay and straw, and peas halms, and hulls or chaff, the tithes of which hay, and of the corn from which the said hulls or chaff were produced had been rendered or paid to the complainant, and that he had no other food or fodder, except the green food or fodder mentioned in his said answer to said complainant's bill, and the grass which was growing for and afterwards cut and made into hay, and except the oats which he had growing in the year 1791 and 1792, the tithes of which he had compounded with, or set out for complainant."

And he also swore in his said answer to the said interrogatory, "that the whole of the dry food or fodder which he had on his said farms and lands, was not sufficient for the support of his husbandry horses without the said green food which he cut in 1792 and 1793, (the period covered by the bill), and that the straw alone was not fit for his husbandry horses; that his hay was bad (being outsides of ricks and refuse), and also not fit for them; that no part of his dry fodder was sold by him,—except oats; and that all his hay, peas halm, and straw, (except what straw was used for litter) was consumed by his husbandry horses: that when the green food was cut (in the months of May, June, and July,) he had very little dry fodder left, and that that also was not proper food for his cart-horses; and that the green food then cut by him, was necessarily cut for their support."

* The part between brackets is omitted, and all that follows is not noticed in the reports of this case in Gwillim and Wood.

1 Rolle's Abridgment, 645, and Degge, 237. Now, on examination, all those will be found to have been grounded on special customs. In *Meade v. Thirman*, in Cro. Car. 393, prohibition was prayed, (and prohibition goes always in the Ecclesiastical Court, in derogation, as it were, of the common law) on suggestion of this custom,—that for tares cut or mown, before they be ripe, and given to plough cattle, tithes ought not to be paid—and upon another custom,—for head lands sown with corn used to be fed with plough cattle, or mowed or cut for that purpose, that the owners shall be discharged of tithes:—and upon this suggestion, grounded upon special custom, the Court granted a prohibition. Now the question here is, upon the law, as founded upon general custom.

The case in Sir William Jones was merely this, “Libel in the Ecclesiastical Court for tithes of green tares cut for feeding labouring horses, and prohibition was grounded, not on this general [365] suggestion, but on the custom of the parish, that no tithe was payable in that case.”

In Degge 232, it is said, “It hath been resolved, that for grass cut in meadows to feed the beasts of the plough, and not made into hay, tithes should not be paid thereof:” but he again cites *Wells v. Crawley*, as if it were an ordinary case, and without referring to any other book.

[On that his Lordship made the same observations as before in speaking of the translation of Watson, and the dictum of Lord Chief Baron Comyn.]

But the very next sentence in the same page (Degge) is, “It hath been resolved that tares, vetches, &c. cut green for feeding beasts of the plough, by custom, may be freed from the payment of tithes, but not without custom,” citing Cro. Car. 393, again, and Sir William Jones, 357.

The last case in the books, on this point, is that of *Mantell v. Paine*. There the defence was, on the part of one of the defendants, that he gave the green food, which he cut for that purpose, to his cattle used in husbandry, for their necessary use and support, and that it was consumed by them; but he does not state that he had not any other fodder, or any facts from which it may be inferred that he had not, unless the word “necessary,” afford such an inference. On the contrary, he stated in his answer to the interro-[366]-gatories subsequently exhibited to him on that subject, that he had other fodder, but that it was not sufficient*. On that answer, the Court, adopting this understanding of the case cited from Rolle's Abridgment, and the other cases to be found on the same point, that the claim to exemption must be grounded on actual and obvious necessity, (for so they must have construed the words “necessary sustenance,”) arising from want of other fodder, referred it to the Deputy Remembrancer, to enquire, whether the defendant had any other fodder to support his cattle used in husbandry: so that the Court decided in effect, that merely giving green food to husbandry cattle, will not entitle the farmer to the exemption, but that to exempt it, he must have no other fodder. What fodder is, however, they have not determined.

On the whole, we may take it to be now clearly settled law, that to entitle the farmer to exemption from tithe for green meat so applied, there must be an insufficiency of other fodder for the necessary sustenance of his husbandry cattle.

Admitting the general principle, that all produce of the earth is titheable, then *prima facie* this is titheable, unless it be exempt, where given, if the farmer have no other fodder, to husbandry cattle.

Then arises the question, what is meant by other fodder. It is in this case assumed, on one [367] side, to mean green food or food of the same kind, as grass: on the other side, it is said to be any food that is capable of nourishing cattle, and is used to be given to them. Let us take the article corn: that is fodder; although people are not in the habit of giving it in common to cattle, except, indeed, to horses, on particular occasions; and hay is certainly fodder. What the meaning of the word may be, in particular parts of the country, its signification in particular books, or its various exposition in the different dictionaries and glossaries, neither of those will much serve us here. Beyond all doubt, (for I think it cannot be disputed,) all food is fodder; I conceive fodder means exactly what food means. They are synonymous terms: and when I see that in the leading case on the law upon this subject, the word “sustenance,” is used, I need not enquire what fodder is, but solely what is

* Vide ante, p. 362.

"sustenance." Surely hay is an article of sustenance for cattle, as much as green grass, and is quite as proper for the purpose of mere sustenance per se: and, if so, can I say that the law is to be broken in upon in this instance, and that there is to be a general non decimando established in all cases to which these facts apply? I see that the only fact on which the non decimando, if there be any, could be sustained, namely, want of sufficient sustenance, does not exist here; for there has been no want of sufficient sustenance on this farm otherwise than by means of the green food in question; therefore there is no reason to say, that that green food is to be excused from paying tithes.

[368] I wholly reject, in considering this question, all the reasoning on the hardship of the case; it does not weigh with me, and I confess I did not expect that so much argument and time would have been wasted on so untenable a ground, because the law excludes it. It was said that it is hard he should pay the tenth of this green food, when, by suffering the cattle to come on the field, it would not have been liable to pay any tithe at all; but in truth it is the occupier who has the advantage in not having his nine parts trod down, and not the tithe owner who takes only the tenth.

The only real point in this case is, whether the word "sustenance," is in its construction to be confined to green food. How could the Court give directions on the subject if it were so? If the construction put on the word "sustenance," by Watson and adopted in this argument, were correct, it would be attended with infinite inconvenience, and even impracticability. Where are we to stop? Suppose a farmer has close A. and close B., if he begin upon close A. and cut enough for the feed of the day, there is still grass enough in close A. for the beasts which were fed from close B., and if there is sufficient sustenance for them so far, you must pay tithe for A. If you go on to the second, when the quantity has lessened in close A. while close B. remains the same, and has the rest of the titheable commodity remaining; it would amount to the same thing. Am I then to say, [369] you shall not pay tithe for the second? So that in truth, it becomes an absolute absurdity, unless you can point out to me how I am to understand from something ab ante what the word means. If close A. and close B. should not both be sufficient to feed the owner's cattle, for what period of time and what number of cattle are we to calculate it? I am quite at a loss to know how to form any line to maintain the construction put on the word "sustenance" by Watson's Clergyman's Law, and that is the only book which has attempted to put any construction upon it. Under these circumstances, I think myself bound to pronounce a

Decree for the plaintiffs.

THE KING v. LEE AND OTHERS. (Claiming Goods seized under an Extent against Thomas Ogle.) 11th February, 1819.—A factor to whom goods have been sent for sale, and who has accepted bills of exchange, drawn on him by his principal to the amount of their value has a lien on such goods and the purchase-money, available against the Crown where the goods or money have been seized by the sheriff under an extent against the principal for a debt due to the Crown.

An extent in chief had issued against Ogle, a cotton manufacturer residing at Preston (Lancashire), an immediate debtor of the Crown, under which goods belonging to him in the hands of the defendants, who were his sale-factors in London, and at that time unsold, were seized by the sheriff of London. The goods were afterwards sold for 3230l. 12s. 9d.

[370] The defendants claimed the goods, and traversed the inquisition. The Attorney General replied; and the following issues were joined on the pleadings, and submitted to the jury on the trial of the cause.

1st. That the goods and chattels therein mentioned were consigned and sent by Ogle to the defendants, for sale, the proceeds to remain in their hands, custody, and control, for the security and reimbursement of the bills of exchange drawn on them by Ogle.

2dly. That before the day of issuing the extent, Ogle was indebted to them in 5182l. 19s.

3dly. That they did, before the issuing of the extent, accept the other bills of

exchange in the plea mentioned, amounting to 2225l. 5s. upon the faith and credit of goods and merchandize consigned and sent, and to be consigned and sent, to them by Ogle.

[The 4th was withdrawn from the consideration of the Jury.]

5thly. That the defendants did pay such of the last mentioned bills of exchange as became due before the plea.

6thly. That the said sum of 5182l. 19s. was not paid to them by Ogle before the issuing of the extent.

[371] Lastly. That at the time of issuing the extent Ogle was possessed as of his own proper goods and chattels, and monies of and in the said goods and chattels, and of the value of 3230l. 12s. 9d. in the inquisition mentioned, in manner and form as found by the said inquisition.

The cause was tried at the Sittings after Hilary Term, 1813, before the then Lord Chief Baron Macdonald.

On all those issues, except the last, the Jury found a verdict for the defendants, and on the last a special verdict in substance as follows.

That long before, and at the time of issuing the said writ of *diem clausit extremum* and taking the said inquisition, Ogle was a manufacturer, &c. &c., and the defendants were factors, &c. in partnership (as already stated)—that Ogle, from time to time, and at divers times, before, &c. (3d October, 1807), according to the usual course of trade and dealing between manufacturers of goods, &c. and factors, did consign and send to and for defendants, as such factors, divers goods, &c. and, amongst others, the said goods and chattels in the said inquisition mentioned, the same being manufactured by Ogle, to be sold by them, as such factors, on commission, for and on the account of him the said Ogle; and for the proceeds thereof, when sold, the defendants were answerable and responsible to Ogle; and that Ogle did also, from time to time, &c. on, &c. before, &c. [372] draw upon the said defendants divers bills of exchange in their plea in that behalf mentioned, payable to divers persons, to be accepted and paid by them (defendants), on the security, for their reimbursement, of the said goods, &c. so consigned and sent, and to be consigned and sent to them as aforesaid, and, amongst others, the goods, &c. in the inquisition mentioned: the proceeds, when sold, to remain in the hands, power, and control of the said defendants, according to the usual course of trade and dealings.

That before the said 3d day of October, defendants, as such factors, had sold and disposed of divers of such goods, &c. so consigned, &c. and had paid and accepted divers such bills of exchange so by Ogle drawn, &c. and,

That on the 1st day of October, and before and at the time, &c. Ogle had been and was indebted to the said defendants in 5182l. 19s. in their plea mentioned, on the balance of divers such goods, &c. so consigned, &c. and such bills so drawn, accepted, and paid as aforesaid, made up to the 31st day of August, 1807.

The verdict then found, that between the said 31st of August and the said 3d of October, the defendants did, on the faith and credit of goods, &c. so consigned and sent, and to be consigned and sent to them by Ogle, accept the said several other bills of exchange in their said plea particularly mentioned and described, drawn by Ogle on [373] them amounting in the whole to 2225l. 5s. and delivered by Ogle to the payees, whereby they became liable, &c.: and that neither of the said last mentioned bills became due and payable until after the said 3d day of October, and after the issuing of the said writ of extent: And that the defendants had since paid the said last mentioned several bills of exchange to the respective holders, as and when the same became due. That the proceeds of divers other of the said goods, &c. manufactured and sent as aforesaid by Ogle to defendants, as such factors, to be by them sold for and on his account as aforesaid, amounting in the whole to the sum of 4132l. 12s. 11d. did not become due and payable from the respective buyers thereof, and were not received by the said defendants, until on and after the said 3d day of October; and that on the said 3d October, and at the time of issuing the said extent, there remained in the hands of the defendants, unsold, 26,032 yards of cambrie, 13,007 yards of calico, and 4007 cotton handkerchiefs and shawls, being the said goods in the said inquisition mentioned, and part and parcel of the said goods so manufactured, &c. and sent, &c. That after the said 3d of October, and after the issuing of the said writ of extent, and before the taking of the said inquisition within mentioned, the said defendants sold and disposed of the said last mentioned goods,

&c. to divers persons, at and for the price in the said plea and inquisition within mentioned, of 3230l. 12s. 9d.

And the jurors found, that the said sum of 5182l. 19s. so due and owing to the defendants [374] upon the balance of the aforesaid account, together with the amount of the several sums of money mentioned in, and made payable by, the last-mentioned bills of exchange, exceeded the value of the goods and chattels in the said inquisition mentioned, and the aforesaid sum of 3230l. 12s. 9d. therein also mentioned, and the proceeds of all other the goods, &c. so consigned and sent by Ogle to the defendants to be sold as aforesaid, the proceeds whereof had not been duly accounted for and paid by them, to or for the use of the said Ogle, before or on the day of making up and balancing the account aforesaid.

But whether, &c. the said Thomas Ogle was, on the said 3d day of October, and at the time, &c. possessed as of his own proper goods, and chattels, and monies, of and in the said goods and chattels, and of the value of 3230l. 12s. 9d. in the said inquisition mentioned, in manner and form as was found in and by the said inquisition, or either of them, or not, the jury are ignorant, &c. submitting it to the Court in the usual way.

Walton, for the Crown, stated, that the question now presented for the consideration of the Court would be, whether, under the circumstances of this case, a factor's lien on the goods of his principal was available against the Crown, suing that principal by prerogative process as its immediate debtor—a question (he observed) of first impression, and of great importance, as the decision would establish an authority on a point which did not appear to be settled by any determination to be found in the books. He contended that the [375] defendants had at best nothing more than an equitable lien on the goods, even as against Ogle—a lien which, he submitted, could not bind the rights of the Crown in matters of mere personal goods and chattels. Although the goods of the Crown debtor were in the hands of the defendants, they were still, to all intents and purposes, substantially the property of the debtor, and therefore liable, even while in their hands, to be seized for the Crown's debt. To defeat the right of the Crown, it has been held that there must be an actual divesting of the property of its debtor, not an inchoate and incipient, but a complete and perfect charge of property. He cited the case of *The King v. Cotton* (Parker, 112), as establishing fully that proposition against any objection of hardship — and *Stringfellow's case* (Dyer, 67). To shew that the King's debts have, from the earliest periods, been distinguished in law from those of the subject, he cited Bro. Abr. tit. Execution, pl. 107, referring to the Year Book 22 Hen. IV. pl. 10, *Monk's case* (Ventr. 221), and the several cases on the Bankrupt Laws (brought together in Cooke's Bankrupt Laws (7th edit. p. 358),) deciding that the Crown is not bound by the bankruptcy of its debtor, and *Regina v. Arnold* (7 Viner, 101). And he submitted, that by analogy with the grounds of those cases, and on the principle by which they were decided, the Crown was in the present instance entitled to judgment.

Knowlys, Com. Serj. for the defendants, (having [376] cited the case of *Drinkwater v. Goodwin* (Cowp. 251), on the point of the factor's general lien on the goods of his principal, as between subject and subject), contended, that the case of *The King v. Cotton*, as far as it could be applied to the present case, was clearly in favor of the claimants' right of lien against the Crown, where goods had been actually pawned or pledged; for it is there said, by the Lord Chief Baron, that if that had been the situation of the disputed goods in that case, they could not have been seized under the extent, whereas, in the instance of goods taken under a distress, or being otherwise in the custody of the law, the distinction is, that the actual right of the parties is not then determined, and the property is not absolutely transferred. Adverting particularly to the language of the inquisition, the facts of the special verdict, and the dates of the different transactions, he insisted generally, that the goods in question were not, at the time of the extent, in possession of Ogle, but in the possession of the defendants, and that the acceptance and payment by them of Ogle's bills was a good consideration for the lien which they claimed — and that Ogle could not have compelled the purchasers of the goods to pay him the price of them; for which he again cited *Drinkwater and Another, Assignees, &c. v. Goodwin* (ibid.), stating the principle of that decision, as disclosed by Lord Mansfield in giving judgment in that case, and applying them to the present. He cited also *Cotes v. Lewis* (1 Campb. 444), to shew that per [377] sons purchasing these goods from the defendants would have been discharged by payment to them. He

then contended, that in whatever situation, with respect to the ownership of these goods, Ogle himself was, at the time of the extent, in the same and not better was the Crown, whose debtor Ogle was, and that the Crown, no more than any other third person, could not vary the then existing rights of the parties as fixed by their own agreement, and the usage of trade, both of which gave the defendants the absolute possession of these goods, as factors, for the purpose of sale, with the usual lien, and all the rights which would attach to that possession under such circumstances, the factors being in advance beyond the full value of the goods, and Ogle being at no one time a creditor as against them : and therefore he submitted that judgment ought to be given for the claimants.

Walton, in reply, urged the paramount right of the Crown, where it interfered with the equitable claim of the subject, and the property seized were, as here, still in specie, and must, from the very nature of lien, be the property of Ogle, the person in regard to whom the lien of a third person was now set up against the Crown suing by prerogative process. He cited *Sir Christopher Hatton's case* (2 Roll. Rep. 294. Godb. 289), as confirming the doctrine in *The King v. Cotton*, of the right of the Crown to seize the property of its debtor, when the subject could not do so, relying on the facts of the case, and the authorities already cited.

Cur. adv. vult.

[378] The Lord Chief Baron now delivered the judgment of the Court.

The only question in this case is, whether the defendants, as factors, have a right to retain the goods consigned to them, as such, against the claim of the Crown. None of the authorities which have been cited are applicable to this particular point ; and therefore we must consider the question purely on principle. The cases cited on the part of the Crown only prove, that where there is an execution of a subject and an execution of the King sued out at the same time, the execution of the King shall have precedence. It is, on the other hand, stated by Lord Chief Baron Parker, in *Per v. Cotton*, in Parker's Rep. 118, to have been agreed, that, in the case of goods pawned or pledged, before the teste of the extent, they could not have been legally seized. Now, by the common law, a factor has the same right to hold goods as a security for money advanced on them, and in the same manner as a pledge. The Crown's debtor himself could not have compelled the factors to give up the goods to him, without first paying them what was due. Therefore we think, that the Crown could not compel the factors to give up their lien, without paying them what money they had advanced on the faith of the consignment to their principal ; consequently judgment must be given for the defendants.

Per Curiam. Judgment for the defendants.

[379] ELIZABETH BAKER AND T. BAKER (an Infant by said Elizabeth Baker his Mother and Next Friend) v. BOOKER AND OTHERS. Demurrer. Wednesday, 3d February 1819.—General demurrer to a bill by widow and infant customary heir of a copyholder, for discovery of title of defendants in possession, allowed, for defect of sufficient case for the interference of the Court.—If a demurrer be not filed in sufficient time, the laches cannot be taken advantage of after it has been set down for argument.—It should in such case be moved to be taken off the file.

The plaintiffs prayed, by this bill, a discovery of the defendants' title to certain copyhold premises, which the infant claimed against them, as customary heir of his father, whom they charged to have been rightfully entitled to the property at the time of his death—that all title deeds, &c. in their possession might be delivered up to the complainants—and for an account of the rents and profits.

The bill charged that Thomas Baker, an ancestor of the infant, having died seised and intestate in the year 1733, the land descended to Cornelius Baker, his youngest son and customary heir—that Cornelius Baker, in 1792, sold to Josiah Baughan, an estate therein, for the life of Cornelius Baker—that he died in 1804 intestate as to his copyhold estates, when his customary heir became entitled to an estate of inheritance therein, but that he, being poor and deranged, was excluded from it by the defendants, who had entered into possession on the decease of Cornelius Baker, notwithstanding repeated applications for restitution—that he (Cornelius) dying intestate in [380] 1816, the complainant Baker, his customary heir, became entitled to the lands, subject to the freebench of the complainant Elizabeth Baker, and that they had applied to the defen-

dants for the title deeds, and for possession, and an account of the mesne rents and profits—and that the defendants having so entered into possession, and one of them (Samuel Turpin Baughan) having, in character of executor of Cornelius Baker, obtained the title deeds, &c. relating to the said copyhold estates, kept the complainants out of possession, on a pretence suggested of the assignment of some old term, created prior to the commencement of the complainant's title.

The defendant Booker demurred generally, for that the complainants had not made out such a case as entitled them to a discovery.

Combe, for the demurrer.

Fisher, for the bill, insisted that this being the case of an infant heir, he was under the peculiar protection of the Court, and might have a decree upon any of the matters arising on the state of his case, although not particularly mentioned, and insisted upon, and prayed, —*Stapilton v. Stapilton* (1 Atk. 6),—that all persons entering upon an infant, and holding possession, would be in Equity considered, as guardian, compellable to account to the infant, and that such account [381] would be extended beyond the period of the determination of the infancy,—*Morgan v. Morgan* (1 Atk. 489), —*Dormer v. Fortescue* (3 ibid. 130), and he observed, that the demurrer admitted necessarily the charges in the bill.

GRAHAM, Baron. Notwithstanding this is the case of an infant and a widow claiming free-bench, I cannot see any grounds, on this statement, for the interference of a Court of Equity. Had there been an allegation, that there were any outstanding terms, there might have been some foundation for a discovery. Lord Hardwicke, in the case of *Stapilton v. Stapilton*, did not mean to say generally, that an infant might, on any occasion, come into a Court of Equity, against any person having an adverse title.

WOOD, Baron, of the same opinion. A demurrer only admits matters positively alleged in the bill, not every fanciful pretence suggested.

GARROW, Baron, concurred.

Per Curiam. Demurrer allowed.

A preliminary objection, in point of practice, was taken to the right of the defendant to avail himself of proceeding by demurrer, on the [382] ground of laches, in not having filed it in due time. The bill had been filed on the last day of Trinity Term, and the subpoena was made returnable on the first day of Michaelmas, and the defendant's appearance was entered on the same day when the bill was delivered to his clerk in Court. The defendant filed his demurrer on the 7th of January.

Fisher therefore contended that by the course of the Court, the defendant was bound to file his demurrer within eight days from the delivery of the bill, and that as he had not done so, he was therefore precluded, unless by special leave of the Court, which had not been obtained, citing Fowl. Practice, p. 317, but

The Court held that the demurrer having been set down for argument, the objection could not now be taken; and that if there were any such practice, a motion should have been made for taking the demurrer off the file, on the ground of the irregularity and laches.

[383] THE ATTORNEY GENERAL *v.* DELANO. 10th February 1819. Construction of statutes. —The term “found,” in the 11 & 12 Will. III. c. 10, s. 2, is, as there used, a word equivalent in import to having been seen or discovered, and held not to be confined to a finding by officers, or other persons seeking the thing for the purpose of seizure, or with intent to institute proceedings for the recovery of penalties, or other hostile motive. —A charge of the thing being “found in the custody of the defendant,” in an information by the Attorney General on that statute, held to be supported by proof of its having been seen in his possession knowingly and illegally, and exhibited by him as his property at any time, and under any circumstances.

A verdict had been found for the Crown, upon the trial of this information, on the sixth count, for a penalty of 200l., founded on the 11th and 12th Will. III. c. 10, s. 2*, charging, that “there had been found, in the custody of the defendant,” certain silks imported from the East Indies.

* That section enacts, that certain silks of foreign manufacture, which shall be
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On the trial of the information before Mr. Baron Garrow, at the last Sittings, it was given in evidence (as now reported by his Lordship), that [384] the defendant, who was a merchant of Liverpool, had legally warehoused the goods, which were the subject-matter of the information (bandannas), in the custom-house at Liverpool, and was in the habit of taking them away, at various times, ostensibly for the purpose of exportation. It was also proved to be the practice with the revenue officers, upon occasions of so taking such goods out of the custom-house for exportation, to see them put into a cart for the purpose of being conveyed to the vessel which is intended to receive them; the loaded cart is accompanied the whole way by a person whose duty it is to see that the goods are actually put on board, and he is termed "a watchman." On the present occasion, the defendant, during the progress of the cart, contrived to inveigle the watchman into a public-house, and in the meanwhile, he or his servants removed the bales of goods out of the cart, substituting other packages, similar in appearance, but which in fact were filled with rubbish. The goods so removed were proved to be afterwards carried to a warehouse belonging to one Duncan, a ship chandler at Liverpool, and after having been left there for a short time, were then carried away by the defendant, and they were offered for sale to some of the witnesses, who were called to prove their having been seen by them in the defendant's custody. Other witnesses, servants of Duncan, proved that the goods had been brought to the private warehouse by the defendant's servants. Penalties had been recovered against the defendant, under other informa[385]-tions, for having illegally in his custody goods of the same sort, and which had been previously seized by the revenue officers: but the goods, for the custody of which the defendant was now proceeded against, had not been seized or searched for by the officers: and the only knowledge obtained of the illegal possession was founded on the evidence now reported.

On these facts, it was objected, at the trial, that inasmuch as the goods, to which the testimony of the witnesses applied, had not been at any time seized or searched for under the provisions of the act, and were, at the utmost, only proved to have been seen in the defendant's possession by persons who were not officers, and had not in any way acted upon that discovery, nor had had any intention to do so, nor had made any search for the purpose of grounding any hostile proceeding on the finding of the goods, they could not be legally considered as having been found in the defendant's custody, within the literal and obvious and only meaning, or the spirit of the statute, which they contended could not apply to goods having been seen in the custody of a party by any person, and that perhaps casually, at any distance of time before the making of the charge.

The case was however left to the Jury by the learned Judge, on the facts in evidence, and they found a verdict for the Crown: his Lordship having reserved to the defendant liberty to move [386] the Court on the point of law raised by the objection.

Denman, this Term, obtained a rule to shew cause why the verdict should not be set aside, and entered for the defendant, against which

The Attorney General, Dauncey, Clarke, and Walton, now shewed cause. They urged in substance, that the positive proof of the illegal custody by the witnesses, who had sworn that they had seen the goods in the defendant's possession, under the circumstances in evidence in this case, was sufficient to support the charge of finding within the terms of this information and of the statute: and that it was not necessary for

imported into this kingdom, shall be put into such warehouses as shall be approved by the Commissioners of the Customs, "so as none of them shall be taken and carried out thence, upon any account whatsoever, other than in order for exportation, and not until sufficient security be first given" to the king, that the same shall be exported, and not relanded—and that all such goods "which shall be found in any house, shop, or warehouse, or other place whatsoever," (other than in such warehouses as shall be approved, &c.) "shall be forfeited, and subject and liable to be searched for and seized," (in like manner as by 14 Car. II. c. 11), and that all such goods so forfeited, &c. shall be sold at the next custom-house for exportation.

The same section also provides, that "over and above the loss of the said goods, the person or persons, in whose custody, knowing thereof, the same shall be found or seized, or that shall sell or dispose thereof, &c. shall forfeit and lose the sum of 200l. &c."

that purpose, that the witnessing such possession should be in consequence of a search, with the object of making a seizure, or of founding any hostile proceeding, or that the goods must be found by an officer, or must have been previously seized, the act having made the finding and the seizure distinct things, giving a penalty on the finding, without any reference to a seizure, which applied only to the forfeiture, and without reference to any particular circumstances, under which, or time when the goods should be discovered to be in the possession of the party, the statute making the fact of custody at any time out of the proper places appointed by law for the keeping of them, illegal, and subject to the penalty.

[387] That exposition of the act they illustrated by allusion to other statutes, wherein the word "found" had occurred, and had been acted upon. Thus the 27th Geo. III. c. 32, s. 5, enacts, That certain vessels, if found out of prescribed limits, may be seized, must be taken to mean being seen out of the appointed limits, and they submitted that that offence might be proved by persons who had seen her in that situation, and that her getting within the proper limits again before she were seized would not destroy the offence, or avoid the forfeiture. So also under the 6th Geo. III. c. 19, imposing a penalty on persons, in whose custody or possession foreign kid gloves shall be found, the offence may be completely proved by evidence of their having been seen in the custody of the party; and the common course of proving that is by the testimony of persons to whom the goods have been offered for sale. On the other hand, a finding in possession, and seizure, were by some statutes expressly made necessary to subject the offender to the penalty, as the 6th Geo. III. c. 28, s. 3, where it is enacted, that the various tradesmen in whose custody, &c. the prohibited goods "shall be found and seized," shall forfeit the penalty. In the present act, the words are "found or seized."

They finally submitted that, if the meaning of the act were to be confined to the construction now attempted to be put on it by the defendant, it would be in most cases rendered easily avoid-[388]-able, as where the goods should be transferred or destroyed after the time of the discovery of the illegal possession by an informer, and before the seizure could be effected by the officers.

On the whole, they contended that the true construction of the statute was, that the mere illegal possession of the goods should of itself be sufficient to subject the party to a penalty, but that if on being found, the goods should be also seized, they should be forfeited—so that there might be a finding in possession without seizure, which alone would be penal on the possessor, but that if they should be seized, the additional penalty of forfeiture of the goods was superadded with the object of encouraging a seizure, where such goods might be known to be in the illegal possession of such offenders.

Denman and Parke, in support of the rule, contended that by the word found, as used in this highly penal act of Parliament, the Legislature obviously meant either a finding by an officer in the course of his duty, or at least a finding by some person making search with intent to proceed against the possessor of the prohibited article for that offence, or who should, on discovering the possession, actually proceed on it: or it might mean a finding, where, in consequence of resistance, or some other cause, the person finding might not be able, at the time, to effect a seizure. And they insisted, that the act could not be extended by construction [389] beyond the meaning of the Legislature to apply to the case of goods having been merely seen in the possession of a party by any indifferent person, who neither acts on what he sees, by taking any hostile step in consequence, nor has gone to the party for the purpose of making the search, with a view to institute some proceeding thereon.

They urged strongly, that to constitute a finding within the statute, by a mere stranger, it would be necessary, when such a person should see the goods in possession of a party, either that he should immediately cause proceedings to be instituted, or should approach or come upon the party offending, charging him with the offence, but that where he passes on without noticing what he sees, he cannot be said to have found the goods in the possession of the party. If a mere seeing in possession were sufficient to convict in the penalty, an innocent person might be convicted; for there might be a possession out of the prescribed places by a person not the owner, as a sale-factor; and that the act meant a possession by the owner was clear, from the words "over and above the loss of such goods." On the other hand, a finding, according to the defendant's construction of the word, would include every thing necessary to make

the offence complete : for the idea of search implies concealment, ownership, and guilty knowledge, united, which would be sufficient to authorise the institution of proceedings against the party, while [390] naked possession would not : nor could the property be proved, without some ulterior step being taken by the party discovering the goods in the custody of the party, as that was not in itself even such *prima facie* evidence of ownership, as should be permitted to subject a possessor to an information : whereas, if search were made, the goods might be found and seized, and the owner ascertained : or if they should not be forthcoming, the party would be bound to disclose what had become of them, at his own peril.

On the grammatical meaning of the word "found," they submitted, that it bore the same sense as *inventum* : and if so, there must be, on the part of the finder, a coming upon the party, or the goods in his possession, with a hostile intent, whether originally by accident or design, in the case of a stranger at least, although in the instance of a revenue officer, a mere witnessing a possession might be a finding, because it being his duty to act hostilely upon it, his witnessing such possession may be taken to be in consequence of his being always on the search for such things : and that it would be necessarily followed up by taking measures for their seizure, and the punishment of the possessor.

Illustrating their construction of the word, as used in this statute, also, by its use and application in other statutes and in other cases, they put the following tests. By the late act, for the more effectual prevention and punishment of [391] poaching (57 Geo. III. c. 90) it is made felony to be found in an inclosure between certain hours, and the punishment is transportation. To convict under that act, they insisted it would be necessary, that the person who should find them there, must actually come upon them, whilst on the spot, and that it would not be evidence of the accused having been found there, to prove that some one had seen him there : putting it, that otherwise an accomplice, who should have gone out with him, and have been in his company at the time, might certainly swear to his having been there, and to the witness's having seen him there, yet he could not be said to have found him there—neither would it be proof of game being found in the possession of an unqualified person, that he had been seen by a witness on some past day with game in his hands. Nor (they submitted) if a sheriff should return *non est inventus*, would that return be falsified by evidence of the officer having seen the defendant at a window or elsewhere, when he could not approach him to make a caption ? Unless therefore there were no distinction in sense between the terms "finding goods in the custody of an individual," and "seeing them casually in his possession," they contended that this verdict could not be sustained.

They urged that the Legislature had itself on several occasions taken the very distinction in its enactments which had been made the ground of [392] the present objection. Thus in the 9 & 10 W. III. c. 41, s. 2, it is enacted, That where naval stores shall be found in the possession or keeping of certain persons, it shall be penal : afterwards, by the 39 & 40 Geo. III. c. 89, s. 1, it is enacted, (reciting that offences against the former statute had increased), that for the prevention, &c. any person who shall knowingly receive or have in his possession, &c. any stores of war, shall be liable to penalties, thus recognizing the distinction between such things being found in the custody or possession of an offender, and his receiving and having them in his possession—that in the 45 Geo. III. c. 121, s. 1, the same distinction is also made : for there the language of the enactment is, if certain vessels shall be found in certain places, or shall be discovered to have been there, under certain circumstances : so also even in the 6th Geo. III. c. 28, ss. 2 & 3, which had been said to support the Crown's construction of the word "found" : if that statute, having made prohibited goods, which should be offered for sale, liable to be forfeited and seized, and the fact penal, the Legislature had considered the mere seeing in possession to be synonymous with a finding in possession, they would not have superadded, as they have done, a distinct clause, making it penal in persons in whose possession the same should be found and seized, and subjecting the goods to forfeiture, unless there were some distinction between a being seen in possession, and a being found in possession : and that in no sense therefore could the words shall be found be con-[393]strued to mean shall have been seen in the possession, or (in the words of the statutes, 8th Anne, c. 71, s. 17, and 5th Geo. I. c. 11), shall have come to the hands or possession of a defendant.

They observed that the statute contemplated two distinct penal consequences, intended to attach in two distinct stages of the detection and punishment of the same

offence—the illegal possession authorising the search and seizure, and subjecting to forfeiture, and the finding on search, whether seized or not, fixing the possessor with a penalty, and that over and above the forfeiture of the goods, manifestly intending that a search at least, if not a seizure, should first be made. Were it otherwise, or were the mere proof of illegal possession to subject the offender to the penalty, any one possession of specific goods might render him liable to an indefinite number of penalties, and many persons might incur penalties for the offence of an individual, in which they might have no guilty participation.

Finally, they urged that in the case of so highly penal a statute, and one not connected with the protection of the revenue, if there should be any doubt as to the validity of the objection, from uncertainty in the wording of the act, the subject ought to have the benefit of a favorable construction.

The Attorney General, in reply, submitted that if the arguments used by the defendant [394] should prevail, they would establish, that there must be, in all these cases, a continuity of the illegal possession up to the time of search, to entitle the Crown to the penalty; and that wherever nothing should be found after search, however manifest and capable of proof the previous possession might be, the penalty could not be recovered, which would be grossly absurd, and not warranted by the language of the statute, but on the contrary, destructive of its object, rendering it altogether nugatory, by securing impunity to the offender.

To meet the observation of this being a penal statute, and the suggestion that therefore it should be construed favorably to the subject, they opposed the fraudulent character of the whole transaction, so devised and executed, as detailed in the evidence, which was of such a nature as to forfeit all claim to favor or indulgence: and in answer to the argument, that by the construction contended for by the Crown, many penalties might be incurred in the person of the same individual, or might attach to many for one and the same act, they submitted, that it had been decided by this Court, that a party might by one act be guilty of distinct offences, and, *a fortiori*, that several persons might incur penalties by being concerned in different stages of the same illegal transaction. And they cited the case of *The Attorney General v. Suggers* (ante, vol. i. p. 182), where the defendant, who was proved to have dealt in prohibited articles (foreign gloves), was held to have incurred two penalties, one for having the gloves in his possession, and another for offering them for sale. The Crown therefore, they contended, was, in the present case, entitled to the verdict recorded.

RICHARDS, Chief Baron, having stated the charge in the information, continued: The question now argued has been raised on the word “found,” as used in the statute, on which the proceeding is grounded. Now it is clear, from the evidence, that the goods, in respect of which the party is charged to be liable to the penalty, were seen in his custody, and they were proved to have been in his custody by the person who saw them there; of that therefore there is no doubt. They were however not seized when they were seen by the person who saw them; and it is urged, that because the goods were not seized, or because something was not done in consequence of their being seen in his custody, the verdict ought to have been the other way, because the law was against the Crown on the construction of this statute.

The 6th count of this information, upon which the verdict was found, is framed upon the 11th & 12th Will. III. c. 10, s. 2 (his Lordship read the section).

In the first place, the forfeiture is by operation of the law upon the goods: being forfeited, [396] they become subject and liable to be searched for and seized.

Then the penalty is imposed on the persons in whose custody they may be found. I confess I have no difficulty in expounding these passages as meaning two distinct things. If the goods are found, they become forfeited, and then they are to be liable to be searched for and seized, and the seizing is a right thrown by the law upon the officer, in consequence of their having been found. Then the subsequent imposition of the penalty by the statute shews most distinctly the difference between the two subject-matters of the offence.

But it has been urged in argument, that the word “finding” must mean something more than a mere seeing in possession of the person possessing them. I however am really quite at a loss to imagine what can be meant by finding, if seeing any thing in a place where it is not a finding there. I find here the gentlemen whom I see here. I consider that even in so penal a statute as the last, in respect to poachers, it is not necessary, as it was contended, that any person should seize them, or come

up with them ; but if they are found, that is, if any one have seen them in the close, they are liable under the act : and it is sufficient to prove that they were there.

[397] There was a very strong case of that description in the county of Lancaster ; the party assembled there was so large, that no man in his senses would venture to go near them : but a person saw them there, and gave evidence against them of his having seen them there ; and on that they were convicted. So here the person who saw these goods in the situation described, might give sufficient evidence against the defendant to fix him with the penalty under this statute.

Then it is said that the word "finding" must be considered as connected with obtaining possession. I conceive that to be quite unnecessary, according to the meaning of the word, in any acceptation of it : but that is particularly not the meaning of it here ; for it is clear, that the word "finding" means something distinct from seizing ; for the seizing is to be consequent on the finding ; and the search for the purpose of seizing is not to be made till after the finding, in one sense ; so that it is plain, that the finding, the searching for, and the obtaining possession, are not the same thing, but have, in the contemplation of this act, very distinct meanings.

It was urged by the Counsel for the defendant, that it is necessary that the goods should be discovered or seen by some particular person, or description of persons, not accomplices, actually searching for them, with intention to act in a hostile manner. Now, there is no word in the act, which intimates any intention of that kind : [398] and in order to make the act of Parliament mean any thing like it, it would require a great many words to be inserted, which are not to be found in the act. I therefore think it manifestly clear, that the word "finding," as used in the statute, is satisfied by proof of any one seeing the thing in the possession of another. It then becomes liable to be forfeited *ipso facto*—it is then liable to be searched for the next day, or at any other time, and is liable to be seized. If that construction is right, the verdict is proper, and ought to stand.

GRAHAM, Baron.—I have had considerable doubts in the course of the argument, because, as was properly pressed upon us, this act of Parliament is highly penal ; and therefore we ought to be clear, that the words are precise in their meaning, so as to bring the party within the offence described ; and I agree with that entirely. Much ingenuity has been displayed in investigating what is the proper use of the word ; and I feel very much the argument used, that "finding," in the proper sense, means a hitting upon the thing tangibly. The fact is, that that word, and many others, are sometimes wrested from their original and proper signification, to some other metaphorical sense ; and it is quite clear, that the word "finding" may be and often is applied to things which you can never corporeally come at, so as to touch or to reach. It has been very ingeniously put, as being something *inventum* ; and that seeing any one at a distance, with the [399] aid of a glass, was not to find him there ; but I take it, that we may fairly say, that looking through a telescope to see if a particular person were on Primrose-hill, if he should be seen there, he may be said to have been found there.

I will put the case of a man returning to this country, after having been transported ; his having been seen since in this country would be decisive evidence of his being found here. If I find a man hanging about the fields of Mary-le-Bone, although he should run away from me when he sees me. So, if a man has been seen in a particular close, it would be quite idle to say, that although he were seen there, he was not found there. If the Legislature used the word in a figurative sense, it is because the poverty of language does not furnish a literal word for every occasion, and there is always a mixture of figure in our language ; but I should expect, notwithstanding, in a case like this, that the Legislature would shew in what sense they meant to use the word "found," if they did not use it in its proper but in its popular sense. In the present instance, I think they have done so by making the distinction. If a man, not a custom-house officer, sees, at any given time, prohibited goods exhibited for sale in a shop in London, and he informs an officer, that in such a shop he saw them, and when he returned with the officer, the goods were completely removed, although that man could not find them there and in the shopkeeper's possession then ; yet he surely may be [400] said to have found them there before, when he first saw them there. The evidence in this case is precisely of that nature. The defendant was dealing with these goods as his own, when they were seen and discovered : they were not seized there at the time, and they were afterwards removed

by him. The argument on the other side labours under this difficulty. It goes the length of insisting, that you must carry the act of possession and finding down to the time of the actual seizure, making the whole one transaction, the finding and the seizing; but the Legislature looked at it in two different points of view. It had occurred to me, certainly, that the word "finding" might be calculated to mislead a man, with reference to the nature of the offence; but my mind is now satisfied, that in this particular instance, there is precision enough in this expression, as used, to make it mean "to discover," as separate and distinct from finding on search with a view to seizing.

WOOD, Baron. I have varied a good deal in my opinion upon this question, but at last I confess I think the fair conclusion is, that the word "found" in possession, in this act of Parliament, is satisfied by the fact of the goods being discovered in the defendant's possession. The word "found" is to be met with in many former acts of Parliament; and such a construction has always been put upon it, as to make it to mean the same as discovered; and therefore, if it is proved to have been found, in other words, if it is disco-[401]-vered by any body, in possession of another, that is sufficient to bring it within the act of Parliament. Upon the whole, therefore, I think the construction to be put upon the word "found" is such, that the present charge may be supported, if the thing be proved to have been seen or discovered in the custody or possession of another.

GARROW, Baron. I was also inclined to think that the objection taken by the defendant's Counsel was conclusive, when first made before me at the trial; but I am now of opinion, that the construction which has just been put on the words of the act by the Court is the sound and just one. We have been told, that in construing acts of Parliament, we must take the words as we find them, and give them their popular and ordinary meaning, and that in expounding them otherwise, we are in danger of doing what I shall always be found anxious to avoid—legislating for ourselves. It should be considered, however, by those who caution us against such a danger, that while we have no right to extend by construction the operation of a statute, we should be equally presuming to legislate in abridging its power and effect, by limiting and confining its full and fair meaning. If we cannot infer words as having been intended to be used, so neither can we omit such as are introduced, or weaken their effect by explaining them away, when essential to the matter and the purpose which the Legislature had in view. If by this act of Parliament, it had been only intended that the penalty should attach [402] where the goods should be found, in the defendant's sense of the word, there would have been no necessity for the other distinct clause superadding very emphatically the penalty, as if it had been intended to provide for this very case, where the goods should have been merely seen and discovered in the possession of the contraband trader, and to destroy the security which they would enjoy, if, notwithstanding the illegal possession should continue for any length of time, no penalty were to attach, until some person should actually come upon the goods hostilely, as has been said, whilst in the possession of the offending party. It is quite clear that the finding in possession must mean something distinct from the seizing or the searching for such goods.

Then, taking the argument for a moment to be good, that the person seeing the prohibited goods in the possession of the party must have had some hostile intention inducing him to watch the possession, as with a view to the giving information, who is to say that the witness in this case had no such intention? That negative is not to be inferred from his not having seized the goods then, or from his not having set on foot a search, when, in point of fact, a search might have become an useless formality, as where the goods should have been seen, as here, in the very act of removal. The possession of this species of property being *prima facie* an offence, it would be incumbent on the possessor to prove a case of innocence, in answer to that fact, or at least to do what, if he [403] were innocent, might easily be done, to disconnect himself with the illegal circumstances of the transaction.

I remember a case of a house in great trade being charged with dealing very largely in prohibited French goods, and their possession was proved by the testimony of their servants, who had been for a long time in the daily habit of witnessing a constant course of regular dealing in the sale of the contraband article. Now, I take it, that those servants might be called, in such a case as the present, by the Attorney General, proceeding on this act of Parliament, to prove that those goods

were found, from time to time, in the possession of the trader, and that their having seen them in their possession, and exposed for sale in their shop, would bring the master within the meaning of this statute, as a person in whose custody the prohibited goods had at different times been found. If then it be not necessary that there should have been a previous search to constitute a finding within the meaning of this act of Parliament, still less would it be necessary that there should be a seizure on the discovery of the illegal possession.

On the whole, I am clearly of opinion that any discovery of goods of this sort in the illegal possession of a party with knowledge, would be such a finding of them as would subject him to the penalty, notwithstanding the original impression [404] made on my mind by the very ingenious arguments which have been so ably pressed on the Court by the Counsel for the defendant.

Per Curiam. Rule discharged.

EAST INDIA COMPANY AND RICHARDSON v. COLLINS AND ANLIFFE. 5th February 1819. —To support an application that service of subpoena, on a bill of interpleader, upon the solicitor who brings the action might be deemed good service, it is not only necessary that the party applying should state that he knows not where the plaintiff (at law) is to be met with, and that the solicitor has refused to appear: but the Court requires that the solicitor should be stated to have positively refused to inform them where he is to be found, and also that the process should have been previously formally tendered to him.

Wyatt moved that service of the subpoena on the solicitor of the defendant Collins might be deemed good service, on an affidavit, stating that Collins had brought an action against plaintiff Richardson, and that it being necessary that he should file a bill of interpleader, in consequence of Anliffe having also claimed the money, he had instructed his solicitor to do so—that being ignorant where Collins resided or was to be found, he had applied by letter to the solicitor by whom the action had been brought, stating the circumstances, and requesting him to undertake to appear to the process, or to inform the plaintiff where his client was to be found, for the purpose of serving him—that the said solicitor had refused to accept process, and in answer to the other part of the letter, he had said that the plaintiff's employers knew where Collins was to be found—and that plaintiff Richardson and his [405] attorney were wholly ignorant where the said defendant Collins was to be met with.

The Court, under these circumstances, refused the application, saying that the result of the correspondence was not an absolute refusal to inform the plaintiff where the defendant was to be found, and that in order to ground such a motion, the subpoena should have been previously formally tendered to the defendants' solicitor. They therefore refused to make the order.

Nil.

TOULMIN AND OTHERS v. COPELAND AND THE BANK OF ENGLAND. 5th February 1819.—The Court will not interfere to require the Bank to transfer money which they withhold, on having been served with process (while in force) on a bill filed by representatives of deceased partners against the survivor of the firm, even for the purpose of paying the partnership debts.

[For further proceedings see 7 Price, 631.]

The plaintiffs, who were the personal representatives of the deceased partners of the defendant, filed a bill for an account, and had served the Bank with the distringas, in the usual course.

Martin now proved, on the part of the defendants, on an affidavit, stating the facts before answer, (which he stated could not with the utmost diligence be put in before a very considerable time, in consequence of the complicated nature of the account, and their great length), that the Bank might be required by the Court, [406] in the exercise of a discretionary control over their process, to transfer part of the stock, for the purpose of enabling the defendant Copeland (who was the only surviving partner, and consequently liable to all the debts at law) to satisfy certain of the partnership demands, urging, that unless the Court should do so, it might be in the power of an

individual, by filing a bill, to shut up any mercantile house in the kingdom, without having any real pretence for such a measure.

The Court refused so to interfere, observing, that they had no such controlling power over their process, nor could they by any means direct the Bank to transfer any part of the stock. Whether the Bank had any right to withhold money in such a case would be a question under other proceedings in another place. If they have done wrong, an action may be brought against them.

Nil.

[407] *LIPSCOMBE AND OTHERS v. BATEMAN*. Exceptions. 5th February 1819.—In what case the interrogating part of a bill for an injunction held to be not sufficiently answered.—Exception for insufficiency allowed, and held to be material; and injunction ordered thereupon.

This was a bill filed for relief from the forfeiture of a building lease, incurred by converting one of the tenements into a public-house, without leave in writing from the superior landlord, in breach of covenant, and an injunction of an action of ejectment, commenced by defendant.

The bill charged that the defendant, the plaintiff's immediate landlord and the person seeking to take advantage of the breach of covenant, had consented to the house being opened as a public-house, (the plaintiff having obtained the consent of the original lessee, but not of the ground landlord, for so doing): and interrogated whether defendant did not, at the time of the execution of the (last) lease by him, or at some other, &c. know, or had been informed, and by whom, and how, or believe or suspect, and why, or had some and what good reason to know, believe, or suspect, that plaintiff John Freeman had obtained the consent in writing of James Bomin (the original lessee), and had erected one of said messuages as and for a public-house. And whether the said defendant, upon being informed of the matters aforesaid, or upon some and what other occasion, did not [408] consent, at that time, or at some and what other time, to plaintiff John Freeman using and employing such one of the said messuages as and for a public-house, so soon as he had finished the same, and could obtain a licence for that purpose, or how otherwise. And whether the said defendant did not promise and assure plaintiff John Freeman, that he (John Freeman), notwithstanding the aforesaid covenant contained in the said indenture of lease, of the 12th day of May, 1812, should not be disturbed in the possession of the premises, for the reason aforesaid, or for some other and what reason, or how otherwise. And whether the said defendant did not then, or at some and what other time, in manner aforesaid, or in some and what other manner, give his consent to plaintiff John Freeman to use and employ one of the said messuages for a public-house, as soon as it should be ready to be opened, and should be duly licensed, or how otherwise. And whether the said defendant did not then, or at some and what other time, promise to assist plaintiff John Freeman in obtaining a licence for opening the aforesaid messuage for a public-house, or how otherwise. And whether plaintiff John Freeman did not wholly rely upon the aforesaid, or some other and what promises and assurances of the said defendant, that he (John Freeman), notwithstanding the aforesaid covenant, should not be disturbed in the possession of the said demised premises, or how otherwise.

[409] Those interrogatories the plaintiff answered as follows:—that at the time of the execution of said indenture of lease, of the 12th May, 1812, he defendant did not know that plaintiff John Freeman had obtained such consent in writing, as in said present bill mentioned, from said James Bomin, or that the plaintiff had erected one of the said two messuages or houses for a public-house: and the defendant, at the time he executed said indenture of lease, of the 12th May, 1812, did not believe or suspect, nor had any reason to know, &c. nor doth he now know, &c. that plaintiff John Freeman had obtained such consent in writing, as in said present bill mentioned, from said James Bomin, save as aforesaid: nor did he defendant, at the time he executed such indenture of lease, believe or suspect, nor had any reason to know, believe, or suspect, that the plaintiff John Freeman erected one of said two messuages or houses for a public-house, although defendant doth now believe that he plaintiff erected one of such messuages or houses for a public-house, but at what time or by whom he defendant was first informed thereof, or did first believe the same, he is now unable to set forth, as to his knowledge, remembrance, or belief.

The plaintiff excepted (inter alia) that the said defendant had not, in and by his said answer in manner aforesaid, answered and discovered whether the said defendant did not, at the time in the said bill mentioned, or at some and what [410] other time, promise to assist the said plaintiff John Freeman in obtaining a licence for opening the aforesaid messuage for a public-house, or otherwise.

Dauncey and Cooper, for the exceptions, insisted that they were material, and that the interrogatories were pertinent, and that the answer, not being, in terms, as full as the interrogatories, were insufficient.

Barber, in support of the answer, submitted, that the interrogatories had been, in effect and substance, with relation to the objects of the bill, sufficiently answered, and that if not as fully in words as they might have been, the omissions were immaterial, and that they would not, if supplied, assist the plaintiff's case.

The Court however held the above exception to be material, and that the answer to the interrogatory was insufficient.

Exception allowed.

The plaintiffs' Counsel then moved for an injunction, on the ground of the insufficiency of the answer, which was

Ordered.

[411] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

CASBERD AND ANOTHER v. D. WARD, R. B. WARD, W. JONES, AND THE ATTORNEY-GENERAL. 8th February 1819. Gray's Inn Hall, 16th, 19th Jan.—(Equitable Mortgage). A deposit of title deeds by a simple-contract debtor of the Crown, for securing part of the purchase-money to be paid in consideration of other lands sold to him, is an equitable mortgage, and binds the Crown; and that although the purchaser have also given his bond to the vendor for the whole amount.—(How constituted.) To constitute such a deposit, for so securing money due, an equitable mortgage, it is not necessary that there should be any agreement accompanying the transaction, that the depositor shall execute a legal mortgage to the depositee, it is sufficient if it can be shewn by satisfactory testimony, that the object and intent of the deposit was the security of money. It is, however, obviously advisable that there should be in all such cases a written memorandum of that intention accompanying the deposit.—(Available against the Crown in the Case of Simple Contract Debtors,—and how carried into Effect after Seizure of the Land under an Extent.) In a case where the Crown had seized the lands of a simple-contract debtor affected by such a deposit, for its debt, the Court ordered the money due to the depositary to be paid out of the proceeds of the sale, before the Crown should be satisfied: the claimant having filed a bill for that purpose against the purchaser of the land under the order of the Court for the sale—the assignee of a term therein—the person against whom the extent issued—and the Attorney-General.—(Construction of Statutes.) Collector of the assessed taxes of a parish, though liable to an immediate extent, is only a simple-contract debtor till his debt is put on record by the inquisition: and therefore where the title deeds of his lands have been bona fide deposited (without notice) in the hands of a subject with a view to executing a legal mortgage for securing money—if such lands should be seized by the Crown for a debt arising from arrears of money collected by him before such deposit, but not put on record till afterwards, the Court will not permit the proceeds of the sale to be paid over to the Crown, without first satisfying the lien of the equitable mortgagees.—Such collector is not a collector or receiver of money for the use of the King's Majesty, within the statute of the 13 Eliz. c. 4, s. 1.—The Court would not, on an application, founded on the second section of the 25 Geo. 3, c. 35, order a depositary of title deeds, who should have a valid lien on them, to deliver them up until his lien were satisfied.

[S. C. nomine *Casberd v. Attorney-General*, Daniell, 238. Explained, *Whitworth v. Gaugain*, 1841, Cr. & Ph. 337. Referred to, *Whitworth v. Gaugain*, 1844, 3 Hare, 416; affirmed 1 Ph. 728.]

In this important case, the hitherto undecided question—whether the mode of charging real [412] property (usually termed an equitable mortgage) by deposit of

title deeds for that purpose, be in the case of a simple-contract debtor of the Crown, an available lien against the claim of the Crown, having seized under prerogative process the lands, to the title of which such deeds relate, was now, for the first time, determined. That question was, on the present occasion, most fully brought before the Court, after very much elaborate argument on both sides, at the bar, in the course of which all the authorities affording any analogous doctrine on the subject were brought together, and their principles investigated and applied.

The Lord Chief Baron, having taken time to deliberate, decreed for the plaintiffs, thereby deciding that such a deposit constituted an equitable lien, not affected by the prior simple-contract debts due to the Crown.

The point was raised in this case by the statement of the facts on either side on the record.

The bill had been filed on the part of the plaintiffs, as the depositaries of the title deeds relating to an estate of the defendant W. Jones, at Clifton, called Dowry Close, under the following circumstances stated in the bill, and admitted by the answer.

The bill charged that the plaintiffs, who were trustees under a marriage settlement had con-[413]-tracted in the year 1812, to sell to the defendant Jones, for a sum of 8000*l.* a certain close, part of the subject-matter of the settlement, called the Upper Honey Pen Hill, reserving to the vendor a right of way to another close. By a subsequent agreement, in order to extinguish that right, in consequence of its being found inconvenient that the road should be retained over the land which Jones had purchased, it was agreed, that in consideration of a further sum of 1000*l.* both the closes should be included in the same conveyance; and it was also agreed that the sum of 1000*l.* (the consideration money) should be secured by equitable mortgage, by deposit of the title deeds of certain other premises belonging to Jones in Dowry Square, in Bristol; and also by his bond for securing the payment of the said sum of 1000*l.* on the 28th February, 1814.

Jones, the purchaser, accordingly, by his agent, delivered to the plaintiffs his bond, dated the 26th March, 1813, impressed with a four pound stamp (which was applicable to it as a mortgage transaction) for securing the 1000*l.* That bond had a condition under written, reciting the whole of the transaction, particularly stating that the defendant, W. Jones, had contracted with the plaintiffs, R. M. Casberd and John Lowe, for the purchase of, &c. &c. for the price of 1000*l.*; and that upon the treaty for such purpose, it was agreed between the defendant, W. Jones, and the plaintiffs, that the said 1000*l.* should be secured to be paid to the plaintiffs on the 21st December, which should be [414] in the year 1816, with interest thereupon in the mean time, payable half-yearly, after the rate of 5*l.* per cent. per ann. to be computed from the 21st day of December, 1813, by the bond of the said defendant, W. Jones. "And by the deposit of the title deeds of a certain messuage or tenement, belonging to the defendant, W. Jones, situate in Dowry Square, in the parish of Clifton aforesaid, late in the occupation of Dr. Barry." It also recited the indentures of lease and release of the 24th and 25th March, 1813, and that the 1000*l.* although expressed in the indenture of appointment and release, to be paid by the said defendant, W. Jones, was not paid, and that the title deeds to the house in Dowry Square, had been delivered by the said W. Jones to the plaintiffs by way of deposit for securing the said 1000*l.* and interest.

The condition of the bond was expressed to be for payment of the money according to the terms detailed in the recital. On the 28th February, 1814, the bond and the title deeds were delivered to the plaintiffs' attorney by Jones, accompanied by a schedule, which was indorsed with a memorandum of their having been delivered for better securing the said 1000*l.* and interest.

On the 21st December, 1814, a year's interest on the sum of 1000*l.* became due to the plaintiffs, but it was not paid. Jones (the Crown debtor) had, in the mean time, become and was declared bankrupt, and an extent for the amount of certain [415] arrears of taxes collected by him in the parish of Clifton, of which Jones then was and had for several years been collector, issued against him on the 21st May, 1814. Under that extent the sheriff had seized the houses and premises which had been purchased by Jones of the plaintiffs in the year 1812, under the different agreements, and also the houses which were the subject-matter of the title deeds so deposited by Jones, and which he had purchased in 1811, subject to a term of one thousand years, which term had been assigned to and become vested in Richard Brickdale Ward, (one

of the defendants) to attend the inheritance, and for that reason he was made party to this suit.

The bill then charged, that at the time when the plaintiffs so agreed to sell the close to the defendant Jones (7th April, 1813), and at the time when the plaintiffs so received such bond and deeds by way of mortgage and further security, Jones was not a debtor to his Majesty of record or otherwise, so as to affect the right or title of the plaintiffs under the deposit, by subjecting the lands to the claims of the Crown notwithstanding the lien which had been created on their behalf by virtue of that transaction.

After Jones had so made the deposit of the deeds, he continued in the possession and receipt of the rents and profits of the premises from that time till the 21st May, 1814, when the extent issued against him in aid of the parish of Clifton, on the ground of being indebted to his Majesty in a sum [416] of money arising from taxes, rates, and duties, collected by him from the inhabitants of the parish, and not paid over to the receiver-general. That extent was founded upon an inquisition, taken upon the 20th of May, (the day before) by which the jury found that Jones, on the day of issuing the writ, and then was (subject to certain contracts therein stated) seised in his demesne as of fee of the Higher Honey Pen Hill, &c. and inter alia of the house and premises in Dowry Square. The inquisition also found that the several deeds, evidences, and writings relating to the title to the said plot of ground, messuages, and tenements (in Dowry Square) had been delivered by the said W. Jones to Robert Casberd, Esq. and John Lowe (the plaintiffs) by way of deposit for securing the sum of 1000*l.* and interest, being the consideration money agreed to be given by the said W. Jones to the said Robert Casberd and John Lowe, for the purchase of the said two undivided third-parts of the said close, called Lower Honey Pen Hill, therein before mentioned, but which was not paid at the time when the conveyance thereof was executed. It finally stated, that the sheriff had seized and taken all those premises into his hands for the use of his Majesty.

On the 16th of July, 1814, upon the motion of the Attorney-General, this Court, in pursuance of the act of 25 Geo. III. c. 35, ordered, that all the estate, right, title, interest, and equity of redemption, late of the said William Jones, of and in the [417] extended premises, should be forthwith sold before the Deputy Remembrancer. Under that order the Deputy Remembrancer had contracted to sell the fee-simple of the premises in question to Danvers Ward, the first-named defendant; but he having afterwards learned that the plaintiffs were equitable mortgagees, unless refused to complete his purchase, they would join in the conveyance, and would deliver up the title deeds in their custody to him. That requisition not being complied with, the purchaser had obtained an order nisi of the Court of Exchequer, discharging him from his purchase.

Under these circumstances the bill prayed, "That the plaintiffs might be declared to be entitled under and by virtue of the bond, and the declaration contained therein, and the deposit of the title deeds accompanying the same, to be and to be considered as equitable mortgagees of the houses and premises in Dowry Square, for securing to them the payment of 1000*l.* and the interest due thereon, in preference and priority to the right of the Crown, or of his Majesty's Attorney-General, under and by virtue of the extent, or of the proceedings grounded thereon; that the defendant, Richard Brickdale Ward, might be declared a trustee of the term of a thousand years in the same hereditaments, for the benefit of the plaintiffs, the better to secure the mortgage money and interest, and that the benefit of the mortgage might be secured to them accordingly; that an account might be taken of the principal and in-[418]-terest due thereon; and that the amount might be paid to them out of the proceeds of the sale, in preference to the debt claimed by his Majesty's Attorney-General under the extent;" (they on their parts offering, on such terms, to deliver up the title deeds, &c. and to concur in the sale).

The answer (of Jones) admitted, generally, the material facts charged by the bill.

Jervis and Roupell, for the plaintiffs, having stated in detail the circumstances of the case, and called the attention of the Court particularly to the several dates of the various transactions, contended that the Crown was bound in equity by what had taken place between the parties, and could not insist on holding the lands in question against the equitable right of the plaintiffs, or appropriate the proceeds of that sale without first satisfying the plaintiffs' lien.

They submitted that it clearly appeared that the defendant Jones had deposited his title deeds with the plaintiffs three months before (as they contended) the extent could have issued against him, inasmuch as he was not till then a debtor of the Crown of a description which could authorize the Crown process. They admitted that he was a depositary of money belonging to the Crown, by virtue of his office of collector; but they insisted that that situation did not subject his real property to responsibility for his debts to Government in preference to the claims of the [419] subject, founded on existing charges and incumbrances, which should be prior in point of time. On that position they rested the basis of their argument, that the actual deposit of these title deeds with the plaintiffs, as a security for money, was a valid equitable mortgage, which was the name that this mode of security by the deposit of deeds by way of pledge, affecting the lands to which they belonged, had now acquired, and by which it was recognized and acknowledged in the Courts of Equity, and that it was now considered in Equity to be (where *bonâ fide*) such a charge on the lands of the depositor, as gave the person with whom they were deposited so effectual a lien on them, as to be available even against the Crown in the case of simple contract debtors; and that it could not be defeated even by the pre-eminent nature of the prerogative process.

They laid very much stress on the commercial policy of allowing real property to be rendered so promptly subservient to men's immediate necessities: observing, that it was of the highest importance in a mercantile country, that this question, regarding a species of security for money, so ready of application, and convenient to resort to in emergency as this mode was, should be decided in favor of the plaintiffs, thereby establishing permanently its legality and efficacy.

They then proceeded to trace from its origin, the history of that branch of the law which gives, in some instances, to the Crown a preference in [420] recovering its debts for the benefit of the public. For that purpose they brought under the consideration of the Court the several statutes, and all the decided cases in any way bearing on this particular question: and they minutely investigated and commented on the character, situation, and liabilities of persons connected with the Crown, in quality of accountant or debtor, and the prerogative course of proceeding in the case of such debtors or accountants making default (referring to Maddox's History of the Exchequer, chap. 23, sec. 22) with a view to shew that both from the nature and purpose of the prerogative or common law right of the Crown, and from the legislative recognition and extension of it, that no right had ever existed in fact on the part of the Crown to seize the lands of its simple-contract debtor.

In support of the proposition (founded on that view of the law, and which they much relied on) that no extent could have issued at common law against the lands of a mere debtor of the Crown, who was not a debtor of record, they took a general review of the different statutes by which the common law right of the Crown to seize its debtor's lands, had been progressively enlarged, regulated, and matured, from the 9 Hen. III. c. 8, down to the present time, as affording a parliamentary exposition of what had been always understood to be the nature of this inherent prerogative of the Crown, its extents, and its limits. From that first statute, they submitted, it appeared that the writ of *levari facias* could not then be [421] sued out against the debtor's lands, before the debt became of record. Afterwards, however, by the 33 Hen. VIII. c. 39, bonds due to the Crown were put on a footing with debts of record, Gilb. Excheq. 165, 6, 7 (ed. 1758) — but that statute (they observed) was expressly limited to debts upon judgment, recognizance, or other specialty, which were not before considered equivalent to debts of record in that respect.

In this stage of the argument they cited the important case of *The King v. Smith* (Wightw. Rep. 31), as having anticipated much of what could be urged in support of the present plaintiffs' case, where the then Lord Chief Baron (McDonald) in an elaborate judgment, bringing together in one view all the authorities on the question, after having commented on and elucidated them with great perspicuity and ability, declares it distinctly to be the opinion of the Court that simple contract debts, due to the Crown, do not bind the debtor's lands in the hands of a purchaser, without notice, in the absence of fraud or covin: and they urged that so solemn a decision had most effectually overthrown and silenced the dictum of the Attorney General, to be found in the case of *Mines*, in Plowden*, on which they anticipated that the [422] Crown

* 321. "That if any one is accountant to the king, or if any money or goods, or

would principally rely in the absence of other or better authority : and they submitted that the situation of Jones in the present case, as to his debt to the Crown, was, in all legal respects, precisely similar to that of Lofft, in the case of *The King v. Smith*.

They then remarked, that by the statute of the 13 Eliz. c. 4, s. 1 *, (which, in the case cited, is [423] described by the Lord Chief Baron as a single code, concentrating the existing law on the subject, with some additions and amendments), a great number of official persons to whom public money may be, from time to time, imprested, and receivers and collectors are specially enumerated as intended to be placed by that statute in the situation of debtors to the Crown, by writing obligatory, having the effect of statute staple—and that a complete judicial exposition of that statute is furnished by the judgment of the Lord Chief Baron, in the case of *The King v. Smith*, where an obvious distinction is taken between persons originally liable to the Crown process at common law, and such as come within the description of persons enumerated in the act of Parliament of the 13 Eliz.

They submitted that a preliminary question arose in the present case, as it regards Jones, which was, (as in the case of *The King v. Smith*, as it regarded Lofft) whether Jones was or was not such a public officer or collector as would be within the description of any of the persons so [424] particularly mentioned in the 13th of Elizabeth—that so parallel were the two cases, as that all which was observed by the Lord Chief Baron respecting Lofft, in the case cited, would be precisely applicable to Jones in the present : from all which, they observed, it must be taken, that Jones here was precisely what Colonel Lofft was there, a person not specially indebted to the Crown, nor a receiver of public money, within the statute of Eliz. (and of course, therefore, not within the previous statutes), and consequently that like the proceeding in that case, the present extent against Jones, as affecting the lands in question, must also be

chattels personal of the king, come to the hands of any subject by matter of record, or by matter in fait, the land of such subject is charged therewith, and liable to the seizure of the King, into whatsoever hands it comes afterwards, be it by descent or purchase, or otherwise."

* It is thereby enacted, "That all lands, tenements, profits, commodities, and hereditaments, which any treasurer or receiver in or belonging to any of the Queen's Majesty's courts of the exchequer, wards, and liveries, or duchy of Lancaster, treasurer of the chamber, cofferer of the household to the Queen's Majesty, her heirs or successors, treasurer for the wars, treasurer of any fort, town, or castle, where any garrison is or shall be kept, treasurer of the admiralty or navy, treasurer, undertreasurer, or other person, accountable to the Queen's Majesty, her heirs or successors, for any office or charge of or within the mint, treasurer, or receiver of any sums of money imprest, or otherwise, for the use of the Queen's Majesty, her heirs or successors, or for provisions of victual, or for fortifications, buildings, or works, or for any other provisions to be used in any of the offices of the Queen's Majesty's ordnance and artillery, armory, wardrobe, tents, and pavilions, or revels, customer, collector, farmer of customs, subsidies, imposts, or other duties, within any port of the realm, collector of the tenths of the clergy, collector of any subsidy or fifteen, receiver-general of the revenues of any county or counties, answerable in the receipt of the exchequer, or in the court of wards and liveries, or the duchy of Lancaster, clerk of the hanaper, now hath, or at any time hereafter shall have, within the time whilst he or they, or any of them shall remain accountable : shall, for the payment and satisfaction unto the Queen's Majesty, her heirs and successors, of his or their arrearage, at any time hereafter to be lawfully, according to the laws of this realm, adjudged and determined upon his or their account (all his due and reasonable petitions being allowed) be liable to the payment thereof, and be put and had in execution, for the payment of such arrearages or debts to be so adjudged and determined upon any such treasurer, receiver, teller, customer, collector, farmer, officer, or accountant, as is before named, in like and in as large and beneficial manner to all intents and purposes, as if the same treasurer, receiver, teller, customer, farmer, or collector, upon whom any such arrearages, or debts shall be so adjudged or determined, had the day he became first officer or accountant stood bound by writing obligatory, having the effect of a statute of the staple, to her Majesty, her heirs or successors, for the true answering and payment of the same arrearages or debts."

founded, if it could be supported at all on the part of the Crown, not on any statute, but on the common law.

Anticipating, that under the words "treasurer or receiver of any sum of money imprest, or otherwise, for the use of the Queen's Majesty," which certainly (they admitted) seem at first sight to be most comprehensive words, it would probably be contended in this case, as it was in *The King v. Smith*, that Jones was a receiver of money imprest or otherwise, for the use of the King; they insisted that the answer to that had been already furnished by the Lord Chief Baron in the same case, his Lordship observing, that "receiver" and "collector," as used in that act of Parliament, does not mean any person who gets the King's money into his hands*; general as the

* An exposition of the true meaning of the technical term "imprest," as understood and employed in the several government offices in the course of their duty, may serve to remove or considerably lessen what appears by the report of the case of *The King v. Smith*, to have been the principal difficulty which the Lord Chief Baron (McDonald), considered, that the Court had to surmount in determining that case as they have done—the apparent universality of the general words "receiver of any sums of money by imprest, or otherwise, for the use of the Queen's Majesty."

It is to be inferred from the judgment that the words "or otherwise," as applied relatively to the antecedent "receiver," had been contended in argument (a) to be sufficiently comprehensive to include every receiver of any money belonging to the Crown, on any account or by any means whatsoever, and probably that the words "for the use of the Queen's Majesty," were equivalent to "in trust for the Queen." If the official import of the term "imprest," however, be taken into consideration, those words will not appear to be so comprehensive in effect as they must have been contended to be in purport.

The term "imprest" is the operative word which is used in the treasury warrants, and other government authorities, for the issue of public money; and it is only known in the public offices, as applied to money issued by and out of the treasury to some one of them, in charge to pay it over to particular persons for certain purposes: or it is sometimes, though not frequently, issued immediately and directly to the individual authorized by the warrant to receive it, in consideration of the performance of some specific duty in the public service; and such money is said to be imprest when issued direct from out of the revenue, whether it be in the usual course to the office of the particular department, whose duty it is to transact the business, in respect of which the expenditure is incurred, or whether it be imprested, or rather, perhaps, more properly speaking, issued by way of imprest, to private individuals, to meet the charges attending the execution of some proposed public service to be performed, or superintended by them. The amount of money, stores, &c., so imprested, is, de facto, to be accounted for by the person to whose hands such money or stores are entrusted in charge, and such a person becomes thereupon instantly an accountant of the Crown. As an example, the defendant, in the case of *The Attorney-General v. Lindgren*, reported in a former part of the present volume of these Reports, is an instance which may serve to make the situation of such a person, as so connected with the government, fully understood (p. 287). He was an individual to whose account public money had been imprested—an immediate receiver of the public property—a receiver of money issued by way of imprest (to himself:) now had he not been a receiver by way of imprest, he would then have been, in the language and letter of the act, a "receiver of money otherwise for the use of" the King.

It is also observable, that it may happen that some of the numerous descriptions of persons and officers coming within that general head in the statute of Elizabeth, may not be publicly known to be of the number of such persons. Thus whilst, on the one hand, a mere parish collector of assessed taxes, although a character of notoriety, is not a receiver by imprest, or otherwise, for the use of the Crown—as it cannot be said that the money received by him at any time from the tax payers is, in his hands, money either imprested to him, or received by him, for the use (in its

(a) It is to be regretted that the learned Editor has not given the substance of the argument in this case, more particularly as it was argued twice, by the present Lord Chief Justice, and Serjeant Williams for the Crown, and by Dampier and Dauncey for the defendant.

words may ap-[425]-pear to be : but that they must be construed with reference to the whole tenor of the statute, and [426] that they are limited and controlled by the

proper sense, as will be presently noticed) of the Crown—yet, on the other hand, an individual not ostensibly known to be such, might be within the statute a receiver of the King's money by imprest, or at least an accountant, as having received it otherwise for the use of the Crown : and therefore it should seem that the lands of such a person would be bound, although he were not generally known to the public to be an accountant of the Crown ; or, in the words of Lord Chief Baron M'Donald, a public officer, or public collector, which his Lordship observes, (p. 46), all the persons referred to in the act are, but with great deference, regard being had to the meaning of the term "imprest" : the duty to account, and the liability of the accountant, does not so much depend on the publicity of the employment or office, as the nature of the charge, and the issue of the means.

To illustrate the observation with which this note commences, it may be worth suggesting that the words (receiver) "for the use of the Queen's Majesty," do not substantially carry it much further, for it is observable that the words are for (not to) the use of ; and therefore with reference to the nature of imprest money, which is invariably furnished, as before shewn, for some special occasion on which it is to be expended, the word use must be understood as meaning service. The distinction would then be, that those words in the act are not generally applicable to any receiver of the King's money to the use of (or in trust for) his Majesty, and who would have to pay it over entire, without furnishing any account ; but merely to persons receiving money from the king for the service of the king, and to be expended on that service, which at once renders him, on the receipt of it, instanter accountable (in the proper sense of the word) to the Crown for the money received, to be set-off against the expenditure incurred. Thus, in the case of *The King v. Smith*, the money was imprested to the paymasters-general of the forces (not to Lofft) by the treasury warrant for army services, and by them paid through the agents of Lofft, as the colonel of the levy, to the regiment, and he (Lofft) is to account for it at the war-office :—and in point of fact the money paid to General Lofft, on the occasion of his levy, was ordered to be issued to his agents by the ordinary document, a letter from the secretary at war to the paymasters. That letter merely signifies his Majesty's

* The following documents afford examples of the different tenor of the instruments, by which issues of public money are made to persons in distinct characters ; the first renders the receiver accountable to the king ; the second expressly discharges him, rendering him only accountable to the secretary at war.

"G. R.—Our will and pleasure is, that out of any money in your hands, or that may be imprested to you for this service, you do issue and pay unto our trusty and well beloved A. B. Esq. agent for commissariat supplies, or to his assigns, the sum of 100,000*l.* without deduction by way of imprest, and upon account to defray the expences of his department, and for so doing, this, with the acquittance of the said A. B. or his assigns, shall be your warrant and discharge."

To the Paymasters-general, &c. &c.

His Majesty's land forces at home and abroad, excepting Ireland.

Warrant.

To the Right Honorable the Paymaster-general of
his Majesty's land forces for the time being.

"You are hereby authorized and directed, out of such monies as are in or shall come to your hands, applicable to army services, to issue to the colonel or commandant of the regiment of , or to his assigns, the sum of *l.* for the ordinary services of the said corps for the year , the same to be issued without deduction, and without other account than such as is liable to be rendered under the authority and direction of the secretary at war."—Given at the War office, &c."

(At the foot of the warrant is a common receipt in these words :)

"Received the day of , of the right honorable the paymaster-general, the above sum."

other [427] very particular descriptions of the persons enumerated there, in respect of whom that act is expressly declared to have been passed.

[429] They then drew the attention of the Court to [430] the 14 Eliz. c. 7*, which had extended the provisions of the 13th, to sub-collectors of the tenths and subsidies of the clergy; and that they used to shew that the former statute had not been considered by the legislature as being so general and comprehensive in its object as it had been contended to be at the bar, and as (they insisted) it had been judicially held not to be the case before cited of *The King v. Smith*; in short, that the former act had not included all receivers of the King's money, or persons who might get the King's money into their hands by any means whatsoever.

They proceeded, in the next stage of the argument, to shew that the Crown's right to seize its debtor's lands, as at present constituted, was wholly created by the

pleasure that the paymasters-general, out of the monies advanced to them on account of the recruiting service, issue to the agents of Major Lofft, who had undertaken to raise a corps of foot, the sum of

l. for which the paymaster-general shall be furnished with the proper vouchers. The sum so issued by them (by draft on the bank) is afterwards ordered to be paid to them by a treasury warrant, called a covering warrant.

There is to be found in Madox's Hist. of the Excheq. vol. i. chap. x. s. xiii. p. 387, (a book of authority in matters of this nature) a definition of the issue of public money, by way of prest or imprest, by which these observations are supported, marking distinctly and clearly both the difference, and the analogy (as far as it holds) between persons to whom public money is properly said to be imprested, and those who have otherwise received the King's money for the use (service) of the Crown.

"Moreover (says the author of that book) sometimes the King's money was issued, by way of prest or imprest de prestitio, either out of the receipt of Exchequer, the wardrobe, or some other of the King's treasuries. Imprest seems to have been of the nature of a concredittum or accomodatium. And when a man had money imprested to him, he immediately became accountable to the Crown for the same." He then gives the following instances.

"In the 5th Stephen, an account was rendered, at the Exchequer, of certain monies imprested to the accountant, when the Empress came into England" (a).

"In the 2d Richard I. William Puintell, Constable of the Tower of London, accounted for monies which he had received out of the King's treasury, for certain works to be done at the Towers" (b).

Several other instances are adduced to the same effect, concluding with the following. In the 18th year of the same King (Edward I.) Richard Foïun accounted for several sums of the King's money, which he had received of Henry De Bray Escheatour, for the expences of the King's horses.

It may be added, that as it thus appears that persons to whom the King's money was imprested, or who had otherwise received it for the use (service) of the King, were both ipso facto rendered accountants of the Crown at the common law, it is probable that the Legislature might have intended that they should both be brought within the description of persons whom the statute was passed to affect, by rendering their lands subject to seizure: and that the persons to whom public money has not been, strictly speaking, imprested, but who have otherwise received it for the public service, may be the persons meant by those latter words in the act of parliament.

* That act, professing in the recital to be necessary for avoiding and redress of great deceits done to the Queen's Majesty, and to the prelates, &c. by under-collectors of tenths, &c. appointed by and under the archbishops, &c. enacts, That the 13 Eliz. shall extend to all such under-collectors, &c. and to their lands, &c. in like form as it doth to the tellers, receivers, and other persons accountant, whom the said act specially and expressly concerneth, in as ample wise as if such under-collector were immediately accountant to the Queen's Majesty.

(a) De prestitit regis, quas rex ei prestitit, quando Imperatrix venit in Angliam. Mag. Rot. 5 Stephen, Rot. 16. a.

(b) Willelmus Puintellus Constabularius Turris Londonie, r e de M & CC & xvj l. & xij s. & iij. d. quos recepit de Thesuro ad operationes Turris Londonie: and for divers other sums. Mag. Rot. 2. R. 1, Rot. 1 a.

legislature, and must therefore stand upon the true construction of the several statutes, observing, that further facilities had been thought fit to be extended to the Crown by successive acts of Parliament for the recovery of its debts, enlarging the power of resorting to its debtor's lands; and having referred again to the 13th Eliz. c. 4, 27th, c. 3, 39th, c. 7, 43d, c. 9, and the first James, c. 25, s. 31, [431] they particularly dwelt upon the 25 Geo. III. c. 35, as having made a most important alteration on behalf of the Crown, in the perfection of its previous remedies and powers, by authorizing a sale of the accountant's lands, on a summary application to the Court for an order for that purpose; although that act (they submitted) had not extended the previously existing statutory rights of the Crown as against its debtor, but merely gave readier effect and practicability to such as had been before given; neither had either of them augmented the number of persons liable under the 13th and 14th of Eliz. and they observed, that since the 25 Geo. III. there had been no other statute on the subject.

Then, anticipating the main objection on which the present question, as it regarded the Crown, depended—that the deposit of the title deeds by Jones in the hands of the plaintiffs had not, even if they should be held to create an equitable right against Jones, given them a lien on the lands to which they related against the Crown—they submitted that the decision of this Court on that point, must depend on the construction which the Court should put on the act of the 25 Geo. III. That act, they repeated, had merely given the Crown a power to apply summarily for an order to sell its debtor's lands, which could only be rightfully seized under the provisions of the 13 Eliz.; and they contended that all that the Crown was entitled to sell under the 25 Geo. III. was expressly the right, title, estate, and interest of the debtor therein; and accordingly [432] the order of the Court for the sale of Jones's freehold property, under the extent, they observed, had, in point of fact, pursued in its language the words of the statute, directing expressly the sale of all his "right, title, estate, interest, and equity of redemption" therein, adopting the very distinction now taken between the land itself, and the quantity of interest of the person entitled to it.

They admitted that that statute, in directing the mode of conveyance, uses words certainly which might give rise to some little argument, because it directs that the conveyance of the lands, &c. so to be sold by the Deputy Remembrancer, shall be made by a deed enrolled, and that thereupon the bargainee shall hold the lands, &c. (the right, title, estate, and interest of the debtor therein, only having been before directed to be sold) for his own use and benefit, not only against the extent of the Crown, but also against such debtor of the Crown, or the surety or sureties, unless by a title paramount to and available in law, against such extent. But they submitted that those latter words should be so construed as to give effect to the object of the statute, and that they could not be limited to the precise letter, so as to let in merely rights strictly legal, in exclusion of equitable claims—that great injustice would be done by such a construction so limiting the operation and object of the act; whereas it might be easily obviated, by giving to the statute throughout a construction consistent with itself, in its various parts, and consistent with its general policy, the obvious and rational meaning of the Legislature, and with justice.

They then adverted to the decision of this Court in the case of *Broughton v. Davis and the Attorney General* (a), as furnishing *prima facie* an authority in favor of the defendants, and to the manuscript cases appended to the printed report of that decision, by way of note, (but now about to be more fully brought before the Court), observing, that they would be cited on the other side, as determinations conclusive against the plaintiffs. The principal case, they contended, had no sort of application to the present, because that was decided on the express ground of clear fraud; whereas this case, on the part of the plaintiffs, was not tainted even by suspicion. With respect to the short notes of the manuscript cases, they observed, that they had, to serve the present argument, procured very full statements of all the proceedings which had taken place in both those cases (b), and of the result of each, from which it would appear, although,

(a) Ante, vol. i. p. 216.

(b) *The King v. Snow*, and *The King v. Benson*.

The Lord Chief Baron having stated those cases at length, in delivering judgment, pages 465-467, and declared that they did not, in his view of the case, favor

from their still very incomplete state, they afforded but unsatisfactory conclusions, that, as far as they could be applied in the decision of the present case, so [434] far from determining the point now before the Court in favor of the Crown, the imperfect doctrine deducible from them would add strength to the plaintiff's case, and, as far as it went, would support the arguments submitted on their behalf.

Anticipating that it might perhaps be contended, on the part of the Crown, that the deposit in this case was not such as would be sufficient to create an equitable lien, they adverted again to the circumstances of the transaction, as applicable to that question, (and marking emphatically the fact of the bond being impressed with a mortgage stamp), they submitted, that the facts on which the question now under discussion was founded, brought this case, on the one hand, precisely within the authority of *Russel v. Russel* (a), and on the other, com-[435]pletely distinguished it from that of *Norris v. Wilkinson* (12 Ves. 192); which they supposed would be cited on the part of the defendants, as shaking the authority of *Russel v. Russel*, and impugning the doctrine of the validity of such liens—because there was not only, in the case of *Norris v. Wilkinson*, no proof of the deeds having been delivered as a pledge, but there was, on the contrary, positive evidence of their having been merely handed over, and for a very different purpose; whereas here, on the other hand, every thing which could concur to give positive indication of an intention to deposit strictly by way of lien, and for the security of money, is manifested both by the conduct of the parties, and the express purpose of it being declared in the recital of the bond, with a view to obviate all doubt of that intention. That purpose, according to the [436] language of the Master of the Rolls, in the case of *Norris v. Wilkinson*, it is, which alone can be conclusive: “such acts (observes his Honor) do appear so unerringly to speak its purpose, as to dispense with extrinsic testimony.” Here are moreover written declarations of that purpose expressed, both in the indorsement on the envelope of the deeds, and in the condition of the bond which has been given, and which has even been impressed with a mortgage stamp, according to that intention, and the fact of its being altogether a mortgage transaction.

As far as the Crown was really, in point of fact, interested in the result of this proceeding, they suggested, that the security of the parish being sufficiently ample to protect the Revenue from actual loss in any event, there could therefore be no reason in this case for depriving the plaintiffs of the effect of their pledge, on the ground of postponing the right of the individual to the general rights and interests of the public.

the arguments of the Counsel for the Crown on this question, they are not further noticed here.

(a) (1 Bro. Ch. Ca. 269). The following cases, decided in the Court of Chancery, have all recognized and confirmed the doctrine in *Russel v. Russel*, although, in many of them, that decision has been much regretted.

In *Ex parte Wetherell* (11 Ves. 401), the Lord Chancellor held the mere possession of title-deeds, if no other purport be shewn, to be evidence of an agreement that the estate itself shall be a security for money advanced by the holder, throwing the onus of proof on the party to whom the deeds belong. In *Ex parte Haigh* (ibid. 403 $\frac{1}{2}$), his Lordship, much lamenting the determination of Lord Thurlow, in *Russel v. Russel*, held, nevertheless, that the Court were bound by it.

In *Kensington (Ex parte)**, the latest reported case on the subject, the Lord Chancellor, giving judgment, is represented as saying, “It has been so long settled, that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, that whatever I might have thought originally, I must act upon that as settled law.” His Lordship immediately adds, “I have often expressed my surprise, how it came to be so settled, as judicial decisions are to be found, that a lien upon deeds may exist without giving a right at law to the estate.”

‡ In a note to that case (*Ex parte Haigh*), the Chancellor is reported to have refused (in a matter which came before him about the same time) to consider a deposit of deeds as a mortgage; but the circumstances attending that deposit are not stated. Et vide *Ex parte Combe*, 17 Ves. 369.

* 2 Ves. & Bea. 83. See also *Edge v. Wothlington*, 1 Cox, C. C. 213, and *Ex parte Buller*, 2 ibid. 243. *Ex parte Comins*, 9 Ves. 115. *Horn v. Mill*, 13 ibid. 114. *Ex parte Mountford*, 14 ibid. 606, and *Ex parte Langston*, 17 Ves. 227.

They concluded by citing the cases of *The King v. Allanson* (Parker's Rep. 260), and *The Attorney General v. White* (Com. Rep. 438), as authorities establishing the ground of distinction, on which the plaintiffs' arguments had mainly proceeded, between the case of debtors to the Crown by simple contract, and that of debtors of record. In the first of those cases, judgment was given for the King expressly on [437] the principle of the debt having become, by the inquisition, a debt upon record, which implies notice: therefore the administrator was held bound to pay the Crown's debt (being of record) before the bond debts of the subject creditors. But there the Court also held, that if the bonds had been paid before the inquisition, or before the administrator had actual notice of the debt to the King, such payment would have been good against the King, because, until the debt was upon record, the administrator had no means of discovering that a debt was due to the King. And in the other case, it was also held, that debts due to the King, which are not of record, seem not necessary to be satisfied before debts due to other persons.

The Solicitor General and Dauncey, for the Crown, insisted, first, that Jones, as a person into whose hands money of the King had come, was within the terms of Gerard's proposition, in the case of *Mines*, in Plowden; and was liable to seizure of his lands, for the satisfaction of the Crown, to the amount of such money. Secondly, that as the duly constituted collector of assessed taxes for the division of Clifton, he was, in fact and in law, such an acknowledged, known, ostensible, and public officer of the Crown, (if not at common law, at least within the statute of Elizabeth), as that his lands and general property were liable for defalcation in his public accounts: and that that liability extended over the whole period during which he should be a debtor of the Crown: [438] although his debt should not be, during any part of that period, converted into a debt of record. On that point, they took in limine what they submitted to be an essential distinction between the case of *The King v. Smith* and the present, in the difference of the character and situation of the Crown debtor in each case. In the former, they contended that Loft was a mere private individual, whose connexion with the Crown was probably not generally, and certainly not necessarily known: for he was clearly not that authorized public and notorious officer and debtor of the Crown which Jones in the present case obviously was. Therefore, they contended, that, admitting the authority of *The King v. Smith* to its full extent, it could have no application to the question in the present case. They then insisted, that if Jones's real estate should be held not to be liable at common law, as one whose lands were liable, in consequence of his being entrusted with public money constantly in his hands, he was still clearly within the policy and purview, and even the letter, of the statute of the 13th of Elizabeth, as a public and ostensible receiver of the money of the King, and at all times accountable to the Crown, being every instant in possession of some portion of the public money. He was collector of the King's revenue; and as such, it was more important, in the eye of the law, that all his property, which constituted his responsibility, thereby inducing and justifying his appointment, should be liable to answer for his deficiencies, than that any sup-[439]posed hardship to an individual should be obviated at the expence of the public inconvenience, by allowing the private claim of that individual to be preferred to the common good, which ought on all occasions to be upheld in the person and name of the Crown.

They went very particularly into the terms of the statute of Elizabeth, to shew that Jones was, in character and situation, within its object and meaning: and that, consistently with the judgment of this Court, in the case of *The King v. Smith*.

As to the subsequent statute of the 14th Eliz. they observed, that that had merely added to the persons described in the 13th, a class who were not immediately accountable to the Crown, and expressly for that reason: whereas Jones was immediately indebted to the King, and at all times accountable to the Crown for the public money constantly in his hands. It could only be on that ground, that this extent in chief had been issued against him, to which proceeding he would not otherwise have been liable. Jones, therefore, being a public collector and receiver of the public money for the use of the Crown, they insisted, that he was within the express words of the statute of the 13th Eliz. and without the protection of the doctrine laid down in the case of *The King v. Smith*. They cited on that point, the case of *Brassey v. Dawson* (2 Strange, 978), as establishing, that a col-[440]-lector of the land-tax was so far an accountable servant of the Crown, as that a seizure of his goods by the Commissioners was held sufficient to defeat an action of trover brought by the assignees of a bankrupt, where,

in a case between subject and subject, it would not have been so. They urged, also, that the situation and appointment of a collector of taxes was of such a public nature as to be of general notoriety; and that, therefore, the plea of ignorance of Jones's official situation could not be set up; and that if the plaintiffs had not known it, as they must have done from their local connexion with the place for which he had been appointed; they might have ascertained it, since the 43 Geo. III. c. 99, s. 46, had, by its provision in that respect, furnished the public with the means of obtaining such knowledge, by search at the King's Remembrancer's office, and therefore they must be presumed to have been aware of the fact.

As to the terms of the order for the sale, they observed, that no argument could be founded on its language, as applying to this particular property, because it related to all the property of which Jones was found, by the inquisition, to have been possessed, which included the equity of redemption in other premises, which were in fact under actual mortgages at the time.

Secondly, admitting, *argumenti gratiâ*, that Jones was not a debtor of the Crown, within the 13th Eliz., they denied, that the deposit of the [441] title-deeds in the present instance amounted to what was called an equitable mortgage, or gave the depositary any lien on the lands to which they related; for they objected that it had not been perfected by any accompanying agreement to execute at a future time a legal mortgage, or any written declaration of the purpose for which the deeds had been so deposited, being by way of mortgage, and that it had not been followed up by any subsequent instrument in any way affecting the property in the nature of a mortgage, or by any demand to execute a further security; and they insisted, that to become available, that deposit ought to have been so perfected, or attempted to be perfected; and that without it, the deposit only affected the deeds themselves, and not the land to which they related.

They urged, therefore, that the main subject-matter of the security given by Jones, and accepted by the plaintiffs, was the bond of Jones, and that it never could have been intended that so high a security as a mortgage, was to have been merely ancillary to that bond*,—and that the deeds themselves were obviously given *quâ* deeds, and merely as a further security as far as the right to detain them might operate, *ab inconvenienti* upon Jones, as a security for com-[442]-pelling the payment of the money, by withholding them. Such a deposit, they insisted, could not have been construed into an equitable mortgage even in the case of a subject; and they pressed on the consideration of the Court, that in the condition of the bond which had been adverted to, and so much relied on, there was no stipulation or engagement on the part of Jones to perfect a mortgage or to execute any charge upon the land: nor was there any declaration that it was the intention, on the part of Jones, that the depositing the deeds was preparatory to any ulterior object of incumbering the premises to which they related.

They then submitted, that the plaintiffs' bill was not so framed as to embrace the object of compelling the Crown to execute a mortgage; and that they insisted, was all the right which an equitable mortgage, of the most efficient nature, could give to the plaintiffs, even if this deposit could be considered, by construction, to be an equitable mortgage; for the plaintiffs had prayed to be paid 1000*l.* out of the money to arise by the sale of the estate, (as if he were entitled to avail himself of the effect of prerogative process against the Crown) and which, they contended, was a prayer that the circumstances, as disclosed by the bill itself, did not warrant, and which could not be enforced, that not being the ordinary end and object of such a transaction, which, at the utmost, could only be considered as the ground work of a [443] future legal mortgage, and not in any sense in itself, a complete security for money due.

They also pressed upon the Court, that the extent to which the doctrine of the validity and effect of equitable mortgages had been carried in Courts of Equity, had, at length, become matter of great complaint, as it had materially affected the more simple and intelligible practice of legal mortgage by common assurance, and had furnished great scope for fraud and collusion.

* The condition of the bond (which was for 2000*l.*) recited the contract, that 1000*l.* was to be secured to be paid by a certain day thereby, "and by the deposit of the title deeds"—and that the deeds had been delivered by way of deposit for securing the said 1000*l.*, and it provided that when paid, the bond should be void.

On the point of the imperfect state of the present transaction, as not creating any lien on the lands in question—they submitted that it had, in all cases where such deposits had been determined to give a lien, been held to be necessary that there should be some accompanying memorandum of the object of the deposit, declaratory of the intention of the party depositing his title-deeds, to follow up that act, by executing a future perfect mortgage, and that otherwise it would be within the statute of Frauds: whereas here, on the contrary, they insisted there had been nothing of that sort done, or was even now required to be done; but in all that had passed between the parties in the nature of declaring their mutual object, the intention to mortgage this property was rather negatived than supported; for the bond was obviously the perfection and completion of the agreement, as far as the security of the consideration money [444] had been the contemplated after the making of the contract, and the deposit of the title deeds was merely a secondary object, *quantum valeat*.

On that point, they observed, that the decision in *Russel v. Russel* (1 Bro. C. C. p. 269), had been constantly disapproved whenever it had been brought under the consideration of the Court on subsequent questions in which it had been cited, and particularly in the case of *Norris v. Wilkinson* (12 Ves. p. 192), where much disapprobation of it had been expressed by the Master of the Rolls, who reprobated the practice of proceeding on parol testimony in such cases, as an encroachment on the wholesome provisions of the statute of Frauds. In all the subsequent cases (a)¹ too, which had been grounded on the authority of Lord Thurlow in that decision, the determination had been lamented, and if were doubtful law, they urged, that in the case of the Crown acting on behalf of the public, it should not be suffered to defeat the prerogative process.

In another point of view, putting it as if this deposit were, in effect, an equitable mortgage in the usual acceptation of the term in the Courts of Equity, they insisted that the plaintiffs ought to have come in on a formal claim, and that they should thereupon have pleaded to the extent, and that not having done so, they ought not to [445] be permitted to embarrass the proceedings of the Crown, after having lain by for so long a period: and till the Crown had proceeded thus far, by coming forward to press their supposed claim in this extraordinary and irregular manner by a bill in Equity, when they had, by their own laches, suffered their rights to a legal remedy to lapse.

As to the authorities to be found on the question, they admitted there were but few; but they contended, that the determination in the case of *Broughton v. Davis* (a)², and the MSS. cases there cited, were in point, to shew that this sort of equitable lien was not available against the rights of the Crown, and that the fuller account of the manuscript cases, as furnished by the further search, had not, in any respect, varied the effect of those decisions from what it had been represented to have been on that occasion by the Counsel for the Crown: and they insisted, that in point of law, the rights of the Crown, as against a debtor of Jones's description, could not be affected by such deposits of the debtor's title-deeds: and that they were rendered unavailable as against the Crown, by the express language of the 25 Geo. III., by which the right was given to sell the debtor's lands absolutely and conclusively, it having been, by the first section of that statute (and which had been alluded to by the counsel for the plaintiffs), enacted, that the bargainee shall hold the lands, &c. against [446] all persons claiming under the Crown's debtor, excepting only claimants who had a strict legal right, cognizable in a Court of Law, the terms of the single exception being "unless by a title paramount to, and available in law against such extent as aforesaid," applying, most clearly, to fixed legal rights and absolute interests, and to those only: and therefore if this supposed equitable claim were even more solid than it is, the Crown would not be bound by such imperfect liens as these, and which it appeared by the wording of the exception, that the act had contemplated with a view to exclude them. As to the deeds themselves, on which they admitted that the plaintiffs might, perhaps, have a lien, the Crown, they observed, did not demand them or require them to be delivered up, although, they submitted, that it was matter of question whether

(a)¹ See those cases, ante, p. 434, 435.

(a)² Ante, vol. i. p. 216.

the second section of the act * (25 Geo. III.) had not given this Court the power to order the delivery of the title-deeds to a purchaser.

They then cited the case of *The King v. [447] Smith (a)*, as establishing, that the Court of Exchequer, in all cases of this nature, recognizes a distinction, where the King sues on behalf of the public by his process of extent, and a subject prosecuting his private claim. In that case (the question being, whether the defendant was protected by an outstanding term, held in trust for him, against the claim of the Crown on the vendor, as being an accountant), the Court held, as the result of all the cases (which are there brought together), that "the land is chargeable that has been in the hands of the King's debtor," and that the lands of the King's debtor may be extended by the Crown in whatever hands they may be found: and therefore they gave judgment for the Crown. They further adverted to what was said by the Lord Chief Baron (McDonald), in the early part of his judgment, as stating expressly the distinguishing principle on which he then proceeded. His Lordship observes, "the argument on behalf of Mr Smith turned almost entirely on [the construction of] the statutes of Uses in Courts of Equity; and besides, that on the doctrine laid down in *Willoughby v. Willoughby*, which has never been shaken, and which I hope never will. I take that now to be a leading decision never to be departed from in cases between subject and subject. In answer to this case made on the part of the defendant, irrefragable as between subject and subject, it was argued, that the case of [448] the Crown is essentially different from that of the subject; and, as far as we are furnished with light on this subject, it does seem clear that the case of the Crown is essentially different." They therefore submitted that the distinction between the cases of the Crown and the subject, and those of subject and subject, must be taken to be judicially recognized and sanctioned by the authority of that decision—and that it ought to have its due influence in the determination of the present question.

On the whole, therefore, they insisted that Jones, if not such a debtor accountable to the Crown as would have rendered him liable before the 13 Eliz., was a receiver of money for the use of the King within that statute—that from the time of his so becoming a debtor by receipt of the King's money, his lands were bound notwithstanding any claim originating within that period, under even a complete equitable mortgage, perfected by a memorandum of its declared object, that the deposit was made in contemplation of a mortgage intended to be executed—and that whatever right such equitable mortgage might have given the holders of the deeds as against Jones, it could not affect the possession obtained by the Crown, through the medium of the prerogative process enforced against Jones's legal estate, so as to compel the execution of a mortgage; and still less to found a decree that he should be paid the money out of the produce of the sale of the property [449] (whereby the plaintiffs sought, in effect, to render the Crown process available in their behalf against the Crown itself) in a case where such perfected mortgage should not have been previously executed to them: and they contended, therefore, that such a bill as the present could not be maintained in any case, and that this, consequently, ought to be dismissed.

The Lord Chief Baron expressed considerable doubt as to the practicability of this Court making any decree where the thing required to be done was personal on the part of the Crown, represented by the Attorney General, as was the execution of a mortgage, Courts of Equity never acting at all where they cannot give an effectual and complete decree.

18th January.—Jervis, in reply, insisted, that the defendant Jones was not, by his office, brought within the statute of Eliz.; and he distinguished the situation which Jones filled from each description of persons mentioned in the act, adverting

* And whereas from the want of the deeds and writings relative to the title of such lands, tenements, and hereditaments as the said Court of Exchequer may decree to be sold under this act, difficulties might arise in the execution hereof, Be it therefore further enacted, "That it shall be lawful for the said Court of Exchequer, from time to time to make such order touching the production, delivery, and custody of such title-deeds and writings as aforesaid, in the same manner as if a decree had been made by the said Court for the sale of the lands of a Crown debtor in execution of a trust created for payment of debts by such Crown debtor himself."

(a) Appendix to Sugden's Treat. on the Law of Vendors and Purchasers, p. 24.

again to the case of *The King v. Smith*; and contending, that the word "collector," wherever it was used in the statute, could not be considered as applying to a collector of assessed taxes,—and he submitted, that it was apparent, from the terms of the extent itself, that the Crown had not considered him as a debtor within the statute, for if they had so considered him, the extent would have directed an enquiry, not (as it does) of what lands Jones was seised on the 21st of [450] May, but at the time when he first became a debtor of the Crown.

He then contended that Jones was not, at any time, as had been asserted, a person in any way accountable to the Crown; and he guarded that phrase from being confounded, by being used in the popular sense, with a being liable to the Crown process from having public money in his hands; taking a distinction between being accountable to the King in his Exchequer, and being amenable to Crown process for money due from him as a collector of taxes, and that distinction, he submitted, was, in fact, the very foundation of the determination in the case of *Brusey v. Dawson* (2 Stra. 978).

In point of fact and of law, he urged that the persons really accountable to the Crown in this case were the Receiver-General and the division of the parish, the collector being merely a middle man between them, in whom no confidence is placed, and from whom, accordingly, no security is taken; for he is not, in fact, appointed by the Crown, lest such appointment should operate to discharge the Receiver-General from his personal responsibility, on which the Crown relies, as the person immediately accountable to the Crown.

As to the arguments founded on the notoriety and publicity of the office of collector of taxes, [451] he denied that there was any such publicity given to the situation, either by the duties which he had to perform, or by the provisions of the 43 Geo. III., and urged that by a record alone could such publicity be given to the responsible connection of subjects with the Crown, as would have the effect of concluding third persons; and on that position he reverted to the cases of *The King v. Allanson*, and *The Attorney-General v. White (a)*¹. He next proceeded to shew that the deposit of the deeds in question by Jones, under the circumstances of this case, was, in effect, that sort of transaction which has been now so often held to give the person holding them a lien on the land, and right to enforce the execution of a legal mortgage; and on that point, having again adverted to the facts of this case, he relied on the cases of *Russel v. Russel*, and the subsequent decisions founded on that authority, in many of which he reminded the Court there was not even an agreement or promise to execute a legal mortgage, which was one of the objections taken to this deposit, being an equitable mortgage; and he denied that such deposits required any such further acts, in order to their perfection, as had been contended to be necessary to give them effect, or than had been done in the course of the present transaction.

Then, on the main question in the case, whether an equitable mortgagee could insist on [452] his lien against the Crown, he urged that in the absence of direct authorities on behalf of such a right, on principle such a claim could not be controverted. To obviate the objection which had been taken on the ground of laches, the plaintiffs not having come in and claimed before, he submitted that, in the instance of a freehold seized, the rule to claim did not apply, as the ordinary venditioni exponas does not extend to freehold lands and tenements: and more particularly in the case of an equitable mortgagee, because he could have, as yet, no legal interest on which to ground a claim against the Crown. He then alluded to the practice in cases of mortgaged property, which, he submitted, was that the estate should be sold, subject to the mortgage, citing *The King v. Coombes (a)*², and *Boyd and Benfield's case*: the latter, he observed, was a case of equitable mortgagees being preferred to the Crown. They were not, indeed, constituted in the same manner as the present equitable mortgagees, by deposit of the title-deeds, but were persons to whom subsequent mortgages had been executed after a legal mortgage to a prior mortgagee, which made all the rest equitable mortgagees. And he contended that if the words of the 25 Geo. III., excepting titles paramount in law, were to operate literally, as had been contended, such second mortgagees would be excluded, which could hardly be supposed to have been the intention of the legislature; and it had [453] never been so considered in any case upon the subject.

(a)¹ Ante, p. 436.

(a)² Ante, vol. i. 207.

To illustrate the connection between the title-deeds and the estate to which they belonged, in giving a lien on the latter by deposit of the former, and to shew the fallacy of the distinction taken between the delivery of the deeds, as being a pledge of those deeds merely, and not as affecting the estate, he submitted, that if trover should be brought for the recovery of such deeds, it could not be maintained where money had been advanced on them, unless that money were previously tendered to the party; and he put it hypothetically, that if the Court should be called on under the 25 Geo. III. c. 35, s. 2, authorizing the Court, in the performance of that act, to order the production and delivery of title-deeds, as if a decree had been made for the sale of the lands of a Crown debtor in execution of a trust created for payment of debts by such Crown debtor, the Court would not make such a decree against a party who should have possession of the deeds, for securing money advanced by him on the faith of such a deposit by way of equitable mortgage.

[To that the Lord Chief Baron assented, unless it were established that such possession of the deeds could not avail the holder against the Crown; for as in a suit between subject and subject for such purpose, the Court would not make any such order, unless the holder should be paid, so [454] neither would they, in the case of the Crown, if the party who had possession of them should oppose a valid right of lien to such an application.]

With respect to the case of *The King v. Smith*, which had been cited from Sugden, for the purpose of establishing that the Court distinguished the cases where the claims of the subject were opposed to those of the Crown, from such as arose between subject and subject, he observed, that that case could not be applied to the determination of the present; first, because the vendor of the defendant there was, in fact, an accountant, and not merely a simple contract debtor of the Crown; and that was, besides, a mere question of law, raised in this Court as a Court of Law, as the Lord Chief Baron observes, when he says, speaking of a proposition made in argument, that purchasers without notice are favoured by Courts of Equity, "Perhaps it may be a sufficient answer to say, that in the present instance we are not in a Court of Equity." Whatever distinction, therefore might be taken by this Court as a Court of Law, on a point of law in favor of the Crown's legal prerogative, he submitted, it could not affect this question which, in itself, denied the existence of the prerogative in the particular case, where the party relied in this Court, as a Court of Equity, on his equitable right.

[455] For these reasons, he contended that the plaintiffs were entitled to a decree in the terms of the prayer of the bill.

Cur. adv. vult.

8th February.—RICHARDS, Lord Chief Baron, now delivered judgment, and (after having stated the names and relative characters of the various parties to the suit, and the general object of the bill) he observed, that if he understood the case at all, the law arising upon the facts was very clear and satisfactory.

[His Lordship then stated particularly the principal circumstances of the case.]

Upon these clear facts the questions in the cause arise. There is no doubt at all with respect to the integrity of the transaction; there is no suggestion thrown out by the evidence or otherwise, that the plaintiffs knew any more of Mr. Jones's situation than any stranger might have known. He was in truth collector of the assessed taxes, but it does not appear that the plaintiffs were at all cognizant of that fact. The first question that arises then upon the facts is, whether the plaintiffs are equitable mortgagees or incumbrancers, by reason of this deposit of the title deeds. This case is relieved from any difficulty that may have arisen in other cases which depend upon parol evidence of the intention of the parties as to the object of the deposit; for this deposit is made with great care, and accompanied [456] with every circumstance which the Courts have in any of the cases thought to be necessary for the purpose of giving it effect.

The condition of the bond expressly recites the fact of the deposit, and its clear purpose. It is not necessary to describe the condition further, than that it recites that it was agreed that the sum of 1000*l.*, with interest thereon, should be secured to be paid to Mr. Casberd and Mr. Lowe, by a deposit of the title deeds of these premises, in these express terms, "and whereas the title deeds to the said houses in Dowry Square have been delivered by the said defendant William Jones, to plaintiffs, by way of deposit for securing the said 1000*l.* and interest." We therefore find that this recital states not only an agreement with respect to the object of the deposit, but that the

deposit had been, in point of fact, accordingly made : and, as I said before, this transaction is not even suspected in point of integrity.

Under these facts the plaintiffs call upon the Court, by this bill, for a declaration that they are entitled to be paid the 1000*l.* and interest, out of the produce of the sale of these premises, to Mr. Ward, the purchaser, in preference to the Crown, and they also call upon the Court for the necessary directions consequent upon such declaration. That is the substantial object of the bill.

The Attorney-General, on the part of the Crown, resists this application, and contends, [457] that the plaintiffs have no right, on the facts, to claim assistance from a Court of Equity.

The first question of course which arises is, whether the plaintiffs have, as they insist, under the circumstances stated, an equitable mortgage or incumbrance on the lands in question—and, secondly, whether (if they have) such a lien can be made available against the Crown in any case : for if they either have not an equitable mortgage, or, having such a lien, if they cannot make it available against the Crown, there is at once an end of the case.

The Solicitor-General argued, that the plaintiffs had not, in a case of this sort, and so circumstanced, even as against a subject, (supposing this were a question between subject and subject) any right to claim a lien on the land as equitable mortgagees ; and that the deposit of the deeds gave them only a right to retain the deeds, but was certainly not an equitable mortgage or incumbrance. In answer to that proposition, which it somewhat surprised me to hear, I cannot do better than refer to the cases which were cited on the other side. There are a great many others which make that point very clear, and which the counsel for the plaintiffs, I am sure, abstained from citing, merely because they did not wish to trespass more upon the time of the Court than was absolutely necessary. The first case, which has been very much alluded to, and which in truth has been a subject of considerable animadversion, if I may so say, and yet has not-[458]-withstanding always been followed, is the case of *Russel v. Russel* (1 Bro. C. C. 269). That was decided by the Lords Commissioners, when my Lord Loughborough was at the head of the commission. It will be recollected that all the difficulty in that case arose from this, that it was a mere naked deposit, with nothing to explain the object or intent of it but parol evidence : and in that case it was urged, and as it appears to me with great force, that that deposit was prevented from operating by the statute of Frauds, for want of a memorandum of the purport of it in writing. Lord Loughborough, however, was of opinion that if the evidence should be, that the title-deeds were delivered to the plaintiff by parol, it would make an equitable mortgage, or at least that it would give him an equitable incumbrance on the lands (which will amount to the same thing), and then, in order to be assured that the evidence before him was correct, he sent it to an issue : certainly, however, deciding the principle, that if there be a deposit of deeds, and it is proved, although by parol, that the deposit was for the purpose of securing money, it operates as an equitable mortgage, or at least as creating an equitable incumbrance on the lands to which they relate.

That case has been followed by other decisions in cases under the same circumstances*, the most [459] material of which on the present question, is that of *Norris v. Wilkinson* (12 Ves. 192), which was also mentioned by Mr. Jervis, and which I remember personally, for I was in it myself. There Sir William Grant decided that he would not carry that case farther than *Russel v. Russel*, but he did not venture to say that that decision was not correct ; nor has any other Judge avoided following it, where the circumstances were the same ; but he rested upon the purpose not being clear, and supported by parol testimony only : his objection was of that nature wholly, not denying that the deposit of deeds is an equitable mortgage, provided the intention and object of the deposit is sufficiently explained to take it out of the statute of Frauds ; and he complained that men should neglect to explain the object of such deposits, by some memorandum which might be done in two lines of writing, and which would also obviate any objection founded on the statute of Frauds.

The other cases which have been cited, all of them at least in which there was any evidence by writing or otherwise, sufficient to prove satisfactorily the intention of the parties to be the security of money, have established, not merely by reference to *Russel v. Russel*, but with reference to the acknowledged law of England, that such

* Vide supra, pp. 434, 435.

deposits create an equitable mortgage or incumbrance; and if the Solicitor-General were here, as he has now been attending the Court of Chancery for some time, I would venture to ask him or any [460] gentleman who has attended that Court, whether they can remember any one week during the business of bankrupt petitions, in which the Lord Chancellor has not directed an estate to be sold to pay off such a mortgage or incumbrance. The Court may sometimes doubt whether, on proof of such and such facts, there is sufficient to give a deposit the effect of a mortgage; but the instant there is evidence to shew that it is such a deposit, there is an end of all difficulty. The Chancellor is continually ordering estates to be sold under such circumstances, and I think he would be extremely surprised if any opposition were offered gravely to the proposition now contended for on that point by the plaintiffs.

There is one case, and it is a very strong one, which I have brought down with me, that puts the matter out of all possible doubt, supposing it were questionable, whether this deposit be an equitable mortgage. The Solicitor-General urged strongly that this was only a deposit of the deeds themselves, and that although, therefore, the depositary might have the deeds; and make the most of them; yet that it gave him no interest in the estate. Now, I say, with great deference, that it does give an interest in the estate beyond all question; and the Lord Chancellor, when he has ordered estates to be sold under similar circumstances, has done so on that very ground, because the party has an interest in the estate.

The case to which I have alluded to that effect, [461] is that of *Lucus v. Comerford* (a), decided by Lord Thurlow, and it shews, beyond all doubt, that the depositing of deeds, with a clear intention to charge the estate, gives just as strong an interest as a mortgage, or as if a conveyance had been made; and the latter both the Solicitor-General and Mr. Dauncey admitted would have done. That was a bill by executors of a lessor against the depositary of a lease which had been delivered to him to secure a debt due from the lessee: it was filed for specific performance of a covenant in that lease to rebuild houses upon the premises at certain given times: the defendant admitted he was bound to perform the other covenants in the lease; but insisted he was not bound to rebuild. The Lord Chancellor there says, "It is no matter whether the defendant took it as a pledge, or as a purchase, he cannot take the estate, and refuse the burthen." So that in taking that deposit, he was held to have taken the premises absolutely as assignee, and to have been therefore liable to all the covenants, and that it made no difference whether he took it as an assignee for securing the payment of money, or as a purchaser out and out. The Lord Chancellor then says, alluding to the case of *The City of London v. Nash*, "I rather think, upon reading the answer, that they would recover even without the assignment; but it is very just they should assign absolutely, and that defendant should take it; and this will come under the general prayer for relief" (Ves.). So that there the lessor compelled the [462] depositary of the lessee to accept an assignment of the lease, that he might maintain an action on the covenant, on the ground of the deposit having given him the interest of the lessee in the estate. I think it is impossible for me to hesitate a moment in declaring, that according to the principle of that decision on this point in the Court of Chancery, this deposit must be considered not only an equitable incumbrance but an equitable mortgage: and the Court of Chancery would compel the person who took this deposit as a security for money, or as evidence of an intended mortgage or purchase, to accept an absolute conveyance if it were necessary.

Now, in the present case, Mr. Lowe and Mr. Casberd, having taken these deeds as a deposit, and beyond all question, it appears from the recital in the bond, as a security for money, I conceive it to be just as much a mortgage to them in Equity as if Mr. Jones had conveyed to them the whole interest he might have had in the estate, for the security of the money, although that interest might have been only the equity of redemption, and it is admitted to me, that if there had been a conveyance of the equity of redemption, it would have been a good title against the Crown; and that I apprehend is quite clear, although that also would only have been an equitable mortgage.

Then the next question that arises is, can such a deposit affect the Crown? Now, very considerable difficulty has occurred, I know, in [463] the consideration of cases between the subject and the Crown, from a doctrine which is very well founded, at

(a) 1 Ves. jun. 235, and 2 Bro. Ch. Ca. 166, more fully reported, but shorter and somewhat varying in the judgment.

least to a certain extent, that there are no equities against the Crown. I felt, early in this cause, the embarrassment which arose from the doctrine, that the Crown, generally speaking, cannot be considered as a trustee; I say, generally speaking; for I do not mean to assert, that it is so universally; and I do not know, if the Crown had had the legal estate here, how I should have got it out of the Crown's hands for the benefit of the person who would have been a cestuique trust; but it is not so here, for the Crown had no estate at all. But the estate has never passed over, for it is yet in medio; although it has been seized into the hands of the Crown; and the Crown, before the statute (13 Eliz. c. 4) which first permitted a sale, was only entitled to retain the estate quousque, but not beyond the period of its debt being satisfied. The right of receiving the rents and profits, or that right of possession which gives a title to receive the rents, has not passed to the Crown; and the legal estate in this case has never been in the Crown. Accordingly, therefore, the plaintiffs do not call upon me to declare that the Crown is a trustee, because the Crown has not the legal estate; if it had the legal estate, as I said before, I do not know exactly how I should have been able to deal with it, however the justice of the case might require; but the estate in this case is in medio; it is between the parties; and the Crown has not the estate. This Court has sold the property by force of the act of Parliament; and it is the money only which is [464] now in dispute between those who claim to be entitled to it.

Now, if we find that the plaintiffs are equitable mortgagees, of course they are entitled to be paid before the Crown, if their title is, in point of time, anterior to that of the Crown; the instant, then, that we admit that the plaintiffs are equitable mortgagees (as I conceive and am about to decide that they are), they have a right to be preferred: they have a right to be paid before the Crown. But they take nothing from the Crown in that case; they only take it from the fund which is produced by the sale of the subject-matter of their security, and which is in dispute between the parties; and it really is a question, not between cestuique trust and trustee, but between two parties, one of whom has a clear title before the other, unless the prerogative of the other prevents his using it. Now, the instant it is admitted that a conveyance of an equity of redemption would have given a title against the Crown, I say that a deposit of title-deeds, with intention to secure money, in other words, an equitable mortgage, gives just as strong an interest as that conveyance would, for both of them give interests only in Equity; and I am very much fortified in this by what passed in a late case arising out of the affairs of *Boyd and Benfield (a)*. That case was decided before I came into this Court, but I have looked into it since. There were there mortgages of the equity of redemption, I do not know to what extent, one within another: but it [465] never occurred to any human creature to doubt that the Crown was not to be postponed to those who had equitable interests prior in point of date, to the right of the Crown, every thing else being fair and correct; and although it was not disputed in that case, I can hardly conceive that it could have passed sub silentio, unless those who were, at that time, sitting in this Court as Judges, as well as those who had to maintain the interests of the Crown, had thought it quite idle to contend that the Crown could supersede those who had prior interests, whilst the estate was in medio between them. Then, to be sure, it is a necessary consequence, if those conveyances of equities are entitled to stand, that the person entitled to a mortgage, by a deposit of deeds for that purpose, is entitled to the same thing; for they merely differ in form only, and not in substance.

Trinity, 1794.—Two MSS. cases were cited (and I have had the good fortune to be furnished with very full notes of them) in order to shew that the rights of the Crown are not affected by a security of this kind. The first is the case of *The King v. Charles Snow*, in Trinity Term, 1794, and the note I have of it, I believe, is very correct. It is as follows:—On the 2d March, 1793, the defendant agreed, in writing, to sell four leasehold messuages to Samuel Collins for 700l. Collins immediately paid 400l. in part, and agreed to pay the remaining 300l. within a month after that time. On payment of the remainder, Snow was to assign the premises to Collins. Observe, this is an agreement by Snow, the King's debtor, to sell [466] to Collins a leasehold estate for 700l. Collins became entitled to the estate in equity, and paid 400l. in part of the purchase-money, and promised to pay the 300l. remaining within a month after-

(a) Vide *The King v. Mainwaring*, ante, vol. ii. p. 67.

wards: Snow absconded within the month, and Collins therefore did not pay the 300l. On the 22d March, 1793, an extent issued against Snow, and on the 11th of the following May, an inquisition was taken; and it was found that Snow was possessed of and entitled unto a certain piece or parcel of ground, and to seventeen messuages, &c. for the remainder of a term of forty years, under the Dean and Chapter of Westminster; and which piece of ground and messuages, &c. were, by the said Charles Snow, before the said 22d day of March, mortgaged to certain persons, for securing the payment of 2130l. and interest. On the 28th February 1794, there was an order to sell these premises, and Collins gave the sheriff notice to pay him the 400l. which he had paid to Snow. On the same day the sheriff sold the premises, *optimi pretii*. On the 31st May, 1794, Collins obtained a rule nisi that he should be paid back, out of the purchase money, the 400l. which he had paid to Snow. On the 4th July, 1794, the rule (the Attorney-General having shewn cause against it) was discharged. On what ground the rule was argued or discharged does not appear. I have no statement of that. Now, let us consider that case. In the first place, it was an equity—but observe what it is:—Collins, by an agreement in writing, became equitable owner of the leasehold premises; he had agreed to buy them; and [467] he was entitled, on payment of the rest of the purchase-money, to have an assignment; but till then he was equitable owner. He had paid part of the purchase-money, and thus became entitled to a specific performance; and he might, right or wrong, have called upon the Crown to let him have an assignment of the premises, upon payment of 300l. more; and that was his only equity, as it appears to me. By his application to the Court, however, he did not seek to enforce that Equity; but he demanded payment of the money which he had paid to Snow, and which Snow had a right to keep. If I buy an estate and pay the money, the vendor has a right to keep the money, if he gives me the estate. The purchaser has no right to have the money back again, but only to claim the estate. It is clear, however, that if Collins's could be considered as a valid claim, it was an equity only, and the relief could only be properly given in a Court of Equity. But it seems to me, and that is the conclusion which I draw from the case, that as Mr. Snow had agreed to convey the estate to Collins, and Collins had paid part of the purchase-money, he was the equitable owner of the estate: and it must have been on that ground that his claim to the money already paid was not allowed.

1804.—The other case is *The King v. Benson*, which happened in the year 1804. By an inquisition taken on one of the extents issued against Benson, the Jury found him seised of a freehold messuage, &c.; and that he was possessed of the title deeds which were the subject of the subse-[468]-quent proceedings; that Benson had placed those title deeds in the hands of Mr. James Hall, as attorney for Messrs. Tomkins and Co. to enable him to prepare a security for a debt then due from Benson to Tomkins and Co. and for all further sums of money that might in future become due from him to them, and for any bills which they might accept for him, and that the deeds remained, up to the time of the taking of the inquisition, in the hands and possession of Hall for the purpose aforesaid; but Benson had not executed any security. The finding of the Jury then, it is to be observed, is that the deeds were deposited by Benson in the hands of Hall, as attorney for Tomkins and Co. to enable Hall, expressly, to prepare the security for that debt and for other sums and so on. Now, if that were the case, it was not an equitable mortgage, and that has been settled in the case of *Norris v. Wilkinson*: so that whatever the condition of the party who made the application to the Court might have been in other respects, he could not vindicate his right, even if it had been an equitable mortgage in the way in which he tried to support it there at law; but in truth it was not an equitable mortgage according to the authority of *Norris v. Wilkinson*.

Then Tomkins and Co. appeared and claimed the property in the messuage or tenement in the inquisition named: and they pleaded that, "before the issuing of the extent, Benson was well entitled, as owner, and seised in his demesne as of fee, of [469] and in the messuage, &c. and was also possessed of divers deeds, writings, and specialties relating thereto, and being the title to the same: and being so respectively seised and possessed thereof, he became and was indebted to the claimants in a large sum of money, and that being so indebted he, in consideration thereof, and before he became indebted to the Crown, promised and consented to mortgage the said messuage and tenement, with the appurtenances, to secure (amongst other things) the repay-

ment of the money so due to them, and delivered to the claimants the several deeds, writings, and specialties relating thereto, and being his title to the same, then in his power or possession, as a security or pledge for the repayment of the money, and that such mortgage or security might be made,"—so that here they mingle in their plea these facts; "that before he became indebted to the Crown, he promised to mortgage the premises to Tomkins and Co. to secure the said money due to them, and delivered to them the title deeds as a security or pledge for the repayment of the money;" that is, stating it as if it were an equitable mortgage, "and that such mortgage or security might be made." Now here again they depart from the ground of the deeds having been delivered to them as a deposit or pledge, and say that it was done in order that a mortgage might be made, which mortgage he had promised to make; "whereupon Tomkins and Co. became and continued legally possessed of the several deeds and writings relating to the title to the said estate, for the [470] purpose of preparing such mortgage or security as aforesaid, and entitled to have the same made as aforesaid, and to have and enjoy the said messuage or tenement under the same." That is the averment.—So that in truth this plea does not state an equitable mortgage; for on the face of it it is impossible to say that they mean more than this, that the deeds were deposited with Hall, in order to enable him to prepare that mortgage which Benson had promised to make. It seems that no proceedings were had for some time afterwards; but in December 1804, a motion was made, on behalf of the Crown, in the Court of Exchequer, for an order to sell the estate of Benson, of which the premises in question were part. Tomkins opposed this as to these premises; (I take this from the statement in the pleadings in the Court of Chancery, which I believe are correct) and the result was as follows:—"And as to the rest of the estates of the said William Benson, seised into his Majesty's hands, under and by virtue of the said writ of extent, it appearing to the Court that the title deeds which related to the said estates are in custody of Benjamin Tomkins, John Coles, and John Maude, creditors of the said William Benson, and who claim an equitable lien thereon for or on account of their debt due from the said William Benson, the Court do not make any order for the sale of those estates." So that even upon this statement we see the Court seem to have hesitated. Then, in Hilary Term 1806, the Attorney-General filed an information of trover against Tomkins and Co. on [471] account of the detention of the title deeds, to which they pleaded the general issue; and upon the trial thereof, Tomkins and Co. having proved the *bonâ fide* deposit of the deeds in their hands, or the hands of their solicitor for securing such balance, a verdict with nominal damages only was entered in favor of the Crown. Tomkins and Co. then moved for a rule to shew cause why that verdict should not be set aside, and a verdict entered for themselves. That rule was afterwards discharged by their consent, on the Attorney-General, as it appears upon these proceedings, undertaking that no advantage should be taken of the verdict entered for the Crown; and that they should be at liberty to retain the deeds.

Thus Tomkins and Co. having been advised that the question might be discussed and decided by traversing the inquisition, pleaded as I have stated before; and proceedings then took place; when the question came before the Court on a demurrer put in by the Attorney-General: and after argument, judgment was given in favor of the Crown; but it is said to have been declared by the Court, that they gave judgment for the Crown because Tomkins had no legal but only an equitable right; and that appears to be a reasonable ground for the decision; for if it was any incumbrance (which I much doubt), it was equitable only, and could not be maintained at law. Then a bill in Chancery was filed by Tomkins against the Attorney-General and Benson, stating these several facts, and Tomkins and Co. insisted upon their equitable right. The [472] Attorney-General put in the usual formal answer, but Benson denied all the facts stated by the bill as founding the ground of the equitable mortgage; and therefore, that answer being read in a Court of Equity, of course they could not grant an injunction on bill and answer where all the facts of the bill were denied by the answer. It is stated that Benson was afterwards indicted for perjury, and that he was acquitted upon that indictment. What, in point of fact, became of it afterwards, however, does not appear; but there was certainly nothing like a decision in that case, which can affect this question beyond all doubt, for the Court determined nothing at any time during the course of the proceedings, which can be used here as an authority in point. In the first place, I think it is pretty clear that the pleader who prepared this plea, put it upon a ground which, according to the decision of the

late Master of the Rolls, would prevent the deposit from being considered as an equitable mortgage. In the second place, it was certainly a question in Equity, and if the Court of Chancery has made any order upon it at all (and I do not find that it has) the parties must have gone on to have proved their case. Probably there was no injunction granted, or the injunction being dissolved, they did not think it worth while to go on any further in the cause: but there is no decision in the case of *The Attorney-General v. Benson* which in any decree affects this case. It therefore, as it appears to me, leaves the question as [473] if these two cases had not existed: except that if they establish any thing, they incline to support the doctrine that an equitable mortgagee would have succeeded at least to a considerable extent; but beyond that, they cannot be considered as at all applicable, and therefore I must have recourse to principle and general reasoning in the determination of this case, as if it stood alone and untouched by any prior authority adverse to the claim of the plaintiffs.

Now, holding that those two cases, which were the only authorities produced on the second point, do not, in my apprehension, at all affect this case, on the grounds upon which I feel myself obliged to consider the question, we are brought to the last position: that (taking it for granted that there is, under this deposit, an equitable mortgage, and that it is good against the Crown in a general case) it is not valid against the Crown in the case now at the bar, under the circumstances which have been disclosed by the pleadings on the record. It is quite clear that Mr. Jones was, before this deposit was made, liable to the process of the Crown in respect of the money which he received as collector of the taxes, and which was in his hands; but it does not follow that he was therefore that kind of debtor to the Crown, which would bind these lands so as to affect the existing, equitable, or legal interest, of any third person in them. If he were a debtor to the Crown of record, or one of the persons described in the 13th of Elizabeth, there [474] is no doubt at all, that, whether there were an equitable or a legal mortgage on his lands, it would not have affected the Crown; for the Crown would have a right, the moment he became a debtor of record, or came within the statute of Elizabeth, to have seized his lands, although they should have been subsequently mortgaged; but if he was not a debtor on record, (as he clearly was not, for his debt was never put on record) nor had given bond to the Crown, and if he was not within the statute of Elizabeth, which is at last the only real question in this case, then he was merely an ordinary simple-contract debtor, and the Crown had no right to the estate at the time of the equitable incumbrance, nor until he became a debtor by record, which he did not until the inquisition was taken, and that was not till a considerable time after the deposit was made; and indeed it is not even alleged that he was a debtor of record at that time.

There was certainly once very considerable doubt in Westminster Hall, before the case of *The King v. Smith*, (and I myself remember it) whether the Crown's debtors by simple-contract were not in the same situation as debtors of record; and whether those who made purchases of estates from them were not affected by the Crown's debt? and whoever looks with attention into that case, as those by whom this question has been argued, have no doubt done, must see that very great industry and research have been there employed by the Court, to shew that that doubt arose from a mistake, and a too implicit faith in what [475] had been reported to have been said by an Attorney-General in former times. That case (*The Attorney-General v. Smith*) has not been at all doubted upon the present occasion: it has, on the contrary, been acknowledged to be consistent with the law. It will not be necessary for me to say more than that I feel myself bound to follow such a decision as that is, and which I find made upon grave and deliberate consideration; but I have no difficulty in saying (if I may be excused for mentioning it here) that independently of that case, having myself much examined the question, not only now, but formerly, with a view to that particular subject, I have not the least doubt at all that it is the only decision which ought to, or could have been made under the circumstances of that case. Therefore if Jones were not a debtor to the Crown of record, nor so connected with the Crown as to come under any denomination of persons enumerated in the statute of Queen Elizabeth, I take it he must be considered as being a mere simple contract debtor, and must be so regarded in deciding the question which has been raised by this record.

Now I have looked, and with great attention, as may be supposed, very frequently into the statute of Queen Elizabeth, and I cannot myself entertain any doubt that Jones is not at all within that statute. I do not see one word in that statute which

applies to the case of a person in his situation; he was not appointed by the Crown; he was not a servant of the Crown; he was appointed by [476] other persons; nor did he give any security to the Crown: the security he gave was to other persons. Now, throughout the statute of Elizabeth, I think it is quite clear that the persons whom that statute contemplated were persons in a public situation, and they are indeed so specially described in the statute as sufficiently to distinguish them from the case of Mr. Jones. He received not one shilling by being placed in the office, from the Crown; he was not recognised by the Crown, or accountable to the Crown; although it must be admitted that beyond all doubt he was liable to the Crown to the amount of the money at any time in his hands; and he was therefore subject to the process of the Crown, as every one is who has, quocunque modo, money of the Crown in his hands.

Then the statute of the 14th of Elizabeth throws great light on the construction which the plaintiff's counsel put on the 13th of Elizabeth; for that act provides that a person not immediately a debtor to the Crown, in any of the ways pointed out by the statute of the 13th of Elizabeth, although a receiver of the Crown's money, should be put in the same situation as the persons there enumerated; and it then names a person in the receipt of public money, who was not considered by the Legislature to have been before within the former act; therefore, if they passed that act of Parliament for the express purpose of introducing a person who was not considered to be put in the same situation with regard to his liability, as a debtor on record to the Crown, it [477] is evident that the Legislature had not included all persons receiving the King's money, in the 13th of Elizabeth. If the statute of 13th Elizabeth had been sufficient to reach the persons made liable by 14th of Elizabeth, as persons receiving the King's money, it might have been contended to be applicable to the present case; but if it was considered in passing the 14th of Elizabeth that the persons then made liable, were not previously liable, under the 13th, it is quite clear, that no person in that situation, or in similar situations, were considered to be within that act; which at once destroys the argument, that all persons indebted to the King by receipt of money belonging to the King, in their hands, are within its purview and meaning.

Under these circumstances, it does appear to me that the plaintiffs are entitled to the relief which they pray. Mr. Ward having agreed to buy the estate, I must declare, that the plaintiffs are entitled to be considered as equitable mortgagees on this property, to the extent of 1000l. and interest; and it must be referred to the Deputy Remembrancer to take an account of the 1000l. and interest; and it must be ordered, that Mr. Ward perform his purchase specifically, and that there be paid out of the purchase-money what shall appear to be due of the 1000l. to the present plaintiffs, with interest, and costs of course, and that the residue be paid to the Crown.

Decree accordingly for the plaintiffs.

[478] THE DECREE.

THE COURT DOETH DECLARE, that the plaintiffs are entitled, under and by virtue of the bond and declaration in the pleadings mentioned, and the deposit of the title deeds accompanying the same, to be and be considered as equitable mortgagees of the house and premises in Dowry Square, in the pleadings mentioned, for securing to them the payment of one thousand pounds, and interest due thereon, in preference and priority to the right of the King's Majesty or of his Majesty's Attorney-General, under and by virtue of the writ of extent issued against the defendant William Jones, in the pleadings also mentioned:—And it is ordered, adjudged, and decreed by the Court, that it be, and it hereby is referred to Abel Moysey, Esquire, the Deputy to his Majesty's Remembrancer of this Court, to take an account of what is due to the said plaintiffs for principal and interest on their said security, and to tax them their costs of this suit, and otherwise incurred in relation to the said security:—And the Court doth declare, that the said plaintiffs are entitled to be paid what shall be found due to them for principal and interest, and costs, as aforesaid, out of the purchase-money arising by the sale of the said estate and premises purchased by the defendant Danvers Ward, under an order of this Court, bearing date the fifth day of May, one thousand eight [479] hundred and fifteen, made in a cause "*The King versus William Jones*," and doth decree the same accordingly:—And the Court doth also declare that the defendant Richard Brickdale Ward, the trustee for the term of

one thousand years, in the hereditaments in the pleadings mentioned is, and is to be considered a trustee of the said term for the plaintiffs, for the better securing to them what shall be found due on their said security: And it is further ordered, adjudged, and decreed by the Court, that when and so soon as the said defendant Danvers Ward shall have completed his said purchase, and paid his purchase-money into Court, in trust in the said cause, "*The King versus Jones*," that the said Deputy Remembrancer do pay thereout, to the said plaintiffs, what shall be found due to them, for principal, interest, and costs, upon the account hereinbefore directed, and pay the remainder of the said purchase-money (if any) to the use of his Majesty; and upon payment to plaintiffs of what shall be found due to them, for principal, interest, and costs, as aforesaid, the plaintiffs, and the said defendant Richard Brickdale Ward, and all proper parties, are to join in and execute proper conveyances to the said defendant Danvers Ward, which are to be settled by the said Deputy Remembrancer, in case the parties differ about the same: And thereupon it is ordered by the Court, that the said plaintiffs do deliver up all title deeds and writings in their custody, to the said defendant Danvers Ward; but in [480] case the purchase-money for the said hereditaments, when paid into Court, shall be insufficient for payment of what shall be found due to plaintiffs, upon their said security, for principal, interest, and costs, as aforesaid, it is ordered and decreed by the Court, that it be, and it is hereby referred to the said Deputy Remembrancer, to inquire and report to the Court, who has received the rents and profits of the said estate since the same was seized into the hands of his Majesty, under the said writ of extent, and by what authority, and to what amount, and what has become thereof:—Concluding by investing the Deputy Remembrancer with the customary powers; reserving costs, and all further directions.

THE KING, IN AID OF SOLLY AND ANOTHER, *against* EVANS AND ANOTHER, (Assignees of Adam, a Bankrupt) claiming the Property seized under a Writ of Extent against the said Adam. 5th February 1819.—The Court will not give judgment as if the plea were confessed, for defendants, (claiming as assignees, the goods of a bankrupt seized under an extent) on motion for that purpose, where the Attorney-General has not demurred, replied, or otherwise proceeded.—Semble, however, they would grant a writ of *amoveas manus* in such a case.

Dauncey and Pollock, F. now shewed cause against a rule which had been obtained by Manning, on the part of the defendants, calling upon the Attorney-General, and the prosecutors of the extent, to shew cause why judgment of *amoveas manus* should not be entered as upon the confession of the Attorney-General.

[481] The rule had been obtained (23d January) on a representation to the Court that the defendants had entered a claim of property to the estate and effects of the bankrupt, which had been seized under the extent: and had filed a plea thereto in last Hilary Term, since which time the Attorney-General had not replied, or taken any other proceeding in the cause at the instance of the prosecutors of the extent or otherwise.

On shewing cause, it was insisted, that the Attorney-General could not be non prossed, and that he should be required to enter a *nolle prosequi*.

In support of the rule, the case of *The King v. Masters* (Parker's Reports, 50) was relied on, where—the Attorney-General, not having demurred or replied to the defendant's plea to *scire facias* against him, as administrator of a surety in bond to the Crown—the Court ordered that the Attorney-General should shew cause why he did not proceed; and on cause being shewn, they held, that although the King could not be non prossed, the Court might give judgment for the defendant, where he has pleaded, and the Attorney-General will not reply or demur, or proceed in a reasonable time.

GRAHAM, Baron. I think we cannot make this rule (as it is drawn up) absolute. The case of *The King v. Masters*, appears to be a very strong case in terms, for the Attorney-General may at any time enter a *nolle prosequi*. If he [482] will not proceed, the Court, perhaps, may give you a writ of *amoveas manus*.

[It was suggested that the object of the defendants being to institute proceedings on the judgment, a writ of *amoveas manus* would not answer their purpose; and in the case cited, the Court had given judgment for the defendant, as if the Attorney-General had confessed the plea.]

GARROW, Baron. I do not understand the word "judgment" in that case, to mean judgment in its full efficient sense: and in this case there is a distinction in the character of the parties defendant, who are not in substance but only nominally so—they are in effect *quà* plaintiffs.

WOOD, Baron. After the plea there will be an entry, that the Attorney-General does not proceed, and that therefore an *amoveas manus* shall issue.

Per Curiam. The application must be differently framed. Nothing can be taken on this rule.

Rule discharged, without costs.

End of Hilary Term.

[483] SITTINGS AFTER HILARY TERM, 59 GEO. III. GRAY'S INN HALL. CORAM RICHARDS, LORD CHIEF BARON.

BOULTON, Clerk, v. RICHARDS AND BOOTH. 22d April 1819.—Clear documentary evidence of the existence of an ecclesiastical rectory in support of a rector's title, and proof of performance of ecclesiastical duties, held to prevail, in a suit to establish his right, against perception by the patron of the advowson, who also by documentary evidence, proved himself entitled to a sum of money in respect of the tithes arising within the parish, and a general non perception of tithes by any former ecclesiastical rector.—The rector's right in such a case, established by mere proof of the existence of the rectory—of his being *de jure* and *de facto* rector by presentation, &c. and therefore entitled at Common Law—and by inference, from the ancient valuation of the rectory, as proved by the old surveys and documents, being shewn to be much larger than the cotemporary valuation of the adverse right to the tithes claimed by the defendant (on which proof the Court held the adverse claimant to be only a portionist), although there was no evidence given of the extent of the claims on either side, in respect of the particular tithes demanded by each.—On such conflicting claims so established, the Court cannot decree an account until the right of the rector to certain of the tithes, shall be specifically ascertained (as such a case bears no analogy to that of a lessee's confounding boundaries) and to that end the Court ordered a reference to the Deputy Remembrancer, as being more advantageous and less objectionable than a commission for that purpose.—A room, part of a mansion-house in the parish, fitted up as a chapel, in which marriages and baptisms have been solemnized, sufficient to establish the fact of the rectory being ecclesiastical, although there be no burying-ground attached, and other incidents thereto be wanting.

The plaintiff claimed, by this bill, the tithes of corn, grain and hay to be due from the defendants, the occupiers and owners of certain lands in the parish, to him as rector of the rectory or parish-church of Glendon (Northamptonshire).

The defence set up was (denying the plaintiff's title), that there was neither church-yard nor burying-ground in Glendon, but that there was [484] a small room, commonly called a chapel, in the mansion-house of defendant Booth, having a room over it, both being part of the mansion-house, the only way into which was through the servants' hall: that no person had been baptized, married, or christened therein, except by permission of defendant Booth's ancestor, and that little, if any, ecclesiastical service had been performed there for many years previous to the 3d December, 1814, the day of complainant's alleged induction, and that he had since performed some inconsiderable duties in the said room; that the church of the adjoining parish of Rushton was generally resorted to by defendants and the other inhabitants of Glendon: that defendant Booth was the impropiator of the hamlet or village of Glendon, and seised of the manor and advowson of said parish (if it were a parish), and (except about sixteen acres) of all the lands therein, and the tithes thereof; that such tithes formerly belonged to the monastery or abbey of Pipewell (one of the larger abbeys belonging to the privileged order of Cisterians), and had been granted by the abbot and convent before the dissolution (30 Hen. VIII.) to Ralph Lane for ninety-nine years, by the description of all and singular their oblations, tithes or corn, hay, grass, or otherwise, lying, being, arising &c., and to the said monastery appertaining or belonging, within

or by the occasion of the said town or fields of Glendon, &c. at a yearly rent of 11. 6s. 8d. The answers then—deriving title through mesne conveyances and by descent to [485] plaintiff Booth, in the said manor, rectory, and advowson of the church and vicarage of Glendon and the tithes, in fee—insisted on non-payment of tithes to the complainant or any former minister of the chapel: and alleged, that in the old conveyances in the defendant's possession, the said chapel was usually described as a vicarage, and that the defendant Booth, his ancestors, and those under whom they claimed, had always, as impropiators, paid the procurations and synodals due to the archdeaconry of Northampton, in which Glendon was situate.

To support the plaintiff's case, witnesses proved the plaintiff's presentation, institution, and induction—that divine service had been performed for twenty-five years in the chapel or room mentioned in the pleadings, by the predecessor of the plaintiff and the plaintiff, and which was attended by various families—that a parish-clerk had been appointed, who constantly attended divine service in the chapel—that the room wherein service was performed, was usually called the chapel; and that it appeared from the decayed state of the reading desk and seats, to have been fitted up as such for a very long period—that marriages and christenings had been solemnized in the said room, and that parochial offices had been served in the parish. Copies of various letters of presentation, from the records in the registry of the diocese of Peterborough, were produced in evidence; extracts from the ecclesiastical valor, 38 Hen. III.: [486] the taxation of Pope Nicholas, the ecclesiastical and parliamentary surveys, 26 Hen. VIII., and of the King's ministers accounts, 30 Hen. VIII. (the effect of which are stated particularly, and commented on in the judgment),—and many institutions of incumbents by the Bishop. The plaintiff did not give in evidence any proof of perception of the tithes of the rectory, either by himself or his predecessors.

The defendant gave in evidence an official copy of a counterpart of the lease (24th September, 30 Hen. VIII.) from the abbot and monastery of Pipewell to Ralph Lane—an official copy of the return of the collector, or minister's account, (31 Hen. VIII.) as to the tithes of Glendon, and possessions of the Abbey—the letters patent of Eliz. and subsequent grants—and receipts for payments of procurations and synodals.

Jervis and Perkins, on the part of the plaintiff, relied on the facts proved, contending that Glendon was proved to be a spiritual rectory, not donative: and that the plaintiff was rector, and therefore, by law, entitled to all the tithes, except where a clear exemption or positive counter-claim could be made out.

Martin and Treslove for the defendants, insisted, that Glendon was not a parish, and still less an ecclesiastical rectory—that there never had been a church or consecrated chapel there—that the room which had been appropriated to [487] divine service for the accommodation of the family of the mansion and their friends, and in which, in some few instances marriages, baptisms, and christenings had been solemnized by permission of the owner, was not such a complete place of public worship as would confer ecclesiastical rights on those who performed the imperfect and partial church duties therein, which had been given in evidence. And they observed, that there was no burial place attached to it, and therefore funeral rites, and the duties of sepulture could not have been performed there; and that they kept no register.

They submitted that the institutions by the Bishop did not conclude the defendant Booth, or those under whom he claimed; and adverting to the evidence of the lease to Lane by the Abbey, (to whom the rectory and tithes must have been originally appropriated, and being so, was never disappropriated by presentation or any act of theirs, as it necessarily must have been before the rectory could be severed from the religious house, Bla. Com. vol. i. cap. 2, p. 384, and the grants by the Crown, after the dissolution) they insisted, that the rectorial rights had become vested in the defendant Booth, and that he was, as impropiator, entitled to the tithes, and that those grants and their effect, were confirmed by the usage, the entire perception having always gone with the grantees for two hundred and eighty years: and they contended that the statute of the 30 Hen. VIII. (c. 13, s. 5), dissolving the monasteries, and vesting their possessions in the Crown, had, in [488] itself, given such an effectual title to the defendant, under the grant of the Crown, as could not be defeated. On the whole, therefore, they submitted that if the plaintiff had, in fact, any right, it might, under the circumstances of this case, be effectually asserted at law.

In reply, it was urged that the Crown could pass no more by its grant than the religious house was itself entitled to at the time of its dissolution, and that in the present instance it was clear that the abbey of Pipewell were only entitled to a seventh part of the tithes of the rectory; the proportion which 11. 6s. 8d. (the estimate of the tithes due to the Abbey) bears to 81. the valuation of the profits of the rectory by the ecclesiastical survey of the 28th of Hen. VIII.

22d April.—The Lord Chief Baron now intimated to the parties in this cause his opinion on the merits, observing that what he should now state was not to be considered final, and that if any other view of any part of the case should occur to him, he would mention it at another time.

The case, said his Lordship, is certainly a very singular one. The plaintiff claims the tithes of this parish of Glendon, as rector. Booth, the real defendant, insists that Glendon is not an ecclesiastical rectory, and that the plaintiff is consequently not rector; and that is the first ground of the defence. The first question, therefore, is [489] whether the plaintiff is rector, and if he be, whether he is entitled to any, and what tithes? The evidence for the plaintiff is of this description:—Pope Nicholas's taxation is first produced, in which the term *ecclesia* is used, or church of Glendon; *ecclesia* is what we now call the rectory, and it is valued at six marks and a half, or 41. 6s. 8d. That was at that time the supposed value, and we well know that in such valuations the church possessions were never estimated at too high a rate. Whatever imputation, therefore, there may be on those documents in general, on that point they are universally allowed to be correct, and to be depended upon; and certainly the valuation in the present instance cannot be said to be very rank. That is produced to shew that the monastery could only have had a portion of the tithes, and were not as rectors entitled to the whole. The next piece of evidence is the ecclesiastical survey of Hen. VIII. valuing the profits arising from the rectory, let to farm by the year, at the sum of 81. 6s. 9½d., the 6s. 9½d. are then deducted for procurations and synodals. Then follows an extract from the parliamentary survey of the possessions of Pipewell Abbey, and the portions of tithes arising from divers rectories, from which it appears that that of the rectory of Glendon was 41. 6s. 8d. From thence we learn, that the monastery of Pipewell had a portion of the tithes of the rectory of Glendon, of the value of 11. 6s. 8d. and it is certainly very difficult to suppose that so small a sum covered all the property of the rectory. That document is also relied on to [490] prove that Glendon was a rectory, and that there was a rector. After the dissolution, the documentary evidence consists of institutions from 1601 to the present time, and two presentations by the Crown, on lapse; and that strengthens the proof that Glendon was a rectory, for neither curacies nor donatives lapse, and therefore it must have been some substantial ecclesiastical property, as a rectory or vicarage. The presentations by the predecessors of Mr. Booth are all acts of prescription, and bind him by their effect, shewing that they have always considered and treated this as a rectory. It is therefore impossible to say that it is not proved to be a rectory. Then supposing that it had at some time or other been appropriated to a religious house, the moment they presented to it as a rectory, there would be an end of the appropriation. The next question is, whether the plaintiff has proved himself to be rector. He has proved that duty was done in the chapel by his predecessors and himself, *quâ* rectors, for twenty-five years at least, how much longer does not appear, and that during that time marriages and christenings were celebrated there. The evidence, therefore, must be taken to establish that Glendon was a rectory, and that the plaintiff is rector. Then *primâ facie* he is entitled to all the tithes. It does not appear by what right these presentations were made from time to time, nor is it very material: for although they might be usurpations, the church was thereby kept full.

[491] Such is the plaintiff's title; but most undoubtedly very great obscurity is thrown on it by the defendant's evidence. Booth also claims to be rector: but that, if the plaintiff is, he cannot be. Whatever right he may have, and however acquired, to the advowson, it is clear that he has always exercised his right. Probably it was originally an usurpation: for there is no evidence of the advowson having ever been in the monastery of Pipewell, or that there was ever any grant of it made by the Crown, or any one else.

The first instrument produced by the defendant is the lease by the abbey and convent to Lane, and that is material for both parties. It is observable that it is

of all their oblations &c. But nothing is there said about the church: there is no obligation on the lessee to find a clergyman, or to do any thing in the way of duty, although he would have been bound by law to supply the church, and to have made an endowment: but those matters are certainly in many instances much neglected. It is also observable, that the rent reserved is the same sum (xxvi s. viii d.) as that mentioned in the parliamentary survey. The next piece of documentary evidence is the extract from the King's ministers returns, in the 31 Hen. VIII., of the possessions of the monastery of Pipewell—"11. 6s. 8d. for the farm of all and singular the oblations of the tithes of all corn, hay, grass, or [492] other things whatsoever, arising or growing within the fields, metes and bounds, of the vill of Glendon aforesaid, annexed to Ralph Lane:" thus ascertaining the possessions of the abbey on the footing of the lease. The letters patent of Queen Elizabeth are to the same effect.

It is evident that the monastery had only the tithes to the amount or value of 11. 6s. 8d. and that they were entitled to nothing more. They were not rectors or owners of the advowson, but were portionists, and demised their portion at a certain rent: and it is quite clear from the instruments, that they had not all the tithes. I take it, therefore, that the necessary construction is, not that all the tithes passed, but that all the tithes which the monastery had did pass. It occurred to me, at one time, that there might have been a severance of the rectory from the profits of the rectory, but of that there is no evidence: and from what evidence there is in the cause, it appears that all the profits of the rectory did not pass. Now, the defendant having failed to prove himself rector, he is not entitled to any tithes but such as actually passed by the lease, and the plaintiff having succeeded in his proof, he must, as rector, be considered to be entitled to all such tithes as did not belong to the monastery.

Then the great difficulty is to ascertain what those tithes are, and how those which belonged [493] to the monastery are to be separated and distinguished from those which belong to the rector. The defendant is certainly entitled to a portion, and the plaintiff can have no right to those which constitute that portion. Prescription can afford no assistance to either party in this case, because the defendant, and those under whom he claims, have hitherto received all the tithes, and whereas it is quite clear that they are only entitled to a part, and yet the plaintiff, on the other hand, has never received any. Now, when I am called on to decree an account against the defendants, in favor of the plaintiff, it becomes necessary to declare for what tithes they are to account, and that is, under the very peculiar circumstances of this singular case impossible. I am bound to say that the plaintiff has made out a title generally, as rector, and that he is therefore entitled to the tithes: but I am also bound to declare, upon the evidence, that the defendant, who has had perception of the whole, has proved himself entitled to a considerable share, at least, and therefore I am very much embarrassed, as to the proper decree to be pronounced.

The conclusion of my mind at present is this:—The plaintiff, having established his right as rector, is entitled *primâ facie* to the whole. The defendant has constantly had perception, the plaintiff never having received any tithes: and the defendant is also clearly entitled to some: the plaintiff, therefore, has a clear title to the rest: [494] but as it is impossible, on the evidence, to allot to each their respective tithes specifically, I cannot decree an account. It had occurred to me, that I could act in this case, as in that of a lessee, who had confused boundaries: but there is an obvious distinction between the relative situations of lessor and lessee, and the unconnected characters of rector and portionist. There is not, in the case of the latter, any duties to be observed between them, as there are in that of the former.

Nor can I, for the same reason—the absence of evidence on the subject—send the parties to law, on the question of the quantity of interest in each. And therefore I think, if the plaintiff desires it, that I should refer it to the Deputy Remembrancer, to inquire and report what part of the tithes was demised by the lease to Lane. If the plaintiff should not wish to have that enquiry instituted, the bill must be dismissed without costs. If the reference be accepted, there must be the usual directions for the production of deeds, and the examination of the parties and their witnesses, with liberty to report any special matter: costs and further directions to be reserved.

His Lordship observed, at the close, that this might be considered as final.

Reference ordered.

[495] It being suggested, by the plaintiff's Counsel, that it was the wish of the

plaintiff, that a commission might be issued for the purposes of the proposed enquiry, the Lord Chief Baron observed, that he considered the reference to the Deputy Remembrancer to be a much better course—that he did not approve of commissions in such cases—and that a very important advantage of a reference, compared with a commission, would be, that the parties might apply to the Court on any occasion of difficulty which might arise.

CORAM RICHARDS, LORD CHIEF BARON.

WILLIAMS v. MEDLICOT (an Infant by Louisa Medlicot his Mother and Guardian), SAID LOUISA MEDLICOT, AND THOMAS EVANS. 23d April 1819.—A. and B. being seised of a freehold estate of inheritance, subject to a mortgage term for 300l. for the life of A.—remainder to trustees, to support, &c.—remainder to the survivor in fee: C. agrees to advance them 800l., for the purpose of enabling them to pay off the mortgage, and stock the farm of A. on an agreement that the estate shall be mortgaged to him (C.) for 1000l., to secure the 800l. and 200l. owing to him, as executor of his father, from B.:—the 800l. being advanced by C., out of which the mortgage is paid off by A., who thereupon receives the title-deeds from the mortgagee (he having assigned to attend, &c.) and delivers them up to C.: A. and B. direct a mortgage deed to be prepared to C., which is engrossed and executed by A. (B. refusing to execute, or to have any thing to do with it): and afterwards A. dies: and then B. dies; both having paid the interest on the 1000l. up to the death of each:—held, (on the determination of a suit, instituted against the infant heir at law of both A. and B., by C.) that the delivery over of the deeds, by the tenant for life, did not, under the circumstances, create such a lien on the estate, in the way of equitable incumbrance, as to have the effect of charging the inheritance with any part of the 1000l.—the proof of B.'s assent to the deeds being deposited for the security of the money, or any part of it, not being sufficiently direct and positive to establish the fact of his intention that the deeds should be delivered to C. for that purpose.—The plaintiff, however, decreed to be entitled to the benefit of the term, and to stand in the place of the mortgagee quoad the mortgage money paid off out of the money advanced.

The bill charged, that John Medlicot, the uncle of the plaintiff, had granted a term of five hundred [496]-dred years, in certain freehold property, by way of mortgage, for securing 300l.—that he afterwards conveyed the same property, subject to the mortgage, by lease and release, in consideration of an annuity to himself of 15l. for life, to be paid by his nephew, and charged on the estate six cords of wood every year, and natural love, to a trustee, to the use of his nephew John Medlicot for life, subject to the said annuity: remainder to the trustee, to support, &c.: remainder to the use of the survivor of himself, and nephew in fee—and that the nephew entered, &c.

The bill then alleged, that it was agreed between the two Medlicots and the plaintiff, (in consequence of the elder Medlicot being, at that time, indebted to the plaintiff, as executor of his father, in 200l., and both being desirous of paying off the said mortgage on the estate) that the plaintiff should advance them 800l. on the security of the mortgaged premises, both for the repayment of that 800l. and the said 200l., and that the elder Medlicot should take the bond of the younger for the annuity of 15l. in discharge of the estate—that the plaintiff, at different times, advanced the 800l. on the faith of having the same secured to him on the same premises, according to the said agreement: and that, out of the money so advanced by him, Medlicot, the younger, paid off the mortgage, and the mortgagee assigned the term, in trust to attend the inheritance, and delivered up the title-deeds, which had been in his possession, to the younger Medlicot—that a mortgage of [497] the premises was then prepared to plaintiff, with the privy of the elder Medlicot (reciting the transactions between the parties) for securing the sum of 1000l.—that as soon as the mortgage-deed was prepared, the younger Medlicot gave the uncle his bond for the payment of the annuity, and executed the mortgage-deed, and also delivered up to the plaintiff all the title-deeds belonging to the premises; but that the elder Medlicot refused to execute the mortgage.

The bill then stated that both the Medlicots afterwards died intestate (the elder Medlicot having been the survivor), leaving the defendant their heir at law—that they had both regularly paid the interest of the 1000*l.* successively, to plaintiff, up to the time of their respective deaths—and that the mother of the defendant (his now guardian) had also, since their death, paid interest to the plaintiff up to a certain time: but that she had since refused to do so.

The bill therefore prayed an account, or that the defendants might be foreclosed: and an injunction to restrain them from bringing Ejectment against the plaintiff for obtaining possession of the mortgaged premises.

The defendants, by their answer, stated in their defence that the money advanced by the plaintiff had been advanced to Medlicot, the younger, without the privity or concurrence of the elder [498] Medlicot: and that it was for that reason, and because he had disapproved of the loan, that he had refused to execute the mortgage-deed. They admitted the payment of the prior mortgage, by Medlicot, the younger, out of the money advanced by the plaintiff to him, the execution of the mortgage-deed by young Medlicot, and the delivery of the title-deeds by him to the plaintiff, but still insisting that the whole was without the privity, concurrence, or consent of the elder Medlicot. They also admitted payment of the interest as charged, until advised that the plaintiff was only entitled to charge the estate with the payment of the 300*l.*, the amount of the original mortgage, and insisted that such interest, having been paid in mistake, ought not to prejudice their rights, but should be considered as payments on account of that mortgage.

Thomas Evans, a witness examined on the part of the plaintiff, who was the solicitor who prepared the mortgage mentioned in the bill, deposed to the verbal agreement made between the Medlicots in his presence, and the presence of the plaintiff, at the residence of the elder Medlicot, that the elder would release the estate from the charge of the annuity, and take instead the younger Medlicot's bond, for the purpose of enabling them to secure the 1000*l.* by mortgage to the plaintiff, as stated in the bill—that the money was to be employed in paying off the prior mortgage, and stocking a farm then recently taken [499] by the younger Medlicot—that the 800*l.* was advanced by plaintiff, and the 200*l.* was admitted by the Medlicots to be previously due from Medlicot the elder, to the plaintiff, as executor of his father: and that it was agreed by both the Medlicots, that the mortgage mentioned in the bill, which the deponent was at that time instructed by all the parties to prepare, should cover the whole 1000*l.*—that he was present when the title-deeds were delivered by Louisa Medlicot, the defendant, the wife of the younger Medlicot, to the plaintiff, for securing the 1000*l.*, in pursuance of the said arrangement—that the mortgage-deeds were afterwards prepared by him, with the knowledge and consent of Medlicot the elder, according to that arrangement—that on his attending the elder Medlicot, for his execution of the deeds, he refused to execute them, giving, as his reason, that the declining health of his nephew had prevented his continuing the management of the farm, and would therefore probably be unable to continue the payment of the annuity of 15*l.*—and he also deposed to the interest on the 1000*l.* having been regularly paid successively by the younger Medlicot, the elder Medlicot, and Louisa, the defendant, up to a certain period.

Other witnesses also proved, in part, the above arrangement between the parties, and their understanding, from conversations, &c. that the first mortgage on the premises was paid off, for the purpose of enabling the Medlicots to [500] make a new mortgage to the plaintiff for the 1000*l.*

Jervis and Pepys, for the plaintiff, contended that, under the circumstances of this case, the plaintiff was entitled to be considered an equitable mortgagee for the whole sum of 1000*l.*, or at least for 800*l.*, the money actually advanced, citing *Russel v. Russel* (1 Bro. Ch. Ca. 269), *Ex parte Wetherall* (11 Ves. 401), *Ex parte Kensington* (12 Ves. 192); and they submitted, that the only question in this case would be, on what terms the defendants might be permitted to redeem the estate.

Martin and Whitmarsh, for the defendants, insisted that such parol agreement, as had been stated in the bill to have taken place, was not binding on the inheritance—that no consideration passed to Medlicot the elder—that the younger Medlicot was only tenant for life, and could not therefore charge the inheritance, particularly where the limitations in the voluntary deed were protected, as here, by the intervention of a trustee—that the transaction was within the statute of Frauds, and quite distinguish-

able from those of all the cases on the doctrine of equitable mortgages, by deposit of title-deeds.

The Lord Chief Baron. The plaintiff's case having been put on the ground of an equitable mortgage, by deposit of title-deeds, I must say [501] that I think this the slightest case of that sort that I have ever seen. I am certainly not at all disposed to extend the doctrine of equitable lien any further than it has already reached; and I wish, from what I have experienced, that it had not been carried so far by the Courts of Equity, as it has been. [His Lordship recapitulated the most material facts of the case.] The title-deeds were delivered, upon satisfaction of the mortgage, to the younger Medlicot; and as he was the tenant for life, I take it he was the proper person to have possession of them. Then he, it appears, delivers them to the plaintiff; and, it is said, for securing the payment of the money advanced. But before such a delivery can be considered as constituting an equitable mortgage, we must have some evidence, in a case of this sort, of the circumstances under which the deposit was made, and for what purpose, and that it was made by the parties interested; for the fact of their delivery creating an equitable charge, depends wholly on those circumstances. Now, in the present case, how could the deposit, by the younger Medlicot, affect the interest of the person who might eventually be entitled to the contingent remainder? It has been said, that Medlicot the elder, consented to his nephew's arrangement. Be it so: that does not establish the fact of his assenting to the depositing the deeds with Williams, for the purpose of creating an equitable lien: it only amounts to his approbation of his nephew's delivering up the deeds to the plaintiff, for some purpose or other, perhaps, [502] merely to induce him to pay off the previous mortgage; but it certainly is not enough to satisfy me, that he joined in the depositing the deeds with plaintiff, as a security binding the inheritance, for all the money to be advanced by him to the younger Medlicot. This transaction, therefore, does not carry even the appearance of an equitable mortgage. It may be very true, that the plaintiff might have been misled by the younger Medlicot; but if that were so, it is no reason why I should charge the inheritance of the elder Medlicot. The circumstances of this transaction, therefore, are not such as to constitute an equitable mortgage, affecting the inheritance of this estate. As to that part of the prayer therefore which seeks to charge the property with any sum beyond the 300*l.* and interest, due on the mortgage which has been paid off, the bill must be dismissed with costs.

As to the other parts of the case, the plaintiff must be declared to be a mortgagee for the sum of 300*l.*, which was paid off by the younger Medlicot, in some way or other, most probably by the loan, and to have the usual decree.

The plaintiff was accordingly declared to be entitled to the benefit of the mortgage term of five hundred years, and to stand in the place of the mortgagee as to the mortgage for 300*l.*

The usual account to be taken as to that mort-[503]-gage, and a decree of foreclosure, in default of payment—and

Day given to the infant, on attaining his full age, to shew cause—and as to all other matters prayed—the bill to be

Dismissed with costs.

On a suggestion that it might be made part of the minutes, that the mortgagee should be restrained from bringing an ejectment—the Lord Chief Baron observed, that the Court never interfered to prevent a mortgagee's ejectment, and that there were already so many difficulties imposed on mortgagees in Courts of Equity, as should make them reluctant to increase the number.

[504] CORAM RICHARDS, LORD CHIEF BARON.

LEECH, Clerk, *v.* BAILEY AND OTHERS. 23d April 1819.—Modus. A money payment, alleged to be a modus, in lieu of the tithe of lambs, and of the wool of the first shearing of such lambs, or in lieu of the tithe of such lambs, is ill pleaded in the alternative.—Composition. So also if pleaded as a composition.—Such money payment may be relied on at the hearing as a composition, if it be charged to be so in the answer, in case it should not be a modus.—Notice (of taking tithes in kind). Notice to determine a composition should be reasonable in point of time, and suited to convenience of the farmer. A notice, given by parol, at the

time of settling the annual amount of the tithes due, the tithe owner telling the farmer that "for the time to come" he requires the tithes to be paid in kind, is sufficient.—When the farmer pleads the composition as a modus, he cannot insist on no notice to determine having been given.

Bill (Trin. Term, 1815) by Vicar of Askham, (Westmoreland) praying an account of the tithes of lambs, hog wool, potatoes, turnips, and agistment on such titheable matters as defendants had taken, &c. since the year 1808, and also of the tithe of lambs produced, &c. since the year 1814.

Defendants admitted the plaintiff's title, and their having had the titheable matters.

The answer of the defendants commenced by stating that lambs are so called within the parish of Askham, till they are separated from the ewes, which is generally about the Martinmas after they are dropped, and that from that time till they are first shorn, they are called hogs, or hog sheep; and are afterwards called sheep. They then set up the following modus for lambs, viz. one shilling and four pence for every ten dropt within the parish, "and so in proportion for every greater or less number than ten, [505] for and in lieu and full recompence and satisfaction of the tithes of such lambs, and of the wool of the first shearing of such lambs when they are called hogs, or hog-sheep: or at least for and in lieu and full recompence and satisfaction of the tithes of such lambs."

The defendants then, in their joint and several answer, insisted upon the said payment as a modus or customary payment; but in case the same were a temporary composition only, that the plaintiff ought to have determined the same by due notice before he could be entitled to sue the defendants for the tithes in kind, of lambs, or the wool of the first shearing of such lambs, while they were called hogs, or hog-sheep; but which he had omitted to do.

As to all the other tithes, the only defence was, that none had ever been paid.

The witnesses examined on the part of the plaintiff, stated that the tithe of pigs and geese, and of wool, except of hog-sheep, in the parish, had always been paid in kind as long as they remembered; and that a sum of one shilling and four pence had been paid for every tenth lamb, and that when the number of lambs was under five, three halfpence was paid for each; fourteen pence for six, and for each above that number, one halfpenny up to ten; and that the same proportions were paid for all the fractional parts of ten above that number.

[506] It was also proved that, about July 1814, the usual time of the plaintiff's taking the tithe, and the settlement with the parish, the plaintiff gave notice to the parishioners that for the time to come he should require the tithes of lambs, hog's wool, agistment, turnips, and potatoes, to be paid to him in kind.

On the part of the defendants, the depositions stated that there was in the parish a modus of one shilling and four pence for every tenth lamb, and when there is a less number, one halfpenny for each of the first four; eight pence for five; one shilling and two pence for six; one shilling and two pence halfpenny for seven; one shilling and three pence for eight; one shilling and three pence halfpenny for nine; and one shilling and four pence for ten: and for the fractional numbers above ten, in the same proportion; and that the said modus was payable as well in lieu of the tithes of such lambs, as in lieu of the tithe of wool of their first shearing, when they are called hogs, or hog-sheep; that such payment was made by the occupier about St. Peter's Day, or Old Midsummer Day, in each year, as a modus, or ancient invariable customary payment in lieu of tithes. They also stated that the lambs are generally shorn for the first time about the 10th of July, after their separation from the ewes.

A terrier was also put in, which stated, that "tithe wool is paid to the vicar throughout the [507] whole parish (except Askham Hall demesne), and for every tithe lamb a prescription of sixteen pence, &c. &c."

Jervis and Dowdeswell, for the plaintiff, submitted, that the principal question in the cause would be on the modus for lambs and wool; for, as to the other tithes, the defence was merely non decimando, opposed to the vicar's admitted title as vicar. With respect to that modus, they objected, first, that it was not proved as laid, it having been pleaded as one shilling and four pence, payable in gross for every tenth lamb, and so in proportion for any greater or less number—and as being payable for lambs, and the wool of hog-sheep, or at least for the tithe of lambs: whereas the

evidence, relating to the payment of the fractional parts of the sixteen pence for ten, was not proportionate to the whole, nor did it apply to the alternative.

Secondly, that the payment, being so laid in the alternative as a modus for one or the other of two things, was ill pleaded, and could not therefore be received, being double and uncertain.

They also objected to the defendants insisting, in their answer, that the payment so laid as a modus, and so attempted to be proved, was, if not a modus, a composition: for it was shifting the ground of the defence, in a manner not permissible in pleading, which required certainty, and [508] legal precision: and they submitted that a defence of composition could not be set up on the failure of modus.

[The Lord Chief Baron. That has become allowable of late years, since I came into the profession*.]

Boteler, on the part of the defendants, stated, that they submitted to the plaintiff's bill, except as to the demand for tithes in kind of lamb and wool, which they insisted was covered by the payment set up as a modus or composition, and which, he contended, was not objectionable on any of the points which had been urged against it: that it had been decided in the case of *Laithes v. Christian* (Bunb. 340, and 2 Wood. 355), that an issue might be directed on a modus, although it should not be proved exactly as laid in the bill. There the variance was very considerable and important, the bill (which was to establish the modus) having laid it to be "for every tenth lamb, and the wool of such lambs which were called hog-sheep," in lieu of lambs, payable on Monday next after Midsummer Day after the lambs fallen, except such as were not alive on Midsummer Day. One or two only of the plaintiff's witnesses proved that the modus was for lambs alive on Midsummer Day, all the rest for such as were alive on the Monday next after Midsummer Day, yet the Court held, that as the witnesses agreed with the bill, but differed only as to the extent of it, (as was [509] exactly the case here) there was ground laid for an issue.

As to the objection of the modus being laid in the alternative, he submitted that there was no decided case in which it had been determined to be bad—for that the money payment was the substantial fact to appear on the record, and the question of its nature, and the tithes it covered, was proper subject-matter for an issue—that the alternative was not in the modus, but on the effect of it, and in this case it was alleged not to charge the article said to be covered by it, or to extend it: but on the contrary reducing the claim to a greater certainty, and more limited extent.

[The Lord Chief Baron. This mode of laying a modus is certainly quite unusual and inconsistent with the rules of pleading—and I confess that I am desirous of giving a decisive opinion on it, for the inclination of my mind is strong against it, and I cannot at all reconcile it with any principle of pleading.]

It was then urged, that if the payment being abandoned as a modus, were taken as a composition (the notice to determine which had always been put on the principle of notices to quit between landlord and tenant, and it had therefore been held, that six months were necessary), was in the present case defective, because insufficient in not amounting to that interval of time. It [510] was proved to have been given after the annual settlement of tithes had been concluded for the year 1814, by the plaintiff telling the defendants that "for the time to come," he required that the tithes in question should be paid to him in kind. That they contended was no notice at all, or at least it was notice ab instanti, the next year's tithes beginning from that moment to become due: whereas, according to the case of *Hewitt v. Adams*(a), the notice should have been given six months before that time, for the purpose of determining a composition, which, on payment, necessarily begins again immediately to accrue due.

Jervis replied, insisting on the objections, and urging, that if the defendants were allowed to convert the bad modus into a good composition, it had been well determined by the notice which had been proved to have been given: for that there was no positive rule with regard to the period for which it should be given, and particularly in a case where there was any dispute as to whether the payment were a composition or not.

The Lord Chief Baron decided that the objections urged against the modus were

* *Bishop v. Chichester*, 4 Gw. 1329.

(a) Cited in *Bishop v. Chichester*, 4 Gwil. 1322.

fatal, and that the notice which had been given to determine the composition was sufficient: for, in point of fact, the notice was for much more than half a year, as the tithes would not be again payable till a considerably longer time. This question of notice [511] (said his Lordship) has been decided frequently, and no one has ever been inclined to extend the period required. The only object of notice is, that it should be so far adapted to the farmer's convenience as that he might not be taken by surprise. Besides, the same objection applies to this composition as pleaded, as was urged against it as a modus. A composition can no more be laid in the alternative than a modus, and perhaps it is even more objectionable in a composition, which is a defence of more recent origin, and therefore much less subject to doubt.

The plaintiff is consequently entitled to a decree for an account of the tithes of all the titheable matters demanded by the bill, including the tithe of lambs for 1814.

Account decreed.

His Lordship afterwards observed, on the point of the notice, that as this defence was in fact a case of resistance of payment altogether of tithes in kind as demanded, by setting up a modus, it was analogous with that of a tenant contesting the right of his landlord, in which case he is not entitled to notice, as it would be inconsistent with such a defence.

End of the Sittings after Hilary Term.

REPORTS of CASES ARGUED and DETERMINED
in the COURT of EXCHEQUER, at Law and in
Equity, and in the EXCHEQUER CHAMBER,
in Equity and in Error, from Easter Term,
59 GEO. III., to Michaelmas Term, 60 GEO. III.,
both inclusive. Vol. VII. By GEORGE PRICE,
Esq., of the Middle Temple, Barrister - at - Law.
London, 1821.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER,
AND EXCHEQUER CHAMBER, EASTER TERM, 59 GEO. III.

CRAUFURD AND OTHERS *v.* THE ATTORNEY-GENERAL AND OTHERS. [CASE OF THE DUTCH COMMISSIONERS.] 29th April 1819. 7th, 11th, 14th, 17th, & 24th November; 17th, 19th, 20th, & 22d December 1817.—Jurisdiction (over Commissioners of Audit). Where the Commissioners for auditing the public accounts have, in the investigation of accounts rendered by a public functionary, disallowed some of the accountants' charges, whereby he seeks to discharge himself of monies received, and surcharged him in other respects, this Court has jurisdiction so far as to examine and correct the principle on which that Board has proceeded in such investigation, if a case of just complaint in that respect be satisfactorily made out; but they will not determine a mere question of quantum meruit, as between the functionary and the Crown, in regard to the service performed and the charges made by the former. *Vide The Attorney-General v. Hoesaen*, ante, vol. vi. p. 312.—The Court, therefore, entertained the present proceeding (by bill) against the Attorney-General, but dismissed it on the merits, which, in effect, were considered as imposing on the Court a duty to enter upon the enquiry of the sufficiency or insufficiency of compensation, which they held to be the peculiar province of the auditors, and not within the scope of a reference to the Deputy Remembrancer, or an issue: and that a case of such manifest injustice had not been made out as enabled them to say that the audit ought to be reviewed. Servants of the public appointed by commission under the Crown, without any stipulated remuneration, have no legal claim to specific compensation, whether the nature of their duties are analogous with well known employments, which, when engaged in between subjects, are remunerated by established rate per cent., or otherwise, by acknowledged usage or custom (ex. gr. prize agents), or in other cases where the value of the services can be ascertained by such means. Such servants are wholly dependent, for remuneration, on the will of the Crown, or the judgment of those to whom competent authority may be, in that respect, delegated.—Interest (on public money). Public functionaries must account for interest made by them, on any considerable balances in their hands, of the money, being the proceeds of public property sold by them, in pursuance of the duties of their appointment to such a charge; although they have necessary payments to make, in the course of those duties, if their instructions on their appointment direct them to pay such proceeds into the Bank, and point out a course of supply-

ing themselves with money for their expenditure.—(Quære, whether, in any case, public accountants may appropriate the interest made on large balances in their hands, as matter of right?—Evidence. In a suit against the Crown, to which the assignees of a bankrupt, who, but for his bankruptcy would have been in the same interest with the plaintiffs, are made defendants, the bankrupt himself cannot be examined as a witness on behalf of the plaintiffs, although he has released the assignees, because the Crown is not bound by the statutes relating to bankrupts.

The plaintiffs in the present suit (by bill) were the three survivors, and the representatives of a fourth of the five persons who had been appointed Commissioners (usually called the Dutch Com-[2]missioners) under the act of Parliament of the 35th Geo. III. c. 80, enabling the government to commit to their care and management (for restoration, sale, or other advantageous disposal) the Dutch ships and their cargoes, which had been or should be brought into this country, or detained in the British ports, by virtue of an Order in Council of the 16th of January, 1795, and other subsequent orders.

The defendants were the Attorney-General and the assignees of Brickwood, (the other Commissioner) who had become bankrupt.

The bill prayed of the Court, that the plaintiffs and the other Commissioners, their colleagues, [3] might be declared to be entitled to a commission of 5l. per cent. per annum, on the gross proceeds of the sales of the ships, cargoes, wares, merchandizes, and effects, confided to their care, and possessed by them, and condemned—a direction that the auditors of public accounts might, on the audit of the accounts of the plaintiffs and their colleagues, allow such commission to them—and a declaration that the Commissioners, the plaintiffs, and their colleagues, were entitled to the sum of 42,504l., admitted to have been received by them, for interest on sundry investments of money, whilst the same remained in their hands uncalled for, and to all such other sums as may have been made, for interest on the said balances; and that the auditors might be directed not to charge the Commissioners, on the audit of their accounts, with the sum of 42,504l., or any other sum of money which did not appear, on the audit of such accounts, to have been received by them, on account of interest on any investment of money, while the same necessarily remained in their hands unappropriated:—and in case the Court should be of opinion that the plaintiffs and the other Commissioners were not, under the circumstances, legally constituted Prize Agents to his Majesty, and were not entitled, as such Prize Agents, or otherwise, to a commission of 5l. per cent. on the gross proceeds of the said sales, or to interest on the said balances; then that they might be decreed to be entitled to charge, in their accounts, the expenses of their establishment, and all other their outgoings, in the execution of the duties imposed on them, and that all neces-[4]sary enquiries might be directed, for the purpose of ascertaining the amount of remuneration to which they were entitled, on account of their time and trouble, in discharge of their judicial functions, and the several other duties imposed on them by the act, commission, or instructions [adverted to hereafter;] and that all necessary directions might be given for such purposes, and that the plaintiffs and their colleagues might be declared to be entitled to such remuneration as, upon the result of such enquiries, should be found to be due to them, and to charge the same in their accounts.

The bill charged, in substance, the facts stated and relied on by the plaintiffs' Counsel, and insisted on the several points made in the argument.

The answer of the Attorney General (which was full on this occasion) submitted the topics urged in the defence.

The evidence consisted of admissions of the material facts—the various documents relied upon on either side—and proof of the general usage in regard to the remuneration of prize agency, the customary allowances for brokerage on insurances, &c.

[To prove that the balances which the Commissioners had retained in their hands, for the purpose of making payments, and satisfying successful claims on the property entrusted to their care, amounted to no more on any occasion, than the Commissioners had bonâ fide considered to be ne-[5]cessary for those purposes, the plaintiffs proposed to read the depositions of Brickwood, one of the Commissioners, who, having become bankrupt, was not a party to this suit, but by his assignees, to whom he had signed a release.

On the part of the defendant, it was objected, that as the Crown was not bound by the statutes regarding bankrupts, the bankrupt could not be admitted as a witness against the Crown; because, although he had released the assignees, he still had an interest to diminish the claim of the Crown, and augment the charges of the Commissioners.

On the other side, it was urged that he could have no interest in this case, at least, because it was admitted, that the balance was on the whole, in any event, in favor of the plaintiffs, the only question being the amount of that balance—but

The Court (consisting of Thomson, Lord Chief Baron, and Graham and Richards, Barons,) held that the witness was not admissible, because, as in the case of subject parties, a certificate would be necessary to restore the bankrupt's competency, so as there can be no discharge by certificate against the Crown, a release of the assignees, as to any surplus which might be ultimately recovered, was not sufficient to render him competent.

Depositions rejected.]

[6] The substantial object of the suit was to bring under the revision of this Court the principles on which the auditors of public accounts had founded their rule in investigating the accounts rendered by the Commissioners, and in refusing allowances, and making surcharges in respect of the sums claimed by them as a remuneration for their services in the course of their duty. The Commissioners, in their discharge as to the money which had come to their hands, had charged the Crown with a commission of 5l. per cent. on the gross proceeds arising from the sale of the ships, &c. with the disposal of which they had been entrusted in quality of Prize Agents—and they claimed to be entitled to retain, as matter of right, a sum of 42,000l. and upwards, made by them by interest on balances in their hands. The auditors had disallowed the claim of 5l. per cent. on the gross proceeds, and calculated it on the net proceeds, making thereby a deduction of 27,000l. and they had surecharged the plaintiffs the sum made by interest, as being part of the proceeds of the sale of the property, which it was their duty to render as available as they might. The propriety of the conduct of the auditors, in assuming to themselves a power so to take the account, and the jurisdiction of this Court to interfere with the discretion of the Board, formed the main question now brought before the Court by the present proceeding.

The nature and history of the appointment of the plaintiffs, and the political events which gave rise to it, being of material importance to the [7] merits of their case, and the foundation of the principal arguments; they were therefore introduced into the bill, and stated to the Court in detail, and are succinctly as follows:—

About the end of the year 1794, and the beginning of 1795, (the French having obtained a footing and very considerable influence in the Netherlands, and the United Provinces), the British Government, with a view to encourage a friendly disposition towards this country in the Dutch people and to facilitate a commercial intercourse, by an Order in Council permitted a general importation of merchandize direct from the ports of the United Provinces to those of this kingdom: and other orders were made with the same object. War between the two countries being soon after considered unavoidable, orders were issued to the commanders of the King's ships and privateers, to bring compulsorily into the British ports all Dutch vessels bound to or from Holland, in order that they and their cargoes might be detained, provisionally, and that speedy restitution should be made of all such cargoes found on board, or the value, as should appear to belong to subjects of Britain or of allied or neutral Powers. In consequence of those several orders, many ships with cargoes came voluntarily to this country; many were brought in by the King's ships, and many at that time here were detained. The importation of Dutch merchandize having been previously prohibited by acts of Parliament; an act was necessarily passed in May [8] 1795, (35 Geo. III. c. 86)*, sanctioning the Orders in Council. By the 21st section his Majesty was empowered, with the advice of the Privy Council, to grant a commission to three or more persons, authorising them to take such ships and cargoes under their care and management. A commission was accordingly issued to the plaintiffs and their colleagues, and they received instructions† on their appointment, in respect of

* This act, and its provisions, are fully detailed in the judgment delivered by the Lord Chief Baron.

† The material tenor of which is also particularly stated in the judgment.

the performance of their duties. War was ultimately resolved on by this country, and general letters of reprisal were issued (15th September, 1795) against Holland by the British Government, a measure equivalent to a declaration of war. Instructions were also, on the 10th of October, issued to the Admiralty, which, after reciting the act of the 35 Geo. III. and the commission thereon, and the letters of reprisal ordered the Court of Admiralty to proceed to the adjudication of such ships and goods of which possession had been or should be taken by the British Commanders, as should be proceeded against by the Advocate-General on behalf of the King, in order that the same, being the property of the United Provinces, or their subjects, might be considered as good and lawful prize, reserving nevertheless to the said Commissioners the care and management thereof, as well before as after final adjudication, according to the provisions of the said act.

[9] In the early part of the same year, before war was actually declared, Capt. Essington had captured seven Dutch East India ships on their passage from St. Helena to Holland, and carried four of them into the Shannon, in Ireland, as capture; and he employed persons to take possession of them as Prize Agents: but that proceeding being considered adverse to the King's rights, an Order in Council was issued, asserting his Majesty's right to the ships, and appointing agents for the care and disposal thereof, and ordering that the Dutch Commissioners, by name (not describing them as Commissioners) should be the agents on behalf of his Majesty, for the care and management of the said ships and their cargoes, whereof all persons concerned were to take notice.

The Commissioners, in consequence of their appointment, afterwards formed an establishment for the management and conduct of the business, opening an office, employing clerks, &c. and transacted official business to a very great extent. They had, of their own accord, insured the ships taken by Captain Essington, on the intelligence of his arrival in London, to the amount of 150,000*l.* and were afterwards engaged in a very protracted litigation with the underwriters, in consequence of their claims for the loss of some of them on their course to Ireland, in which they ultimately recovered.

By a subsequent Order in Council (3d May, 1809) the plaintiffs were ordered to make up their accounts, and transmit them to the office of the Privy [10] Council, with their vouchers, that they might be laid before the Lords of the Treasury, who were to refer them to the Commissioners for auditing the Public Accounts. That order directed the plaintiffs to charge in such accounts a commission of 5*l.* per cent. upon the net proceeds of each ship and cargo, they paying thereout the expences of their establishment. It also ordered the Commissioners to give credit for sums received by them for interest on the balances in their hands.

Upon the delivery of their accounts by the Commissioners, pursuant to the directions of the Order in Council, accompanied with a protest against their being held to be bound by it, the Lords of the Privy Council entered into a minute and elaborate enquiry as to the principle upon which those accounts ought to be taken. They thereupon resolved, that it was fit that the Commissioners should be allowed the expences of their establishment, and declared, that if the Commissioners considered themselves entitled by law to the commission of 5*l.* per cent. upon the gross proceeds, or to the interest made by them on balances, every facility should be given to their taking the opinion of a court of justice upon the legality of their claim: and the Treasury, in consequence, directed that steps should be taken, on the part of the Government, to procure such decision. A correspondence then took place, wherein the Commissioners stated to the Council that there would be difficulties in ascertaining what were the net proceeds according to the view of the Privy Council, for that considerable payments had been made for [11] various purposes, to the crews of vessels, compositions to the East India Company, for the home consumption of China and East India goods, and expences to captors, which had occasioned them as much trouble as their other duties: they therefore desired to know what was to be considered as net proceeds. They were at first answered, that nothing was to be considered net proceeds, except what had been rendered available to Government. The Lords of the Council afterwards relaxed that criterion, and decided, that as to all which had been realized or restored to the claimants after sale by the Commissioners, the commissioners should charge therein commission on the net proceeds of the sales, as well as on the monies paid over to Government. The Commissioners, however, still insisted upon their

right to charge commission upon the gross proceeds, and to retain the interest of monies in their hands; and in their letter to the Secretary of the Council, expressed a hope that their Lordships would reconsider their order of the 3d of May. Upon the delivery of the accounts, the Privy Council took the pains to enter very particularly into them; and a minute of Council was drawn up, expressing, as the result of that investigation, that their Lordships had taken the Commissioners' letter and all the circumstances into full consideration, and referring minutely to the various authorities under which the Commissioners were appointed, they observed, that under the circumstances, it appeared to them difficult to determine what remuneration ought to be made to the Commissioners, especially as they appeared in the insurances [12] effected by them to have described themselves only as "Commissioners for sale of Dutch property," that being their usual style and firm of dealing, and to have blended the whole conduct of their duties, under all the authorities vested in them, in one general account as Commissioners; and accordingly had paid large sums of money (being the produce of the sale of the ships and cargoes placed under their care and management, and of the insurances effected by them, on which they had recovered at Law) into the Bank of England, according to the directions of the act under which they derived their joint authority, as expressly recognized and preserved by the instructions to the Court of Admiralty. On the whole, their Lordships were of opinion that the Commissioners, in making up their accounts, ought to consider themselves as Commissioners acting under the authority of their commission so affirmed and preserved, and as entitled to a remuneration in that character; although in determining the amount of the remuneration to be received by them, it might be fit to take into consideration that in some respects they should be deemed to have acted also as Prize Agents, as where they had actually saved the charge of agency usually allowed—and that they ought not, in their accounts, to charge commission either on the gross proceeds, according to the practice before the passing of the act of the 45th of the King, or on the net proceeds under the provisions of that act. They then suggested that some middle course should be adopted: for that they ought not to have so much as five per cent. upon the gross proceeds, nor so [13] little as five per cent. on the net proceeds; but that where they had saved the Crown the expence of Prize Agents, and had performed other duties, regard ought to be had to the nature, magnitude, and efficiency of their services—that they should account for any interest which they might have made of money retained in their hands, although a power was necessarily given to them to determine what should be necessary for the discharge of their duties—that they ought, on the other hand, to charge in their accounts all the expences incurred by them in executing their commission, which, considering themselves as Prize Agents, they had not done—and that their expences, with proper vouchers, should be submitted, with their accounts, to the examination of the Auditors.

The Board of Audit, however, persevering in the disallowances and surcharges which they had made, the plaintiffs now resorted to this Court, praying the interference sought by the present bill.

Wetherell, Nolan, Jennings, Richardson, and Combe, of Counsel for the plaintiffs, and Carr for the defendants, the assignees of Brickwood, who were in the same interest as the plaintiffs, supported the prayer of the bill.

Under these circumstances, they contended in substance, that the Commissioners were, in point of fact, to all intents and purposes Prize Agents, and entitled to all emoluments and profits attached to the duties of such employment, which [14] was by custom and usage, until the 47 Geo. III., established to be 5l. per cent. on the gross proceeds—and that although called Commissioners in the act of Parliament, in the enumeration of the duties prescribed to be performed by them were to be found all the business that was usually performed by Prize Agents: it was true there are other and higher duties to be performed, and more extensive services to be rendered by them as Commissioners; but that (they urged) so far from operating to diminish, ought to have the effect of augmenting the remuneration—that the term by which the Legislature had chosen to designate their office, could have no effect in changing the nature of their employment, nor should shut them out from the advantages of it to themselves—that if they were not in the first instance constituted Prize Agents by the act of Parliament and the commission under it, they certainly were, as soon as by the declaration of war the ships had become prize as between the Belligerents; for the nature of their employment was then unequivocal, and the state of the property

under their care had become wholly changed and altered—the property had then become prize, and was shortly afterwards so adjudicated, and the Commissioners then became under the instructions, the duly constituted Prize Agents, having the undisturbed and sole management and sale and disposal of the ships and cargoes. They observed that the plaintiffs were persons of great responsibility, and that responsibility was subject to the consequences of their administration of the charge: and that the appointment was altogether, in its nature, [15] rather a private than a public employment, for although the proceeds arising from their disposal of the ships and cargoes, were directed to be paid into the Bank of England, on account of his Majesty, they belonged to him individually and privately as Admiralty droits, and not as public money, payable into the Exchequer.

They urged that so obvious was it that they were, and had been considered to be Prize Agents by Government, that they had, in respect of the Dutch ships in Ireland, been actually so termed in the document by which they were appointed: and that it was a mere subterfuge to make a distinction between the duty, and the name of the office, for the purpose of abridging the remuneration. As well (they argued) might it be said that a person who should be appointed a Commissioner to purchase and sell stock for his Majesty, would not be in fact a broker, as that these plaintiffs were not, under the circumstances, Prize Agents, because they had been styled Commissioners. The Lords of the Privy Council had not disputed the plaintiffs having acted as Prize Agents on the behalf of Government, and they were admitted to have saved to the King, by so doing, the expence of employing other persons in that necessary capacity, which his Majesty must have done as soon as the property had devolved on and become vested in him *jure coronæ*, by the actual commencement of hostilities. There was no distinction, they urged, between the case of the Crown, and of the subject, in this respect, giving to the King a right to refuse to the cha-[16]racter in which he employed an individual, the incidental consequences which would essentially belong to it in the instance of a subject, and that there was no foundation for saying that being employed by the King, does not entitle the agent to the remuneration which, if employed by a subject, he would have a right to demand.

They then submitted, that if the proposition now contended for by them, was not sufficiently supported by principles of law and reason, and by the general understanding of mankind, there was to be found a decision on the point, on the authority of the highest Court in this country, which had already established that these very plaintiffs were, in point of legal construction of the nature and object of their appointment, the duly constituted Prize Agents of the Crown. That was in effect decided in the case of *Lucena v. Craufurd* (2 N. R. 269). It was there determined—on the question of whether there was a sufficient interest in the Commissioners to sustain the verdict that had been taken on the first count of the declaration, which averred the interest to be in the Commissioners—that after the commencement of hostilities they were Prize Agents. In the judgment delivered in that case in the Court of Error, the majority of the Judges considered that there was a sufficient interest, the others that there was not. When that case was afterwards carried up to the House of Lords, the second and third questions propounded to the Judges were, what legal interest the plaintiffs as Commissioners [17] had under the act of Parliament, to entitle them to take possession of and to manage (&c.) the property as such Commissioners—and whether, under the circumstances in evidence, they were duly and effectually constituted agents on behalf of his Majesty, for the care, &c. of the Dutch ships carried into Ireland: and whether, after the declaration of hostilities, their authority was to be considered in law as vested in them as Commissioners, by virtue of the act and commission: or as agents appointed by the Orders in Council. Upon those points there was a difference of opinion, five of the Judges considered that the plaintiffs had an interest as Commissioners, holding that the power of the Commissioners was much more extensive than that of Prize Agents; for the power of a Prize Agent extends only to the taking care of the ship, and managing it during the suit in the Admiralty Court: whereas these Commissioners performed much more extensive duties. “The Crown (said those Judges) appointed them Prize Agents, for the purpose of giving them as much power over the ships in question, in the ports of Ireland, as they had under the original commission in this kingdom, and to enable them to bring the ships within their jurisdiction as Commissioners.” Their opinion, therefore, that the plaintiffs had an insurable interest as Commissioners, was founded upon the ground that they had a much more extensive

appointment than that of mere Prize Agents: for they said that, "In the ordinary course of proceedings, Prize Agents would be appointed for the management of these [18] ships: but by these instructions the King, without conferring any new power on the Commissioners, reserves to them the care and management of the ships." The other Judges were of opinion that their function as Commissioners would not sustain their interest, because, till hostilities had commenced, the Crown had no right to the property, but when war had been declared, they appear to have considered that the plaintiffs were to be regarded as Prize Agents. To the third question the five first Judges answered, that "the plaintiffs were duly constituted Prize Agents of the ships sent into Ireland, and that they exercised their authority in Ireland in that character; but that their appointment as Prize Agents in Ireland was not inconsistent with, nor in any respect intended to revoke or abridge their power as Commissioners in England, and that as soon as the four ships mentioned in the declaration were brought by the King's order into the ports of England, their authority as Commissioners attached upon them:" and they relied upon the reasons given in answer to the last question. The other five Judges, however, thought that the plaintiffs were duly constituted Prize Agents of the captured ships, and that their authority to continue such ships under their care and management, as well in Great Britain as in Ireland, was vested in them as Agents appointed by Order in Council, and not as Commissioners under the act. That answer they considered as following of course from the opinion before given—that after the commencement of hostilities, the plaintiffs could only act [19] under a new authority derived from the Crown, and not by virtue of the act of Parliament: being of opinion that they continued to be Prize Agents, but necessarily also to act as Commissioners: and holding that the reservation contained in the Order in Council, merely limited their authority as Prize Agents by their power as Commissioners. The same view of it is clearly expressed by Lord Eldon (having previously stated that it would be necessary to the question, to determine the real character of the Commissioners,) was ultimately adopted by the House of Lords. His Lordship says, "The moment hostilities took place, the property was condemned as prize. The power of the Commissioners could never have attached upon it in the hands of the King, nor could they have had any authority to deal with it, unless the King had thought proper to grant it to them. With respect to the ships in the ports of Ireland, he expressly constitutes them Prize Agents:" (so that, they observed, there was the highest authority for saying that the not calling them Prize Agents cannot be the foundation for an argument that they are not, in fact, Prize Agents) "and" (continued his Lordship) "with respect to those brought into this country, and condemned, he authorizes them to deal with the proceeds in the manner they had been instructed to deal with them as Commissioners, and according to such instructions as they should thereafter receive. But I state it with great confidence, though, I hope, with proper humility, as my clear opinion, that after the declaration of hostilities, the Commissioners neither did deal, nor had a [20] right to deal with the property as Commissioners." It was, therefore, the opinion of his Lordship and the House of Lords, that as well as to the Irish as to the English ships, their authority was revoked, unless it was renewed to them by the Government: and that the Commissioners, under the appointment of the King, afterwards united both characters. "His Majesty, having a title to it, makes them his Agents, and points out to them in what manner they shall exercise that agency, directing, that it should be in the same manner as if they had derived their title under the commission, and not under their special appointment as Prize Agents," directing them, in substance, to exercise their authority as they had exercised it under the act of Parliament; but his Lordship was of opinion that they had no power under the act, or the commission, but solely under the appointment of the Crown, contained in the reservation, and which constituted them Prize Agents. Therefore, upon authority, as well as upon principle, and the circumstances of the case, they submitted, it was clear, that the plaintiffs did sustain the character of Prize Agents: and if so, that they were entitled in law and in justice to the remuneration attached to Prize Agency by custom and the universal assent of the mercantile world.

If, however, on the other hand, the Court should hold that the plaintiffs are not to be considered as Prize Agents, and entitled to their commission upon the gross proceeds; they contended, according to the prayer of their bill, that as Commissioners of the Crown the plaintiffs [21] were bailiffs, and that all fair expences incurred by them would be a charge that they would be clearly entitled to make against their

principal, every agent being entitled to charge his fair expenditure, unless custom prevent his so doing. The Commissioners (they stated) had necessarily been compelled to have an extensive establishment of clerks and offices for the conduct of their business, reaching to every out-port of the country; the expences of which establishment for such a period of time as their commission necessarily lasted in consequence of litigation (above twenty years) had exceeded 21,500*l.*: and the Privy Council admit, that if they are not entitled to commission upon the gross proceeds, as Prize Agents, but on the net proceeds as Commissioners, they are entitled to their necessary expences; they therefore urged that the Auditors, who were bound to obey the orders of their superiors, had no right to surcharge the plaintiffs the difference of the amount of the commission upon the gross proceeds, and still less to refuse to allow the expences, contrary to the express recommendation of the Privy Council. Then the difference upon the net or gross proceeds, amounting to 27,000*l.* and a fraction, and the expences of their office being 21,500*l.* the difference to be disallowed would be only 5500*l.*; therefore, if these gentlemen are not Prize Agents, they are entitled to be allowed the expences of their establishment, so that that surcharge, instead of being 27,000*l.* and upwards, ought to have been only 5500*l.*

They next proceeded to the consideration of [22] the question of interest, and the charge made against the Commissioners of 42,000*l.* and upwards, admitted by the Commissioners to have been interest made by them on monies remaining in their hands, but not unnecessarily, nor, indeed, was it even suggested by the Auditors to be unnecessarily remaining in their hands; and which they insisted were mere floating balances, subject to pending claims in a constant course of daily determination.

They observed that the reason upon which the Board had made this charge, as stated by themselves, in the document put forth by them on the subject, was upon the general principle of all public accountants being accountable for all sums of money that "shall at any time accrue to them, and be received by them, or by any person or persons on their behalf, by virtue of their office or employment in the public service, other than such as they shall be duly authorised to receive and retain as a remuneration for such office or employment:" and they refer to the Order of Council, of the 3d of May, 1809, directing these accountants to give credit in their accounts for all sums received by them for interest, on any balances they have at any time had, or may now have in hand, as conclusive with regard to the surcharge of that sum for which they have not given credit to Government in their account. But that they denied to be the law: and consequently, therefore, that any ground was laid at all for charging the plaintiffs with interest to the amount of 42,000*l.*, submitting, that before the [23] audit acts, as those acts and their provisions necessarily prove, all public accountants were considered entitled to the interest on balances of public monies in their hands; so that they were ready at all times to answer the demands of the public, when made upon them—that there was nothing, in those statutes, or at common law, which could operate to render these Commissioners accountable to Government for the interest on monies necessarily and properly remaining in their hands, so that they were not defaulters, but prepared when called upon to pay it over, or to account—and that if they were not ready to pay at the time when balances were in their hands, it appears matter of great doubt, whether, even in that case, they could be so charged, as coming within those acts, because they do not make provision for a case like the present, where money has not been improperly retained in the hands of the accountant, and here that is not suggested. Those sums were, in fact, balances which the Crown could not at any time have demanded or taken from the plaintiffs; and which the Crown had not, at any time, a right to call for; because this 42,000*l.* was the interest of money necessarily kept in their hands to answer expected successful claims, always on the point of determination, sometimes to an amount of considerable magnitude. Whether, therefore, the balances in the hands of the Commissioners, which were retained by them for the various purposes and duties enumerated and imposed by the several sections of the act authorising their original appointment, resulted from money kept in their hands, and produced by the [24] disposal of the property: or whether it had been advanced to them by draft, after it had been paid by them into the Bank, the principle of keeping the interest which it should produce would be precisely the same. However the principal sums might come to them, whether regularly or irregularly, the interest would belong to them, which should be made of it while necessarily under their accidental controul. All that could be

required of them would be, to be able to shew that they never kept more than they calculated to be enough to answer the claims against them : and it is not pretended that those calculations were not bona fide. They submitted, as a further objection to the Crown claiming the interest made on such balances, that during the time they remained in their hands, they formed no part of the public money, but were in medio between the Crown and the claimants ; and it depended on the adjudications of the Admiralty whether it belonged to the one or the other. They also insisted, that independently of these acts of Parliament, public accountants were not answerable to Government for the interest on monies in their hands, as of common right—that the Crown must shew some ground for demanding interest ; and that very few cases could occur (unless a special bargain was made) prior to this act, in which the Crown would be entitled to it—that the law does not require that, in every case of interest made by a public accountant, it is to be paid over to the public, unless he can shew some reason why he should keep it ; on the contrary, he may retain it, unless the auditors can shew a reason [25] why he ought not, provided he be always ready to make necessary payments. They submitted, therefore, that the plaintiffs were entitled to render the balances productive, which they must do upon their own risk and responsibility, they being liable for all the securities on which they may invest it ; and that they are entitled so to do, as an accidental emolument attached to their situation, unless some law or reason to the contrary can be shewn. On that part of the argument, they cited the following cases from Viner's *Abr. tit. Account* [O.], pl. 12, p. 162, and *Roll. Abr.* 125, pl. 12. "If a man receives money of J. L. to deliver to J. D., as a messenger, in an account against the bailee, he shall be discharged before auditors by tender in Court of the principal sum ; for he is not to account for the profit thereof in the mean time, though he hath detained it in the mean time ; for he did not receive the money to merchandize, but only to deliver over," and *ib.* pl. 13. "So, if my bailiff of my manor receives the rents of my tenants, and retains them for two or three years, yet, in a writ of account, he is not to account for the profits coming therefrom in the mean time ; for he had not my warrant to merchandize with them, or to gain or lose." *Fitzherbert, Nat. Brev. tit. Writ of Account*, p. 117, in notis. And they submitted, that unless there were any thing in the King's prerogative which distinguished the cases, the plaintiffs were, with regard to the Crown, in the same situation as receivers in the Court of Chancery are, with respect to the infants, or the married women, on whose behalf they are appointed, who never pay [26] over balances till three months, and sometimes half a year after they are due ; and they have a right to make interest of the money whilst remaining in their hands, without being accountable for it to the Court, or to the persons for whom they are bailiffs ; and that is a part of their remuneration. They are not trustees ; and therefore have no *custui qui trust*, to whom, as trustees, they would be accountable for the fruit of the employment and use of the principal.

On the argument expected to be founded on the fact, that the act of Parliament contains a peremptory direction to pay over all sums forthwith to the Bank of England, they insisted, that it was clearly necessary for the plaintiffs to keep money in their hands to satisfy the claims to be paid by them : and that it must be intended, that they are directed to pay over to the Crown only the clear ultimate balance, after the discharge of all demands—or the net produce, which, being once paid into the Bank, was there to remain, subject to such orders as his Majesty, with the advice of his Privy Council, might think fit to give thereupon : that is, until such final orders as might be made, whether they should be, in the result, to pay it to the parties to whom it should be adjudged to belong, or to his Majesty, in right of his Crown—for that it could not be meant that the Commissioners were to apply, from time to time, to his Majesty in Council, for permission to draw a draft upon the Bank, to meet current expences ; such an interpretation would be most inconvenient, and such as no man, whether merchant or lawyer, could possibly [27] suggest, as the fair construction of the Legislature. The Commissioners are to be furnished with money in the first instance, to pay off the crews of detained vessels, if the demand should appear to them to be just. Money was to be issued to them on account ; but they were to take care that all money which should be so issued to them should be replaced out of the sale of the ships and cargoes, as soon as they should be sold. It is to be inferred, therefore, that those payments to the crews were to be defrayed, by the Commissioners, out of monies to arise from sales, as soon as they should have become productive ; and

that money, which had been advanced to them by the Treasury, they were, in the first instance, to replace, as soon as there should be money enough received by them from the sale of the ships and cargoes; and they were not to replace that money by paying it into the Bank, but by paying it to the Treasury, who had advanced it.

The first act of Parliament, providing for the payment of interest by accountants, they observed, was the 39th & 40th of Geo. III. c. 54, and that only two cases are provided for by that act. After reciting the expediency of charging public accountants with the payment of interest upon public monies received by and due from them, it enacts, that in all cases where any person employed in the collection or receipt of any part of his Majesty's revenue, shall, from and after the passing of the act, die, or go out of office, being indebted to his Majesty at that time, in respect of his said office, to the amount of 500l. or up-[28]-wards, the proper officer is to charge him, in case of death, from twelve months after, or, in case of going out of office, from three months after, with interest at the rate of 5l. per cent. per annum, upon the whole of such balance due from him. That provision, they submitted, clearly cannot apply at all in this case. These plaintiffs had not died, nor gone out of office, nor is there any charge made upon them upon those grounds; but the 42,000l. is the interest made by them while their functions were in full exercise. The act then gives to the party aggrieved a right to apply to this Court by motion, who shall give him relief in a summary way, if it thinks it just and reasonable.

The fourth section provides, "that upon any audit which shall take place after the passing of the act of any ordinary or extraordinary account, where it shall appear to the Commissioners for auditing the public accounts, that any public accountant is indebted to his Majesty, upon the balance thereof, in the sum of 500l. and upwards, such account not being an account current, it shall and may be lawful for the said Commissioners, at their discretion, to charge the said accounting party with interest upon the whole or any part of the said balance, for such period of time past, and at such rate of interest, as they shall deem to be just and reasonable, so that the said rate of interest do not exceed 5l. per cent. per annum; then they are required to give notice; and a further charge is to be made in the interval between the statement of the account [29] and the declaration. The case also does not apply to the present circumstances, so far as relates to the 42,000l.; for, at the time when the 42,000l. was made by these Commissioners, the account was undoubtedly an account current in the strictest sense of those words: the parties were receiving sums of money on the one side, and making payments on the other; and the interest, to the amount of 42,000l., which was made from the time when the Commissioners were appointed, was made at a time when they were retaining in their hands monies for the purpose of meeting the various disbursements, which they were bound to make, and the numerous and large claims daily established against them, and they were also receiving the monies arising from the sale of ships and cargoes and that constituted strictly an account current during the whole of that period. That section must be taken to apply wholly to a case in which the auditors find a party presently indebted, and indebted upon an account final, not an account current, as in the case of a collector of taxes, who is to receive monies, and pay the amount, whatever it may be, over to his immediate superior, or to the Exchequer, and such a person cannot be said to be indebted upon an account current.

The other act of Parliament, which carries the responsibility of public accountants still further, is the 47th Geo. III. sess. 2, c. 39. It recites the 39th and 40th of the King, and that it is just and reasonable that persons who have improperly and un-[30]-necessarily retained in their hands large balances of public money, should, in certain cases, be charged with interest upon such balances: but no power is given by the said act to charge such persons with interest, except in the cases that are particularly specified in the said act, (which seems to assume pretty clearly that, but for that act, parties could not be charged with interest, but upon special grounds arising from contract) it is therefore enacted, that in all cases in which it shall appear, upon the examination or audit of public accounts, that balances of public money have improperly and unnecessarily remained in the hands of the accountant, it shall be lawful for the Commissioners for auditing the public accounts, and all other officers who shall be charged with the duty of examining and finally passing such accounts, and they are thereby authorized, in all cases in which it shall appear to them to be just and reasonable, to charge such accountants with interest upon the whole or any part of the said

balances, for such period of time past, and at such rate, not exceeding 5l. per cent. per annum, as they shall deem reasonable, although it shall appear that such accountants were not indebted, at the time, or in the manner mentioned and specified in the said recited act. Then it authorises them, in certain cases, to make annual rests in the account, and to give notice to parties charged, who may appeal to this Court in a summary way, who shall make such order thereupon as justice shall require; and the several persons whose duty it is to make up such accounts shall govern themselves accordingly.

[31] Thus it appears that the former act did not extend to this case, but only to cases where the money remained as a balance in the hands of the accountants after the time of their having died or gone out of office; and then the last act makes a further provision for the case, where the money had been improperly withheld generally, enacting, that where that should be the case, it might be lawful for the commissioners, in their discretion, to charge the party with interest, subject however to the supervision of this Court.

In this case, they observed, it had not even been charged that the money upon which the interest arose was at any period of time improperly or unnecessarily withheld by the plaintiffs: for the charge is not made against them upon that ground, but merely because they did in fact make it. But they contended that the fact of their having actually made it productive of interest, without proof of the retainer of the principal, having been unnecessary and improper, does not, in the smallest degree, affect the question of right. It is to be supposed, that all persons who have large sums of money in their hands, which they are entitled to hold, will make them productive of interest; and it is in cases only where such balances have been improperly withheld, that the party is by this act made chargeable; and there is no law, common or statute, which, in the case of public accountants, generally requires that they shall not retain interest made upon [32] money in their hands, whilst they at all times have it ready for the exigencies of the service entrusted to them; and if they have it, and perform those services, and the money is duly paid over when required, they perform legally, as well as morally, their duty, and they are as much entitled to the interest they make, as a banker is entitled to the interest arising from the money put into his hands by his customers.

In the case of several public accountants, the law has very recently been altered, whilst others are still entitled to the right of keeping the interest on the money in their hands. Thus the Paymaster of the Navy is now, since the office has been regulated by statute, no longer entitled to interest, but previously he was not accountable for interest. It was so with the Masters in Chancery, and it is so at this moment with respect to the Receivers of the land-tax, and Receivers-General for counties—persons generally of respectable station are appointed, with salaries such as would never make it worth while to those gentlemen to accept it, amounting only to fifteen or twenty pounds a year; they make interest of the money, having it always ready to pay over whenever it shall be demanded; but during the interval they avowedly make interest upon it, and that is the source to which they look for their remuneration. It is so with respect to the Registrar of the Admiralty, and the Deputy Remembrancer of this Court, and that, notwithstanding the special attention of the Legislature [33] has been recently called to the subject, and although they have legislated upon it, they have not interfered with the vested right of the present Registrar; for the provision made is to take effect after his demise or resignation: and the Deputy Remembrancer of this Court is still fully in possession of that right without infraction of any law. They enforced these propositions by reasons of analogy with the rule of the common law, which does not give interest on money withheld, except in the case of bills of exchange, and that is an exception by force of the custom of merchants, but in the common action for money had and received, interest on the sum recovered is never allowed, and is only to be obtained collaterally.

As to the surcharge of interest upon the difference between the gross and the net proceeds, amounting to 27,000l. and a fraction, from the 3d of May, 1809, the date of the first Order in Council upon the subject, until the statement of the account by the Auditors, —they submitted, that if the Commissioners were, as Prize Agents, entitled to charge commission upon the gross proceeds, of course the surcharge of interest on the difference, must fall to the ground; or if they are not entitled to retain such commission to be charged upon the gross, but the net proceeds, then their

expences ought to be allowed, which, amounting to about 22,000*l.*, would reduce the difference to 5000*l.* instead of 27,000*l.* and on that smaller sum only, such interest ought to be charged.

[34] The surcharge of interest, they submitted, would depend on the plaintiffs being held to be properly called upon to pay over the interest itself, or not; but at all events they insisted the Commissioners could not be called upon to pay interest upon that interest, but from the period at which they ought to have paid the interest itself over.

The surcharge of 3500*l.* for brokerage in effecting insurances, they contended was unfounded, submitting that that was a part of their duty advantageously performed, whereby expence was saved to the King; and therefore furnishing a claim for remuneration, independently of their other services and of the character in which they had been performed.

On general principles therefore, they contended that the plaintiffs were *de jure* to be considered as Prize Agents, having *de facto* performed all the functions of Prize Agency, together with many more, and because after a declaration of hostilities they could not have acted but as agents for prize,—that they acted so expressly and by appointment as to the Irish ships, and in effect and by necessary implication as to the English ships; that although the words “Prize Agents” are not mentioned in the act or the commission, the reservation in the instructions as to their duties under the act clearly shews they were Prize Agents, for they could not deal with the matters thereby entrusted to them otherwise [35] than as Prize Agents; that if they were Prize Agents, they became (there being no specific bargain between them and the Crown) entitled to be paid that commission to which persons were usually and by custom entitled for Prize Agency, which was at that time five per cent. upon the gross proceeds, and that not controverted on the other side, but recognized by the act of the 45th of the King, ch. 72, s. 69, which, for the first time, introduced a different remuneration for Prize Agents, directing that they should in future charge their commission upon the net, and not upon the gross proceeds; that if Prize Agents were entitled before that act to charge their commission upon the gross proceeds, so would the plaintiffs. And they also insisted, that they were entitled either as Prize Agents or as Commissioners, or whatever might be their character, to the benefit of making profit by interest of monies remaining necessarily in their hands for current exigencies, until those monies should be wanted, so that they were always ready to meet the exigencies of their situation when the necessary calls should be made upon them; in fine, that to establish that the plaintiffs were Prize Agents, was to establish the whole of their case, with the exception of the brokerage, which must stand upon its own ground.

That if, on the other hand, the plaintiffs were not Prize Agents, then they ought to be allowed to charge commission upon the net proceeds, as Commissioners, and to be allowed besides the ex-[36]pences of their establishment, which would come to within 5500*l.* of the same amount, and would reduce the difference, with all the accumulation of interest upon that difference, to a minor point—and that at all events the dates which the Auditors have taken for their computations were erroneous and calculated to work injustice.

Finally, they contended that if the plaintiffs were not to be considered Prize Agents, but accountants having money in their hands, yet as they held that money under circumstances not calling upon them to account for the interest made, they not being shewn or even charged to have unnecessarily or improperly retained for an hour any part of that money, but it being money which they kept to answer current expences, or demands likely to be made upon them, they were entitled to make interest of it in the mean while: that the general ground that all public accountants are accountable for interest, is not supported by any law or statute; that if they are entitled to the 42,000*l.* interest so made by them, of course they are not liable to be surcharged with the interest arising upon it, and at all events, if they are chargeable with any interest, they were not liable from the periods at which they are stated to be chargeable, nor until there was a declaration of the accounts made, which should state that it was improper for them to retain it, and to which they would be bound to defer; that the charge of the brokerage being no extra charge upon Government, but as [37] an allowance made to them as brokers in the customary course by the underwriters, the Crown ought not to claim the principal sum: but even if they claim the principal, at all events they ought not to claim the interest: or, claiming

the interest, they ought not to claim it until the period had occurred when they were called on to pay it over by a competent authority, or, at least, until they were bound to have paid it without such call.

The Attorney General, Dauncey, and Mitford, for the Crown, insisted that the plaintiffs were not entitled to any part of the prayer of the bill.

Before they entered on the defence they submitted, as an objection in limine to the jurisdiction, that in a case of this description, where the plaintiffs had been employed by the Crown without any understanding with respect to remuneration, they had no right to apply by bill to this Court, or in any other manner to any Court of Justice, to fix in their favor a quantum meruit of remuneration to be paid to them by the Crown: that whatever claim they might have in a moral sense, they had no means of enforcing it at law: that there was, in that respect, a necessary distinction between employment by the Crown and by the subject, as in the latter case the person employed would, unless his services were purely gratuities, have a right to apply to a Court for recovering either his stipulated remuneration, or, where the consideration [38] was left open, a quantum meruit: whereas the remuneration of persons employed by the Crown on the other hand was wholly at the discretion of the King, and the reason was obvious, for otherwise every public functionary who could assimilate his services to those which, between subjects, were accustomed to a particular rate of remuneration, might have power to bring an action or file a bill against the Crown on every occasion of personal dissatisfaction, to the great hindrance and embarrassment of the public business. It was true (they observed) that in the present case there was this distinction, that there happens to be money in the hands of the plaintiffs, and therefore the question is, in fact, whether the party be entitled to frame his claim of quantum meruit in form of a set-off against the demand of the Crown, calling for an account of money remaining in his hands, arising from the disposal of the property of the Crown, on the ground of a lien for the amount of some suggested right to remuneration for certain services. Still, in principle, the right claimed must be the same, and must be founded on the same rules, the only difference being the mode of ascertaining and obtaining it. If, therefore, the plaintiffs were, in such a case as this, entitled to retain money in their hands on that ground, they would also be equally entitled to demand it at the hands of the Crown, in a case where they should, in performance of their duty, have paid the whole into the Treasury; and if they should be found to have no effectual means of redress [39] in the latter case, they could have no such right to secure themselves by retainer in the former. In all cases of public employment by the Crown, therefore, they insisted the functionary was entirely dependant for remuneration on the liberality of the Crown, and could have, from the political nature of the connection, no legal right to or means of putting in force a claim of compensation through the medium of a Court of Law, his only course for redress being by petition of right: and they referred to Com. Dig. tit. Action, C. 1, Prerogative D. 78.

They contended, therefore, that even if the plaintiffs should be held to be entitled to remuneration as Prize Agents of the Crown, they could not enforce any such claim on their part as that now set up in answer to the demand of the Crown—that they should render their accounts after the manner prescribed—that they were wholly, in respect of remuneration, in the hands of the Crown, and were entitled, under this sort of unconditional engagement, to no more than what his Majesty or his Auditors might think proper to allow them. It had been so with the Commissioners of the French ships which were detained in 1756, who were allowed a remuneration of only two and a half per cent. on the net proceeds, and no one of those had ever thought of being dissatisfied, or making any further demand upon the public. Whether the Commissioners were to be considered Prize Agents to the King, or not, it [40] could make no difference in the principle; but they insisted that they were not, nor could be considered Prize Agents according to the well known incidents of such employment, as recognized by law and the statutes relating to it. In the 33d of Geo. III. c. 66 (before the appointment of the plaintiffs) there were many regulations and enactments respecting Prize Agents—such as that they should register their appointment, the power of attorney, &c.—not one of which had been complied with by the plaintiffs, and that for the obvious reason that they were not and did not consider themselves to be Prize Agents in fact, by virtue of their special appointment. They urged, that in all their conduct, and in every transaction, the plaintiffs had acted not as Prize Agents, but as Commissioners—that they had always so stiled themselves, and in the case of *Lucena*

v. Craufurd, both in the original cause and on the venire de novo, had relied upon their interest as Commissioners, and averred the interest to be in them in that character—and that they had preserved that character and description of themselves throughout, in all their correspondence with the Lords of the Privy Council, and upon all other occasions, till the year 1809, when, for the purpose of the present claim, they first began to assume the name of Prize Agents, and to insist on a legal right to a percentage, according to the then accustomed rate of remuneration. They then adverted to the imperative language of the act of the Parliament, directing the plaintiffs, after payment of the duties and expences of sale, [41] to pay the proceeds into the Bank of England, which would be inconsistent with their appointment as Prize Agents: for, had they been invested with that character, they would have had a right to have retained their commission out of the proceeds, before they should pay it into the bank: and they contended that the language and the terms of the several Orders in Council (on some of which the plaintiffs had much relied), were also quite incompatible with the notion that they were Prize Agents and not Commissioners: and they concluded that part of the argument by again insisting, that even if the plaintiffs were de facto Prize Agents, persons entitled to a specific remuneration for the business done by them, as in the common case of agents employed by captors, they had still no right to set up such demand in this way against the Crown, or, indeed, in any manner, through the medium of a court of law.

As to the distinction made of the produce arising by sale of the ships and their cargoes, being, as droits of Admiralty, his Majesty's private property, and no part of the public Revenue, they observed, that Admiralty droits, as appertaining to the King, who was bound to provide for the exigencies of the state, were still public property, although not given up like the land revenue and the hereditary duties of Excise under the Civil List Act; that the public were interested in the care of it, and that it was therefore matter of account before the Commissioners of Audit.

[42] On the question of the surcharge of 42,000*l.* for interest made by the plaintiffs, or rather, as they put it, the demand by the Auditors of that sum so made by interest, as being part of the actual produce of the sales, they submitted, that as the object of the act, before hostilities had actually commenced, was to pledge the national faith for the national engagements, and to assure to the friendly subjects of the United States the safety of their property brought into this country for the purpose of protection from the French government,—the money arising from the sale of that property, was directed to be immediately lodged in the Bank of England as the only acknowledged place of security for it, when the property should be turned into money, where it would be most readily accessible in case of emergency; that the Commissioners had therefore no discretion, but were to pay it over, even if it should be as inconvenient as it had been represented to be; but that that inconvenience was, however, to be obviated by applying to the Council on all occasions of necessity, and obtaining their order for whatever money might be wanted. After hostilities had commenced, there was very little pretended motive for keeping any balances in their hands, and even the pretence of having the money always ready to answer demands, would not justify the putting it out to interest: for while it was so placed out, it could no longer be immediately forthcoming for that purpose, because the Commissioners must, for a certain time, have thereby necessarily parted with [43] all control over it, and put it out of their own immediate reach; and besides its being thereby subject to the hazard of their own personal responsibility, it was also risked on that of those to whom they might have entrusted it. To have so used it therefore was, in itself, a refutation of the plea of such balances being necessarily kept by them for the purpose alleged, of immediate satisfaction of impending demands. They also urged, that with respect to the other public officers, such as Receivers General, &c. to whom the plaintiffs had been compared, as persons avowedly and legally making interest of public money, such a custom could be only permissive, and might be made at any time the subject of enquiry; but that those officers were, moreover, in one very material respect of their functions, differently situated from these Commissioners. They are not liable to be called upon at various and uncertain periods for the public money in their hands, but

* The money was made productive by interest on omnium and Exchequer bills, and discount of bills of exchange, the latter to a very considerable proportion of the whole amount.

at certain stated times which were fixed for the purpose, and it might, perhaps, be sufficient that in such cases the Accountant should be ready to pay over the amount of his balances at those times; whereas these Commissioners could not, even if their reasoning were founded on truth, have been sure of an instant of time when they might not be called on for the money in their hands, even if they could be supposed, contrary to the object [44] and terms of the act of Parliament, to be entitled to keep any money in their possession for the shortest period.

The surcharge of interest on the £2,000*l.*, they admitted, would depend on the question of that sum having been properly or improperly disallowed.

With respect to the deduction for the charge of brokerage, which had been disallowed, that, they submitted, fell under nearly the same observations as the sum claimed for interest: that whatever might have been saved by such means formed no item of expenditure on the part of the Commissioners to discharge them for so much; but contributed to swell the produce of the property, and ought, therefore, to be accounted for by them, the question of their ultimate remuneration always depending on the amount of the net produce of the property committed to their care, disposal, and management, of which duty, if insurances were necessary, the business performed by brokers was a component part; that the insurances were, perhaps, very proper, but it was the duty of the plaintiffs, if it were necessary, to insure, to effect insurances, and at the least possible expense: it was also their interest to do so, because it would swell the aggregate of the net produce, and consequently their remuneration, after whatever rate it should be meted to them.

[45] They denied that there was any real distinction, in effect, between the positive character or the duties of the plaintiffs, before and after the declaration of hostilities, or that the case of *Lavina v. Craufurd* had decided that the Commissioners were to be considered as Prize Agents in the sense in which they now contended that they were: the only question in that case being, whether they had an insurable interest in the ships and cargoes which had been lost.

The real character of the Commissioners (they insisted) was, both before and after hostilities, that of trustees of this property for the public, and the persons more immediately interested in it; and as trustees they were bound to account for the interest made on the balances in their hands to those to whom the principal belongs. They cited the case of *The Earl of Lonsdale v. Church* (3 Bro. C. C. 41), on that point, where it was held, that a person being a servant of the public (between whom and the private servant of an individual the Court took a distinction, and that they now urged, in answer to the cases cited on the other side) whose duty it was to collect the tolls of a harbour, was held to be accountable for interest on the money received by him, which he had put out at interest: and they noticed that one ground of that determination was, lest it should be a temptation to public Receivers to put [46] it out of their power to be ready with the money due, when it should be demanded.

[The Lord Chief Baron assenting to the doctrine of that decision, observed, that in the case of public money, there was this distinction, that there could be no binding contract presumed, allowing any one to have the use of it in the way of making interest without account. His Lordship, in this part of the case, required to see the information filed by Lord Kenyon, when Attorney-General, in *Rigby's case* (the cause being compromised, never came to a hearing), but was informed by the officer that it could not be found.]

On the acts of Parliament which had been referred to (39th and 40th, and the 47th Geo. III.), empowering the Auditors to charge Accountants with interest, they observed, as to the propriety of the charge in the present instance, that those statutes had given power to charge interest on balances whether made productive by the accountant or not, where such balances had been improperly retained; whereas here, they had been confessedly made productive of interest; yet it had not been charged against them by the Auditors *quâ* interest, but as forming part of the aggregate produce, all of which they had been required, by the act, to pay into the Bank: and they insisted that such requisition alone, made any withholding of balances improper.

[47] On the alternative prayed by the bill,—that in the event as to the first object of the plaintiffs, of the Court holding that they were not invested with the character of Prize Agents, and had no right to be remunerated according to the acknowledged rate of Prize Agency, the Court would then proceed to enquire whether the remuneration proposed by the Auditors was stripped of the advantages claimed, an equivalent

for the services performed, and the expenses incurred by the Commissioners, they submitted, that since the Audit acts (25th Geo. III. c. 52; 39th and 40th, c. 54, and 47th, sess. 2, c. 39), by which, on the abolition of the old office of Auditors of the Prest, and the establishment of an efficient Board of Commissioners, with enlarged powers and extended authority, they had become the constitutional tribunal for the investigation of such claims; that even if this Court should hold that they have jurisdiction to interfere in the control of that Board, in the exercise of that part of their duties, it would, from the nature of such enquiries, be utterly impracticable, considering the extent of occupation and time which such details must and would necessarily exact to do so on the many occasions which would arise; and the act of the 25 Geo. III. c. 52, would be rendered nugatory, because such interference of the Court of Exchequer, in other respects than on the occasions particularly pointed out by the act, would destroy the authority with which the Commissioners were intended to be exclusively [48] invested by that statute in checking the charges of the public Accountant.

[Richards, Chief Baron. It was very solemnly determined in *Sir George Colebrooke's case* (a), that this Court has still the same jurisdiction over the Commissioners for auditing the public accounts, as it formerly had over the ancient Auditors of the Imprest.]

In recapitulation, they submitted, that (if the Court had jurisdiction in such a matter) as this was a case in which the plaintiffs had taken upon themselves the performance of a duty by appointment of the Crown, they became accountable to the Crown for all the money which they should receive in the course of that duty, and for all the interest which they might make upon that money; that that was a general principle; that they are particularly accountable in this case, because, however the situation of the property might have been changed by its becoming a droit of Admiralty, or otherwise, their duties and the functions to be performed by them, still remained the same as those with which they had been entrusted by the terms of their commission, and they were governed by the regulations of the act of Parliament, which had directed them to pay sums of money into the Bank--and that it was because they have not paid those sums of money into the Bank, but have retained them and made them productive [49]-tive of interest; they are now charged with that interest:--that with respect to the remuneration claimed, that was not to be measured by any fixed rule, as by a rate of per centage, or by any acknowledged standard of allowances or disallowances, but must be wholly subject to the discretion of his Majesty in Council, who had constituted the plaintiffs his special Commissioners: that the allowing or taking a per centage, upon the net proceeds, was only one means of arriving at a conclusion as to what would be a fair compensation, but the adoption of such a mode did not at all proceed upon the principle of that being the rule by which it ought to be done,—and that being entirely dependent on the discretion of his Majesty's Government, could not be made the subject-matter of a bill in Equity, to be filed against the Attorney-General in the Court: constantly keeping in view the position, that this Court had no jurisdiction to interfere, in a case like the present, to direct the opinions of the Board of Commissioners, the quantum of remuneration not being as matter of legal right demandable in a Court of Law or Equity, but was matter of pure discretion at the pleasure of the Crown. They submitted, therefore, that this bill ought to be dismissed.

Wetherell, in reply, denied that the plaintiffs were bound by any mistaken representation of the character under which they might have considered themselves as acting; for that their real character, and the incidents on it, were fixed and determined [50] whatever they might be. And he urged that the high nature of their appointment as Prize Agents in effect and substance to the Crown exempted them from the observance of the common formalities enacted by the prize-agency statutes to regulate the conduct of such agents, when acting for subject employers, the provisions of which for the most part, and particularly those which had been mentioned as not having been conformed to by the plaintiffs, were meant merely to provide against secret agencies, by requiring formalities which should tend to give them publicity: and that if the plaintiffs were, in substance and effect, Prize Agents of the Crown, they would be entitled to remuneration.

On the subject of the jurisdiction* in the present case, he submitted,—citing 4 Co.

(a) A report of that case is subjoined to the present.

* Vide, on that point, *The Attorney-General v. Colebrooke*, post.

Inst. cap. 11, passim. Fleta, l. 2, c. 32, and Fitz. Nat. Brev. (Writ ex parte talis), 129—that there could be no doubt that if the Crown should be dissatisfied with the conduct of the Auditors, in choosing to throw away the public money by means of improper allowances in fraudulent accounts, this Court would, if called on by the Attorney General for that purpose, have a right to interfere, and that the system would be glaringly insufficient and defective if it had not. He urged, therefore, that if they had such a power at all, it was not unilateral or limited, but reciprocal: and that it extended over the whole subject-matter, and [51] embraced every thing connected with that authority. Whatever interference, therefore, might be afforded in aid of the Crown, might also be exercised for the relief of the subject. He finally insisted, that want of jurisdiction in the Court could not now be used as an objection; for that could only be taken advantage of by demurrer.

He contended, also, that the remuneration of functionaries in the public employ, was not mere matter of grace in the breast of the Crown, but a demand of right on the public treasure, as administered by the appointed officers of the Government of the State: and that a public functionary was entitled to discharge himself in his accounts before the Auditors, by taking credit for the amount of his salary or other remuneration, and was not compellable to pay over the final balance or the money received by him, leaving his own demand to be afterwards satisfied at the pleasure of the Crown: submitting, that for the reasons urged, the plaintiffs were entitled to the decree which they prayed.

Cur. adv. vult.

29th April.—On this day the Court (being full) delivered judgment in the Exchequer Chamber.

RICHARDS, Lord Chief Baron, having stated, at length, the prayer of the bill, thus proceeded:—

The Commissioners therefore insist, that they are to be considered as Prize Agents to his Ma-[52]-jesty, and that they are, in that character, entitled to a remuneration for these services, or five per cent. on the gross proceeds of the sales made by them: and also (according to the usage) to interest on such balances as may necessarily and properly have been retained by them:—and in case the Court shall not think they are Prize Agents, then they claim to be entitled to interest, comparing themselves, in point of situation, to Receivers General, and other public officers who are named in the course of the argument, and submit, that they also are entitled to such interest as they have made of the public money whilst it remained in their hands.

[His Lordship here stated the facts of the case as already detailed.] Under these circumstances, an order was made by his Majesty in Council, dated the 16th of January, 1795, by which it was directed, “that all goods, wares, merchandizes, and effects whatsoever, coming directly from any of the ports of this Country, in the vessels of any Country, and navigated in any manner, shall be permitted, until further order, to be landed, and to be secured in warehouses under the joint locks of his Majesty and of the proprietors, at the risk and expence of the proprietors, there to remain in safe custody for the benefit of the proprietors thereof, until due provision shall be made by law, to enable such proprietors to re-export or otherwise dispose of the same.”

[53] There was another order of his Majesty in Council, made a few days afterwards, on the 21st of January, in the same year, by which it was ordered, “that all goods, wares, merchandizes, and effects whatsoever, belonging to any of the subjects or inhabitants of the United Provinces, or belonging to any subject of his Majesty, or to any subject of any Country in amity with his Majesty, coming from any part of Europe, Asia, Africa, or America, in amity with his Majesty, in vessels belonging to any subject or inhabitant of the United Provinces, or to any subject of his Majesty, or of any Country in amity with his Majesty, and bound to any port of the United Provinces, might, until further order, be permitted to be landed in any port of the Kingdom, and might be secured in warehouses for the benefit of the proprietors thereof, in the same manner as was directed by the last-mentioned order of his Majesty in Council.”

After this, on the 16th of March, 1795, an act of the 35 Geo. III. c. 15, was passed, in order to render these Orders in Council effectual; but it does not seem to me that this act bears particularly upon the case at the bar, and therefore I shall proceed to state that another act of Parliament was passed on the 22d May, 1795, namely, the 35 Geo. III. c. 80, with the same view, and that does apply most importantly to the

present case. Without referring to the provisions in this act in general, it will be sufficient to advert to sections 21, 22, and 26. [54] Section 21 is this:—"And whereas several ships and vessels belonging to the subjects or inhabitants of the United Provinces, and also other ships and vessels having on board goods, wares, merchandizes, and effects belonging to such subjects, have been, or may hereafter be detained or brought into the ports of this Kingdom; and whereas such cargoes, and such ships and vessels may perish or be greatly injured if some provision be not made respecting the same:—Be it enacted, that it shall and may be lawful for his Majesty, by and with the advice of his Privy Council, from time to time to grant a commission or commissions under the Great Seal of Great Britain, to three or more persons, authorising them to take such ships and cargoes into their possession, and under their care, and to manage, sell, or otherwise dispose of the same to the best advantage, according to such instructions as they shall from time to time receive from his Majesty, with the advice of his Privy Council, subject, nevertheless, in respect of goods, wares, and merchandize hereby directed to be brought into the warehouses of the East India Company," to the special provisions made in the act, which do not apply to the present question.

The 22d section is in these words:—"And be it further enacted, that it shall not be lawful for any person to prosecute any claim, or maintain any suit or action respecting any such ship or cargo, excepting in the manner herein specially provided."

[55] Then the 26th section is this:—"And be it further enacted, that if any of the ships or vessels, goods, wares, merchandize, or effects shall be sold under the authority aforesaid, they shall be respectively liable to the duties, and entitled to the drawbacks, and subject to the conditions, rules, regulations, and restrictions, penalties and forfeitures before mentioned; and the Commissioners shall and are hereby authorised and required to cause the duties and expences of the sale, in the first place, to be paid out of the proceeds of such sale; and after such payment shall, except in cases where it is otherwise provided by this act," and which do not belong to or affect the present question: "cause the proceeds of such sale to be paid into the Bank of England, there to remain subject to such orders as his Majesty, with the advice of his Privy Council, may from time to time think fit to give thereupon; and if such proceeds shall arise from a sale under the direction of the High Court of Admiralty, then subject to such orders as that Court shall make, concerning the same:" now much attention is due to these words, "and after the payment of the duties and expences of the sale, the Commissioners shall cause the proceeds of such sale to be paid into the Bank of England, there to remain, subject to such orders as his Majesty, with the advice of his Privy Council, shall think fit to give thereupon."

[56] The other sections, for the most part, relate to the duties of the Commissioners when they shall be appointed, but it does not seem to me to be necessary to trouble the Court with them upon the present occasion. By the 21st section, which I have read, the Commissioners, when appointed, are to attend only to such instructions as they shall from time to time receive from his Majesty, with the advice of his Privy Council; and by the 26th section they are required, after the payment of the duties and expences of sale, to pay the proceeds of sale into the Bank of England, there to remain, subject to such orders as his Majesty, with the advice of his Privy Council, might from time to time think fit to give thereupon. The 22d section prevents any actions being brought, otherwise than as is mentioned in the act of Parliament.

In consequence of this act of Parliament, a commission duly issued to the plaintiffs and their colleagues; and pursuant also to the directions in the act, instructions were given to the Commissioners, when they were appointed, for their conduct. Those instructions are the first exercise of the power given by the act of Parliament, and they, referring to the Orders in Council, are in these words: "You are directed to proceed forthwith to take into your possession and under your care, all such ships, goods, wares, merchandizes, and effects as are mentioned in an act of Parliament passed in the 35th year of the reign of his present Majesty, and a commission granted to you under the Great [57] Seal of Great Britain, according to such lists as you shall from time to time receive from the Commissioners of Customs in England and Scotland, in pursuance of directions they are to receive from the Treasury; and you will receive all necessary assistance from the Commissioners of his Majesty's navy at all the ports; and you are hereby authorised to make such allowance to the crews of such ships and vessels as may be taken under your care and protection, in payment of their wages, as

shall appear to you to be just, for which purpose money will be issued to you on account :” so that they were not to be charged with the issue of any money of their own accord, but money was to be issued to them in order to enable them to make these payments, which they are here directed to make to the crews of the ships and vessels ; “but (the instructions proceed), you are to take care that all monies which you shall so pay, shall be replaced out of the sale of the ships, and the goods, wares, merchandizes, and effects as soon as the same shall be sold ;” and they were, in pursuance of the directions given, to cause all goods, wares, and merchandizes belonging to the East India Company, to be applied according to the act. They add, “you shall cause minutes to be kept, and fair entries to be made in books, of all your proceedings and transactions whatsoever, in executing the commission, and these your instructions, and also accounts of the proceeds of all sales, distinguishing the ships which shall be so sold, and the goods, wares, merchandizes, and [58] effects taken out of each ship ; and also you are to take an account of the monies which, according to the directions of the act, shall be paid into the Bank of England, or shall be lodged in the hands of the East India Company, for which, according to the directions of the act, credit is to be given to you in the books of the said Company ; all which accounts shall be kept in such form as shall be approved of or directed by the Lords Commissioners of his Majesty’s Treasury, in discharge of the trust conferred on you by the aforesaid commission ; and you are to be careful to execute the direction given you in the several clauses of the said act ; and in all cases of doubt or difficulty you are to apply to the Privy Council for further instructions, which will be issued to you from time to time as the case may appear to require.”

Under these circumstances, the constitution of this body was certainly formed by the commission, and they were clearly Commissioners acting under the authority of the act of parliament. They were not originally Commissioners as Agents relating to any prize beyond all question : for there was no war then depending between us and Holland, whatever opinion might prevail of war being likely to take place, which was certainly justified by the event. That result took place on the 15th of September, 1795, when letters of reprisal were issued against the inhabitants of the United Provinces of Holland, which are always considered as a declaration of war. The situation of the [59] Commissioners seems to me to have then had an alteration made in it ; for before, they were not Commissioners with a view to the war ; they were Commissioners in the state of things anterior to the war, and independently of the war : their commission was applicable only to the state of things as it was before the commencement of hostilities. Upon that event a perfect alteration seems to me to have taken place in respect of the objects of the commission : for any vessels taken before the declaration of war, were to be kept subject to the orders of the King in Council, for the benefit of those to whom they might belong ; but after the declaration of war, all the captured enemies’ ships, &c. became prize, and belonged absolutely to the King *jure coronæ*. Until the declaration of war, the King had no right *jure coronæ*, or any claim to the ships or vessels, or property which might be taken by the Commissioners into their possession ; but after the declaration of war, all captures were prizes of enemies’ property, and belonged to the King in right of his Crown : yet still, though their precise and strict character was altered, and the duties which they had to perform were altered, no alteration took place in the terms under which they acted, or the nature of their subsequent employment, unless, as they contend, an instrument, which I shall presently advert to, necessarily imported a change in the conditions on which they afterwards served his Majesty.

[60] The next proceeding that appears material is, the Instructions of the 10th of October, 1795, to the Court of Admiralty. At that time this Country was at war with the States of Holland. In these instructions it is recited, (after reciting the act of Parliament and the appointment of the Commissioners) that the Commissioners so appointed, had taken possession of many ships and goods belonging to the subjects and inhabitants of the United provinces ; and that since the issuing of the said commission, his Majesty had thought fit, by and with the advice of the Privy Council, to order general reprisals against the ships, goods, and subjects of the United Provinces, and to issue a commission, authorising the Commissioners for executing the office of Lord High Admiral, to will and require the High Court of Admiralty of Great Britain, to take cognizance of, and judicially to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships and goods that are or shall be

taken, and to hear and determine the same, and according to the course of the Admiralty and the law of Nations, to adjudge and condemn all such ships and goods as shall belong to the United Provinces, or their subjects, or to any other inhabiting within any of their territories or dominions: and his Majesty doth thereby order and direct, that the said High Court of Admiralty shall proceed to the adjudication of such ships and goods of which possession had been taken, or should be taken by the said Commissioners, as should be pro-[61]-ceeded against by the Advocate General on his Majesty's behalf, "in order" (in the words of the instrument) "that the same, being the property of the United Provinces or their subjects, may be condemned to us as good and lawful prize: reserving nevertheless to the said Commissioners the care, sale, and management thereof, as well before as after final adjudication, according to the provisions of the said act: provided always, that nothing herein contained shall restrain the Judge of the Court from receiving and determining all claims, &c." which is not material. Thus it directs, in effect, that the property may be condemned as good and lawful prize, acting upon the law as it certainly stood the instant hostilities were declared: "reserving nevertheless to the said Commissioners the care, sale, and management thereof, as well before as after final adjudication, according to the provisions of the said act;" and that is, certainly, an important reservation.

In this paper, called the instructions, and importing to be directions to the Court of Admiralty, the plaintiffs were named Commissioners. There has been certainly considerable difference of opinion amongst very learned men, whether they continued Commissioners after the commencement of hostilities, or whether their character, situation, and duties were not thereupon changed; and I do not see that the case of *Lucena v. Craufurd*, in the House of Lords, has quite determined that question: for there was a ground for that decision, which has the effect of excluding such a de-[62]-termination: because there were some ships amongst those upon which the verdict was taken, that clearly were not within the authority of the Commissioners, even as Commissioners: but, whether they considered themselves strictly as Commissioners, it is clear they did not retain precisely the same character in which they stood when they were first appointed; and it seems that the act of Parliament, and these instructions, united together, created and formed the sole foundation of the duties of the plaintiffs. The instructions direct that the Commissioners shall have the care, sale, and management of the property to be condemned as prize to the King, according to the provisions in the said act: whatever therefore, their strict authority might have been, it is clear that their duties were according to these instructions, which they accepted, and by which they were bound, and were to be regulated and performed in the same manner, with reference to the act of Parliament, as their duties when they were appointed Commissioners. The instructions reciting the act of Parliament and the proceedings consequent upon the commission, connect the act and the instructions together, as prescribing the duties of the Commissioners, and provide that they shall have the care, management, and sale of the property, according to the provisions of the said act. The effect of this document (the instructions) appears to me to be to shew, that though the property was, in consequence of hostilities, vested in the King by his prerogative, the Commissioners, or, in other words, the persons who had before received a com-[63]-mission, that is, the plaintiffs and their colleagues, were to act as the Commissioners had been authorised and instructed to act. They were still bound by the directions of the 35th of the King, which were, by reference, incorporated in the commission and their instructions, just as they were at the first moment when they were appointed Commissioners; and therefore whatever name they ought to have been called by, they stood in the same relationship of duty to the King that they had borne before to the Kingdom, I may say to the Country, being then the Commissioners immediately of his Majesty. At this time there was certainly no new contract: there was not even any new treaty, but the plaintiffs and their colleagues accepted their new character in silence, and must, I think, be presumed to have assented to the terms upon which they had acted before; but the next proceeding removes that doubt, if any can be said to prevail, by giving them another designation. Upon the next document great stress has been laid, namely, the Order in Council of 26th November, 1795, respecting the four Dutch East India ships. That order is in these words:—"At the Council Chamber, Whitehall, 26th November, 1795: present, the Lords of his Majesty's Most Honourable Privy Council: Whereas it appears, that four Dutch East India ships, namely, the 'Alblasserdam,' the 'Vr w Agatha,' the

'Mentor,' and the 'Dordrecht,' now lying in the River Shannon, in the Kingdom of Ireland, were sent in there by his Majesty's ship 'Sceptre,' commanded by William Essington, Esquire, or by other ships [64] under the command of the said William Essington, Esquire, antecedent to the order issued by his Majesty in Council, for granting reprisals, and appointing agents and so on; and whereas the sole interest in all ships so sent in, are vested in his Majesty, and the appointment of agents for the care and disposal thereof, does of right belong to his Majesty, 'It is hereby ordered in Council, that James Craufurd, John Brickwood, Allan Chatfield, John Bowles, and Alexander Baxter, Esquires,' naming them severally, not describing them as Commissioners, as they had been called in the former order, and appointing them specially to be 'the agents on behalf of his Majesty, for the care and management of the said four Dutch ships and their cargoes,' whereof all persons concerned are to take notice, and govern themselves accordingly." By this it appears that Captain Essington having taken the ships, and sent them in before the commencement of hostilities, he, and others concerned in sending them in, joined in appointing agents to support their claims. The Privy Council thereupon by their order, reciting that fact, and that the property was exclusively in his Majesty, ordered that these gentlemen, by name, should be the agents on behalf of his Majesty, for the care and management of the said four Dutch ships and their cargoes. There is no doubt at all that there they were appointed Agents, and not Commissioners, unless Commissioners and Agents can be considered as the same thing. They are described by their names distinctly, and are appointed [65] Agents expressly for the care and managements of those ships. Proceedings were afterwards had in the Court of Admiralty against these four ships, and they were condemned as good and lawful prize to his Majesty. The Order in Council, appointing these gentlemen Agents for the care and management of these Dutch ships, was much relied on in argument, as constituting or acknowledging the plaintiffs, who had been Commissioners, Prize Agents to his Majesty. If that was so, must not the effect of it be confined to the four ships only which are the subject of this order? for this order does not extend to any other ships, and if it is the ground on which the plaintiffs mainly stand, it raises a strong argument against their claim to be considered as Agents in respect of any other ships, for if there must be an order to make them Agents as to these it was equally necessary that they should have an order with respect to the other ships, and if they had not such order, the negative is very strongly proved: but in my own opinion (and everybody who hears me will understand I am only giving such reasons as occur to myself, the Court only uniting in the result, but I give my own reasons) although they are appointed Agents for the purposes specified with respect to these ships, they are not Prize Agents in the ordinary sense of that word; but they are constituted by the Privy Council, not, indeed, by the King, Agents or Servants to his Majesty with respect to those four ships and their cargoes; subject, however, as it seems to me (since nothing is ex-[66]pressed to the contrary), to the same terms and conditions as are contained in the instructions to the Court of Admiralty, dated the 10th of October, 1795, which I have already stated to the Court. It does not, therefore, seem to me, as there is nothing said in this last order altering the terms on which they acted before, that it can be considered as relating to any thing further, except as to the particular agency of these ships, than was imported necessarily in the former proceedings.

These are, I believe, all the facts on which the questions in the case depend. A great deal has passed which does not at all apply to the question before us—there has been much correspondence, and so on: however, it is proper to observe, that proceedings were had in the House of Commons, and continued there for a considerable time, in every part of which the plaintiffs and their colleagues described themselves as Commissioners only, and rendered their accounts to the House as such. Now, certainly, if they are to be considered as only Commissioners, and not, according to their own construction, Prize Agents, there is an end, at once, of the demand of the five per cent. on the gross proceeds.

On the 3d of May, 1809, there was an Order in Council, in which they are treated as Commissioners acting in the character which had been imposed upon them by the act of 35 Geo. III. c. 80. On the 12th of May, and on the 17th of May, 1809, [67] there are letters from them to the Clerk of the Privy Council, in which they urge their claims in the character of Commissioners, and by those letters they certainly

submit their compensation to the discretion of the advisers of the Crown. Then, on the 15th of July, 1809, there is a letter from Mr. Faulkner, the Clerk of the Council, in which they are still treated as Commissioners: he deals with them, and they deal with the Privy Council as persons who claim a fair remuneration, not so much as a matter of legal right as a matter of grace from the Crown, or of moral, not legal, justice on the part of the Crown. No instance has been produced, nor have I discovered any instance in which Commissioners, as such, have claimed, as a matter of right, or maintained any suit against the Crown for their remuneration as a matter of legal right: and it seems to me that it must be admitted, that as Commissioners, they were not entitled to demand, at law, any particular compensation from the Crown; and throughout all the proceedings with the Privy Council, they urge their claims as Commissioners, as if they were not entitled to any specific compensation; they seek to persuade the officers of the Crown to advise the Crown to exercise its discretion in their favour: and this was the course of proceedings on their part, until the 29th of September, 1809, proceedings in the House of Commons having been taken several years before, in the year 1806, I think. Afterwards, on the 29th of September, these gentlemen, for the first time, insist that they are Prize Agents, and as [68] such, claim to be entitled to five per cent. upon the gross proceeds, and to retain the interest made on the balances in their hands. They claim the five per cent. commission upon the gross proceeds, and, to be sure, if they were entitled as Prize Agents to five per cent., they were entitled to the five per cent. at the time, I suppose upon the gross proceeds, for the act which reduces the allowances to five per cent. upon the net proceeds, was made after these transactions, and therefore, I take it, if they were Prize Agents, according to the usage, which is sufficient to make law, they are entitled to it upon the gross proceeds, if at all. Then they also claim to retain the interest on the balances in their hands, as Prize Agents. I do not know of any law upon that subject, and if I found no such law, I should be the last man in the world to give interest on balances, which would have the effect of giving a premium to keeping such balances in hand. That, however, it is not necessary to enter into here. I do not mean to say that the plaintiffs and their colleagues are to be bound by their delay in making this claim: but I cannot help feeling some surprise, that in the course of the enquiries before the Committee of the House of Commons, and their correspondence with the Clerks of the Privy Council, they should not have put their case upon this short point, but, in fact, they do not do so till the 29th of September, 1809. The points, however, are now brought before the Court by this bill, and we must dispose of them as well as we can.

[69] The first point to be decided before we reach the merits of this case is, whether the Court has any jurisdiction? It was at one time thrown out by the plaintiffs, that the Auditors had no right to interfere in these accounts; because they were not, properly speaking, public accounts: but that was not insisted upon, for the plaintiffs would then have been asked, what right they had to apply to this Court to direct the Auditors in taking those accounts; because if the Auditors had no such right, this Court could have no jurisdiction. But a more formidable objection was afterwards taken by the Attorney General, to the jurisdiction of the Court. However, as his Majesty has been pleased to refer the subject to the Auditors of Public Accounts, I think, upon the best consideration that I can apply to it, that the Court has a jurisdiction in this particular case; and I am perfectly persuaded that those who urge the objection, would be very sorry if the Court did not act as if it had jurisdiction; for the Lords of the Treasury have expressly invited the plaintiffs and their colleagues to a legal decision, and they have promised to give them every assistance which could give any facilities to the obtaining a decision; and, indeed, this bill was filed in consequence of an arrangement of that nature made between the law advisers of the plaintiffs, and some of the law advisers of the Crown; and accordingly the Attorney General, instead of demurring as he ought to have done, if he meant to object to the jurisdiction of the Court, puts in, not the usual short answer, but a long and full defence. But as the present Attor[70]ney General was not in office at the time, it was, perhaps, his duty to make the objection which he has taken. I think, however, that it is the duty of the Court to remove that objection, and I am quite sure I feel no difficulty in persuading myself that the Attorney General would himself have been dissatisfied if we had not entertained this cause, coming to us, as it does, under these particular circumstances; and I think it would not be consistent with the

honour of those who administer the government of this Country, to disappoint the plaintiffs, whom they have invited to the discussion, by turning them out of Court merely for a defect of jurisdiction in this Court, to which jurisdiction all parties seemed willing, in the first instance, to submit the case: but I think, independently of that consideration (which is applied only *ad hominem*), that as the question has been referred by his Majesty to the Auditors of Public Accounts, the Court of Exchequer, as the high Court of Revenue, and having inherent power, as I conceive, over the Auditors, have a right to dispose of the question.

Then arises the great question in the cause,—are these gentlemen Prize Agents? I do not mean Agents concerning a prize or prizes, but are they Prize Agents in the usual sense of the term, the King being their master and employer? and are they, as such Prize Agents, entitled (for in no other character do they urge that part of their claim) to the five per cent. upon the gross proceeds of the sales: and also to the interest [71] on the balances in hand which they claim to be entitled to, on other grounds. Now, are they Prize Agents in the usual sense of the term as between his Majesty and them? Down to a certain period, viz. the 15th of September, 1795, when letters of reprisal issued, they unquestionably were strictly and correctly Commissioners only, for the execution of business certainly of a very responsible and very important nature, but uncertain in its detail, in its labours and extent, and in its duration. No salary was appointed, no contract was made, nor was any treaty entered into for their remuneration: and I consider, therefore, that for such remuneration, the Commissioners necessarily relied on the discretion and grace of the Crown, and that they have no legal title to support a demand for any remuneration at all. That appears to me to be the law as applicable to this case. But whatever be the law as applied to the case of these Commissioners, they clearly were not entitled as Commissioners, nor do they claim, as such, to be entitled to five per cent. upon the gross proceeds. When war was virtually declared on the 15th of September, 1795, their strict character of Commissioners, as it appears to me, expired. His Majesty, however, was pleased to continue them in his employment. They then became Agents or Servants of his Majesty, and he was alone interested in the subject intrusted to them, and they were certainly his Agents or Servants of and concerning the prizes; but, as it seems to me, they continued so, (there being no new terms introduced or proposed) [72] on the same terms as before. That appears to me to be the effect of the instructions to the Court of Admiralty of the 10th of October, 1795, which, I think, controul the meaning of the subsequent Order in Council of the 26th of November, and give it a construction consistent with the foregoing instructions of the 10th of October. To use the words which Lord Eldon is reported to have used in the House of Lords, in the case of *Lucena v. Craufurd*, “His Majesty, having the title to the property, makes them his Agents, and points out to them in what manner they shall exercise that agency, directing that it should be in the same manner as if they had derived title under the commission, and not under their special appointment as Prize Agents.” In this view of the case, I confess, I find infinite difficulty in declaring that the plaintiffs and their colleagues have any legal title to maintain any claim as Prize Agents to his Majesty, in the common sense of that word.

I do not think that the case of *Lucena v. Craufurd* affects this case. That decides, or, at least, there is a great deal of argument preceding the decision to shew, that the plaintiffs and their colleagues were not Commissioners after the declaration of hostilities, and that therefore the verdict in their favour, on the first count in the declaration, in which they were averred to be Commissioners, could not be sustained: but there was another defect in the verdict on that declaration; for it referred to ships that were not within their [73] authority. Then the subsequent verdict was not taken on any count averring them to be Prize Agents, but upon the count averring the interest to be in the King.

Now let us consider, a little further, the situation in which these persons stand, as connected with his Majesty. Suppose they had in their hands no property of the Crown, and that they had not, therefore, the means of paying themselves as they have now. If they are entitled to succeed in this way, what proceedings could they then have instituted, with any prospect of success, against his Majesty? If they had no property in their hands, and the King had proceeded against them, they could not have set-off this demand against the Crown; for the statute of Set-off does not affect the Crown. But for the purpose of this judgment, I will assume that there is a debt

to them from the Crown, and that they have a right to stay the hand of the Crown in this cause, until they are satisfied. Now even in that case, I think, from the evidence, it is clear they cannot be considered as Prize Agents in their sense of the word. Is there any instance in which the King has constituted a Prize Agent, with the privileges annexed to that Agent as between subjects? Has any Agent for prizes, appointed by the King, been held to be entitled, as against the King, to those privileges?—and has the law, as now administered on this point between subject and subject, ever been applied to the case of the Crown? No instance has been adduced, to prove it ever has [74] been so considered, and I have not myself been able to discover any. Yet a Prize Agent is a character pretty well known, and much marked; for by the act of Parliament of the 33 Geo. III. c. 66, s. 50, it is enacted, “that all appraisements and sales of any such ship or ships, goods, wares, or merchandizes, as shall be taken by any of his Majesty’s ships of war, shall be made by Agents appointed by the flag officers or flag officer, captains or captain, officers or officer, ships companies or company, and others entitled thereto; that all and every person or persons who shall be so nominated and appointed Agent or Agents for any prize or prizes taken by any ship or vessel of war, or for receiving the bounty thereafter granted, and which prize or prizes shall be condemned in the High Court of Admiralty in Great Britain, or in any of the Courts of Admiralty in any of his Majesty’s plantations in America, or in any other of his Majesty’s dominions where the said prize or prizes shall be condemned, shall exhibit or cause to be registered in the same, his or their respective letter or letters of attorney, appointing him or them Agent or Agents for the purposes aforesaid;” then the Registers of the Court of Admiralty are directed to enter the letter accordingly. So we find that they are persons constituted in a very formal manner, and with very particular directions concerning their conduct.

It really seems to me, that by the contract originally, such as it then was, whatever it might be, and whatever were the original terms between [75] the public and the plaintiffs and their colleagues, those terms continued as between his Majesty, when he became their master, and them. It also appears to me that they cannot be called Prize Agents in the proper and technical sense of the expression, and in the sense in which they must necessarily use it, because they do not come, in any degree whatever, within the statute of 33 Geo. III. c. 66, s. 50. Then, if they are not Prize Agents, there is an end of their claim of five per cent. upon the gross proceeds, or upon any proceeds, and then their title to interest, as Prize Agents, must also fall.

But then they claim interest on the balances in their hands, and compare their case to that of Receivers General, &c. But surely there is a great deal of difference between the office of Receivers General, even supposing they are not chargeable with interest, and the employment of these plaintiffs. These gentlemen are Agents appointed for the purpose of receiving money for their employers. Receivers General, by a long habit and course of business, have not been called upon to pay interest, it being, perhaps, understood to be the implied contract, that they are not to be called upon to pay interest, but merely to produce the money when called for, as a banker does; but, however that may be, on this occasion it is not necessary to enquire into the law upon the subject of the liability of public officers to pay interest upon their balances, or what decisions there have been on that point. Here, the express direction of the [76] act of 35 Geo. III. c. 80, is that the proceeds of the sales shall, after the duties and expences shall have been discharged, be paid into the Bank of England. They accept the service upon these terms; and can any one maintain, that if persons who otherwise would not be liable to pay interest in the usual course of law, accept an office under such a condition, they would not be liable to pay interest as much, as if they had entered into a contract to pay interest. It is said to have been proved, that the plaintiffs and their colleagues kept in their hands no more money than was proper and necessary; but it is very difficult to imagine these balances to have been necessary, under all the circumstances of this case, and if not necessary, it could not be proper to retain such large sums for such a length of time as to produce by interest 42,000*l*. It was much urged, that if they had not had those sums ready, under their immediate dominion, they might have been put to great inconvenience by persons calling on them for payment; one answer is, that if they had at any time wanted any part of the money which they had paid into the Bank, they could have been relieved by application to the King in Council, just in the same manner as every one of us knows a Court of Equity relieves an executor or trustee,

who is liable in a much greater degree than these gentlemen were ; for there is a great doubt whether they were subject to any action. The Court, in ordinary cases, very often directs persons to pay their money into Court, and, if an action should be brought against them, to apply for money to pay the amount [77] which is demanded of them : and that was the clear course here ; I think, therefore, that is an answer as to the hardship of the case. But, whatever the hardship was, there is another short and more decisive answer, that the act of Parliament under which they acted, and which bound them as much as acts bind every body else, directed the payment of the money into the Bank of England. Now, if the act directed the payment of the money into the Bank of England, so did the instructions which proceed on the authority of that act of Parliament, and therefore there being a law which makes it their duty, they were bound to obey the law ; if they are bound to obey the law, shall they then obtain an advantage by not doing so, and by keeping the money in their hands? Clearly not. I am therefore of opinion, and I believe the Court concur with me, although perhaps, not precisely for the reasons I have expressed, in so thinking, that the plaintiffs are not entitled to interest, either as Prize Agents, or as by analogy with any other officer to whom, in the argument, they have compared themselves.

It was said, and urged strenuously, that these balances—these monies, were not the monies of the Crown—that they were undetermined property which might perhaps, in the event, be adjudged to belong to other people. But the course of business is not according to that argument. If a person, for instance, has money paid into a Court of Equity, to be distributed hereafter, the person who commands and controuls the money is the person to [78] whom the interest is to be ultimately paid, unless other people are specially entitled to the interest upon it. These gentlemen were the Agents for the Crown, and for the public,—they were bound to pay the money into the Bank, and if they did not pay it into the Bank, they may be called upon for interest. Are they to put the interest into their own pockets? Clearly not : the persons who employ them are the persons *primâ facie* entitled to the principal, and also to what is derived from the principal, namely, the interest : the persons who receive it from them may be called upon by other parties to account for that interest, but as between the agent and principal the principal is entitled to the money in the Agent's hands, and also to the fruit which he derives from it contrary to his duty.

That being our concurrent opinion with respect to the interest, the Court is then called upon to give such directions as shall secure to the Commissioners a fair and just remuneration for their trouble ; they, in all respects, proceeding upon the allegation that the auditors have not allowed them nearly what they deserved, and what ought to be allowed to them. Now what remuneration they may deserve cannot, as it appears to me, be ascertained by any proceeding in frequent or familiar occurrence in this Court. We cannot, as I conceive in this case, compel the Crown to try an issue of quantum meruit, and I think we cannot refer a question of quantum meruit to the Deputy Remembrancer [79] : the Deputy Remembrancer is not the constitutional officer, but the subject has been already before the proper and constitutional tribunal : and all that this Court, as a Court of Revenue, could do in such a case as this would, I apprehend, be to correct and guide the judgment of the Auditors, and to order them to review and alter their report if we thought they were wrong ; but then the plaintiffs must satisfy us that the report is clearly erroneous, and they have furnished us with no means of ascertaining whether it is erroneous or not ; we have no data, and we cannot act upon conjecture or surmise. To some the remuneration already allowed may appear an ample compensation, whilst to others (not that I wish decidedly to express that I exactly agree in that opinion, if such an opinion exists) it may be said that it appears to be a too scanty allowance : but there is no ground on which either the one or the other opinion can rest : there is, in short, no evidence to warrant us in coming to a judicial determination. I cannot find that there is, throughout this cause, any foundation upon which I can erect the proposition, that the Auditors have done wrong. That there ought morally to be a sufficient compensation made to the plaintiffs is beyond all doubt : but whether that which they have been allowed is sufficient, or not, I protest, for one I have no means of knowing. The plan of taking the accounts proposed by order of the Privy Council, by their minute of the 10th of October, 1810, was, as far as I can judge of it, the result of great attention to the subject, founded in excellent [80] sense, and calculated to do complete justice to all parties,

and, speaking privately, which, perhaps, I have no right to do, I wish the Auditors had adopted it, as it must have carried satisfaction with it to all the world, and I own, for myself, that having taken, I hope, sufficient pains to understand the case, I cannot survey the enormous multiplicity of business of the most important nature, performed by the plaintiffs and their colleagues—and performed with great diligence, industry, integrity, and talent, that no person, who understands the matter, has even suggested any blame or objection to the progress, or any defect in the execution of it, —I say I cannot survey it without a sensation of uneasiness, because I cannot help suspecting, that a sufficient allowance has not been made to them; but I cannot, with the lights I have, be certain that this is a correct view of the matter, —it is only my private conjecture, and I cannot act upon it.

Upon these general grounds, I believe, we all agree, however we may differ as to the particular reasons; for I have not the honour of knowing whether there is any difference in our reasons; but I believe we all agree on these general grounds, in thinking that this bill must be dismissed.

GRAHAM, Baron. I am so entirely of the same opinion in the main with my Lord Chief Baron, and particularly so very much concur in the concluding observation of his very learned [81] illustration of the case before us, that if I had not understood from my Lord Chief Baron himself, that he wished something should proceed from the other Judges of the Court, in respect to the general nature of this bill, I should not have been disposed, upon the present occasion, to say a single word: but—as the general subject of the jurisdiction of the Court in such a case as this, and the form of proceeding by bill in particular, are matters of very considerable importance—perhaps my Lord Chief Baron and my brother Judges will forgive me if I also signify my opinion, and my general view of the nature of this application.

I consider then this bill as one of the first impression. It is contrary to every notion I have been able to form of the jurisdiction of this Court, in the course of now a pretty long attendance upon it. This application must be considered as made to us, on the part of the plaintiffs, as sitting in a Court of Revenue, and in a Court of Public Accounts: and if this matter be admitted to be a fit subject for the cognizance of this Court, it strikes me that it cannot be brought before us as a Court of Equity, but as a Court of Law, sitting on questions of public accounts: and the only possible way in which I can conceive that the subject-matter of this bill can be brought within our jurisdiction is, upon an application to be made in a summary way by motion, and not by bill, by the persons who now sue as plaintiffs, claiming these sums as allowances in their accounts, contrary to the determination, or to the [82] opinion of the Commissioners of public accounts. That is the only shape in which, as it appears to me, that it could properly be brought before the Court; but to file a bill in Equity on the equitable side of the Court, for such a purpose, appears to me to be quite a wild notion: for if the plaintiffs have any merits, it is impossible to say they are of an equitable nature, or that they come under the equitable cognizance of this Court. This is the view that I have taken of this case, and I wholly accede to the reasons which my Lord Chief Baron has urged for our not entertaining this suit at all, because, according to my apprehension, we have no original jurisdiction to receive the application on a suit by bill. I know of no original jurisdiction which this Court has, sitting as a Court of Revenue, to deal with matters that do not affect the King's ordinary and extraordinary Revenues, of which I consider that these Droits of Admiralty form no part, and I have never been able in the investigation of this particular subject, and many others of the same sort, to fall upon any hint or intimation that this Court ever took up the consideration of questions which relate to the King's privy purse. With respect to these Droits of Admiralty, all questions arising upon them belong properly to the Courts of Prize, and more particularly to the Court of Admiralty, in the first instance; but when my Lord Chief Baron suggested to me (and this is the ground on which I have gone in the first instance), that this may have been brought within our cognizance by the invitation of those concerned in the administration [83] of these affairs, namely, the Lords Commissioners of the Privy Council, and the part which has been taken by the Attorney-General, I, for one, do not refuse the acceptance of the jurisdiction which, perhaps, the King may by his own authority thus throw upon us: and as his Majesty has been pleased to refer the administration of the produce of these funds (though they do not primarily belong to the King's ordinary or extraordinary revenue), to the Auditors of public accounts, that circumstance may have brought it

within our jurisdiction to consider whether the Auditors of the public accounts have done right in disallowing the claim made on the part of the plaintiffs. I am, therefore, very ready to withdraw the objection that would, according to my mind, have arisen to this bill, observing only, that if a demurrer had been, in the first instance, put in, it appears to me that there must have been an end of it.

Having thus expressed my opinion that this is an anomalous bill, and one of first impression, and that, as such, it cannot strictly be sustained on any ground whatever, yet, taking it up incidentally, after the example of my Lord Chief Baron, I should be willing to go into the case, and give redress, if we can give redress; but it is beyond the compass of my mind to come to any kind of resolution or decision on it as it stands. I perfectly agree with my Lord Chief Baron, that we have but two modes by which we can come to any decision at all. It is, strictly speaking, a bill of quantum meruit brought by [84] these persons as Agents for the Crown; for as to their being Prize Agents, there is no pretence whatever for saying they were placed in that character by the act of Parliament, the acts of the Privy Council, or the acts of the King. They are entitled, perhaps, to some remuneration, though I very much doubt, in my own mind, their having any thing like a legal demand originally. They had no legal right when the question was in suspense to whom this property should belong, whether to Dutch or English owners, or ultimately to the King. The King's authority was doubted as to the commission, though I should not, perhaps, have doubted it myself; but the King appointed these persons Commissioners, and I cannot distinguish this commission from other commissions. Ultimately, when war was declared, it became the profit and the private money of the King, and even if these persons, from that time, were the Agents of the Crown, and if they should be entitled legally to any thing, there occurs a very great difficulty as to how they are to call upon the Crown: I know of no means by which, even if you suppose them to have been appointed Agents for the Crown, they could sue the King in any other way than the Constitution points out, which is by petition. We have no right to command the Crown, and I do not know any other means by which these parties can call upon the Crown to do them justice, than by petition of right.

But suppose, in the form in which it comes before us, we were to say the Crown has given us the [85] power *pro hac vice* to decide this question, there is still no means of deciding the particular matter, which is a mere question of quantum meruit, except either by a reference to the Deputy Remembrancer, and he, I agree with my Lord Chief Baron, is perfectly incompetent, and is not the constitutional officer:—or (which is our only other mode) by sending it to an issue; and that it is impossible to say the Crown could be compelled to accept or defend. If the Attorney-General were to say, I will not submit to appear to such an action, we have no power to controul the Attorney General, and say that he shall appear. Then it comes to this,—we are, perhaps, called upon to say that the Auditors have done wrong, and upon that I cannot, as I agree with the Lord Chief Baron, take upon myself to say they have done wrong: I am perfectly clear they have done right in some respects, as in not considering the Commissioners upon the footing of Prize Agents, as entitled to the extent of remuneration they require, and also in not allowing them the interest on the balances in their hands. I will not, however, go further; I did not intend to have said so much, but I must declare my opinion that this Court has no right, under this proceeding, to command any thing. We can only concur in that very impartial and proper recommendation on the part of my Lord Chief Baron, every expression of which conveys the meaning of myself and the Court, much better than any language that I can affect to use. I conclude with saying, that in the present suit this Court has not the power of making such a decree as is prayed—[86] to declare that the plaintiffs have a legal right to call upon the Auditors peremptorily to allow the sums demanded and disallowed, which is utterly out of the power of the Court: and therefore this bill must be dismissed.

WOOD, Baron. As my Lord Chief Baron has delivered the judgment of the whole Court, being the result of previous consultation amongst ourselves, I did not expect that each Judge would be called upon to give his single opinion, and consequently I am not prepared to go through the whole of the case: I therefore shall content myself with saying that I concur, as I have already expressed to them in private, with the Lord Chief Baron and my Brothers, in the judgment that has been delivered.

GARROW, Baron. If there had been any difference of opinion in the Court, I

should have thought it becoming in me not to deliver any opinion at all, but as I individually concur, not only in the judgment which has been delivered by my Lord Chief Baron, but in the reasons: and as the unanimous opinion of a Court carries with it (however constituted) something more of authority than when any one of the Judges have not delivered any opinion, I am desirous of saying now that this case has arrived at its conclusion, that I entirely acquiesce in the judgment which has been delivered by my Lord Chief Baron and my Brothers.

Per Curiam. Bill dismissed.

[87] EASTER TERM, 43 GEO. III.

EX PARTE COLEBROOKE, BART *1. Petition. 1819. Friday, 20th May 1803.—Practice.

Whatever jurisdiction this Court may have in controlling the judgment of the Commissioners for auditing the public accounts, in regard of allowances or disallowances and surcharges, alleged to be unduly made by them in favor or to the prejudice of the accountant, they will not interfere in a summary way on petition and motion, but the party complaining must file his bill.—Jurisdiction. On the question of the jurisdiction of the Court, and the mode in which redress should be sought vide the subsequent case of *Colebrooke and Others v. The Attorney-General and Others*.

This petition—which was presented (16th May, 1800,) by one of the plaintiffs in the case of *Colebrooke v. The Attorney-General* (which immediately follows the present), on behalf of himself and the other persons interested in the contracts therein mentioned—prayed a declaration by the Court, that the Accountants ought not to be charged by the Auditors of public accounts with the sum of 57,725*l.* 16*s.* 5½*d.* the alleged value of provisions delivered over to them: (they undertaking to stand charged with the sum of 34,688*l.* 7*s.*) and that they ought to be allowed the sum of 40,232*l.* 19*s.* 7½*d.* with which they had been surcharged by the Auditors—and for the necessary directions—and that all process might, in the mean time, be stayed.

The Court, on motion supported by an affidavit, verifying the allegations of the petition, granted an order (16th May), requiring the Commissioners for auditing the public accounts, to shew cause why this Court should not so declare and direct as prayed—requiring the order to be served on the Attorney-General.

[88] 18th July 1803.—The Attorney-General (Mitford) now shewed cause.

7th, 11th, 14th, and 15th Nov. —Plumer, Best Serjt. and Fonblanque, supported the order: and the Attorney-General replied.

[The arguments on either side appear to have been somewhat to the effect, but not to the extent detailed in the following case of *Colebrooke v. The Attorney-General*. They are therefore omitted here; but as the Court did not give any reasons for their decision in that case, the judgment delivered on the present occasion, by Mr. Baron Graham, with whom, on the question of jurisdiction, the Court ultimately, on more deliberate consideration, coincided, having been rendered much more important, is therefore stated fully.]

20th May 1803.—The Court having taken time to deliberate, this day delivered their judgments *seriatim* *2.

GRAHAM, Baron. Having stated the object and nature of the application. When this matter came before the Court, it was opposed upon much argument upon the merits of the case—that is to say, upon the question, whether the Commissioners had done justice upon this occasion—and it was opposed also on the ground that this Court has no legal or equitable cognizance of the [89] subject matter: or if it has, that it cannot give relief upon this summary mode of application.

The manner in which the public attention has been called to this subject, has

*1 See the note to the next case.

*2 The Reporter has not been fortunate enough to obtain a note of the judgment delivered by the Lord Chief Baron; but as his Lordship is said to have doubted, upon that occasion, the jurisdiction of the Court altogether, it is of the less consequence perhaps, since the subsequent determination of the Court, in *Colebrooke v. The Attorney-General*.

rendered it necessary for the Court to give its opinion upon this great point,—whether, after an account has been prepared by the public Auditors of the kingdom, the public and patent officers of the Crown, and stands ready for final declaration by the Chancellor and Under Treasurer of the Exchequer, and the Lords Commissioners of the Treasury that account can be sent back to be altered or corrected, either in its general statement of the balance, or in any particular item of it, by any controlling power inherent in this Court:—and secondly, (if it can be done by any mode of proceeding known to the Court) whether it can be done in a summary mode like the present, namely, by motion, upon a petition, supported by affidavit.

The consideration of the first question is undoubtedly extremely important, and I have very earnestly to request the indulgent patience of the Court while I go into the ground of that opinion in which I unfortunately differ from my Lord Chief Baron and my two other Brothers: with real diffidence, at the same time, of my own opinion, when it is not only opposed to theirs, but to the very able and ingenious arguments and research which have been offered, in support of the contrary opinion to that which I am now endeavouring to maintain.

[90] The consideration of a subject of this sort, in spite of every effort to reduce it, necessarily takes me into a very extensive field, but it shall be my study to treat the subject with all the brevity that it will admit of, and more particularly so, because the greatest part of it has already been canvassed most ably and most learnedly. As far as in a subject of this sort we are instructed by Madox and the several able authors referred to by Lord Coke, in 4 Inst. 103, we certainly go upon sure grounds; but that information stops very short of any satisfactory conclusion; because it is clear, that in those early times, the executive and judicial powers of the Court were not marked by any clear line of distinction. In the times to which those writers, particularly the former, refer, and when the King's Chief Justicier ceased to preside at the Exchequer, the Lord Treasurer, the Chancellor, and others of the King's Council, sat with the Chief and other Barons, in the Court of Exchequer, by which I understand, as well the Court of Pleas of the Crown, as the Court of Pleas between party and party. During some portion of that period, the Chamberlains sat also; but it is not necessary to go into any learned discussion of the nature of their office, because it is clear from Lord Coke that the Chamberlain had long ceased to be a judicial officer of this Court. The business of this Court was then done by the Barons, and they were often not lawyers, as is clear from an act in the 14th of Edward III. regulating com-[91]-missions of Nisi Prius in the several counties. There is, in that act, this provision, that if it happens that none of the justices of the one bench nor the other, may come into the country, whose inquests or juries be to be taken, then the Nisi Prius shall be granted before the Chief Baron of the Exchequer, if he be a man of the Law. So that it is clear, that even at this period, the Chief Baron was rather a political character, than that legal officer which he is now, as Chief Judge of the Court. This appears more strongly, if it were necessary to discuss it for the present purpose, from Lord Coke's comment on the Mirror, which I will just repeat, by way of shewing more distinctly what really was the state of the Court in those ancient times (vide 4 Inst. p. 109). Lord Coke, in point of fact, carries his information in respect to the real jurisdiction of the Court, as applied to matters of this sort, not very far in his comment: for the greater part being comments upon Britton, and upon the Mirror, the passages he refers to, allude to a time when the whole business and jurisdiction of the Court was different from what it now is [his Lordship read the several passages referred to, from p. 103 to p. 113].

In commenting on the accounts that were then taken, Lord Coke assumes, that the accounts, as they were originally taken, comprehended those which afterwards fell within the department of the auditor of the Prest, for he mentions the accounts of the Treasurer of Ireland, as forming a part of them, (p. 113), and mentions, as the only [92] exception of the persons accounting in this Court, the Treasurers of the King's chamber. At that early period, therefore, it really does seem as if this Court, constituted as it then was, superintended the public accounts, and in most instances, transacted in open Court, all the business of such accounts in the kingdom, including those of the Prest, as well as all others, excepting Ireland which never did fall within the province of the Court in the early establishment. But now, from the great and neces-

sary change which the business of this Court has undergone since, the political character of its members has been distinctly taken away from the judicial character which they at present assume : and in many respects the Treasurer and the Chancellor of the Exchequer, who originally formed a part of it, and sat in Court here with the Barons, have taken and confined themselves to the business which more peculiarly belongs to them, namely, the administration of the Revenue of the Country ; for when it is once received into the receipt of the Exchequer, the proper department, the judicial authority and controul of this Court ceases.

At the time when Lord Coke wrote, it will appear, that most incontestibly, the proper and sole Judges of this Court, with respect to pleas of the Crown, and pleas as between party and party, were the Barons of this Court to the exclusion of the Lord Treasurer. It will appear likewise, by a further reference to Lord Coke, [93] (4 Inst. 118), that the Lord Treasurer, the Chancellor and Barons of the Exchequer were, in his time, and are to this day, if it should please his Majesty to constitute a Lord Treasurer, the proper Judges of Equity in the Court of Exchequer. It is clear too, that the Lord Treasurer was one of the Judges, as was the Chancellor, with the Barons, in the Court of Accounts. I apprehend, as appears clear from various passages in Lord Coke which it is not necessary to go into, that the Court of Accounts, of which the Lord Treasurer was the President, was not a Court of justice. They had no judicial power, independent of the Chief and other Barons of the Court ; although, in the ancient Court of Accounts in this Court, the Lord Treasurer had a right to preside, and the Treasurer of the Exchequer, who was generally also the Chancellor of the Exchequer, also sat there. These two officers were confounded together for a long period, but with regard to the Court of Accounts, it is plain that the necessities of other business had taken great part of that branch totally out of the immediate management of the Court.

When the Court of Accounts sat here as a Court to take accounts judicially, the Accountants were actually either brought into Court, or commissions issued under the statute of Henry VIII. empowering certain Commissioners to enquire into the state of the accounts, and report them here. But though the Court of Accounts is still an existing Court, it is not an effective Court, because the business of the Nation having [94] so greatly increased from the vast extent of the pecuniary concerns of the subjects of the kingdom, it has transferred that duty to another department.

Having said already so much upon that head, I shall next endeavour to find out what the jurisdiction of this Court is, by as short a reference as possible to the several acts of Parliament which have taken place, regulating that jurisdiction, and defining in what cases this Court should, or should not interfere. The first act which I will refer to, is the 20th of Edward III. cap. 1 & 2. The accounts of public Accountants were then taken in the manner which I have already been describing, and no allowances were made upon any occasion, without the writ, and without the order of the King. By that statute, the power of the Treasurer and Barons (for at that time the Treasurer sat as a Judge in this Court) was enlarged. It appears by the first act, that the writs and mandamuses from the King to do right, and in some cases to forbear to do right, had been sent to other Courts, as well as to the Exchequer, for the statute says,—“First we have commanded all our justices, that they shall from henceforth do equal law and execution of right to all our subjects rich and poor, without having regard to any person, and without omitting to do right for any letters or commandment which may come to them from us.” And then the act goes on to prescribe the form of the oath to the justices. Then [95] follows the act (ch. 2), relative to the Exchequer. “In the same manner we have ordained in the right of the Barons of the Exchequer, and we have expressly charged them in our presence, that they shall do right and reason to all our subjects great and small, and that they shall deliver the people, reasonably and without delay of the business which they have to do before them without undue tarrying, as hath been done in times past.” It is to be observed, that this is particularly addressed to the Barons of the Exchequer. It seems, however, that notwithstanding this positive and particular direction to the Court of Exchequer, they still persevered in their former practice, because it became necessary in a later period, in the 5th of Richard II. (ch. 9), to repeat these injunctions, and to repeat them to the Court in a more positive manner.

I should previously have noticed one document, which perhaps I might not have rested very confidently upon, if I had not found it had been made very particularly

a topic of argument both by Lord Somers in the celebrated *Banker's case* in the 11th volume of Hargrave's State Trials, (pp. 136 and 150) and is referred to by Holt and Lord Chief Justice Treby, and that is, the oath which the Barons take here in Court. The second article is—"That well and truly, he (the Baron,) shall charge and discharge all manner of people, as well poor as rich." Now this oath undoubtedly is taken by the Barons at this day, and I own it strikes me as affording a strong [96] argument in favour of the jurisdiction, and I shall be found supported in this by the great authorities to which I have referred in that case. And it would be a very extraordinary position, to maintain, that where the Barons generally take an oath that they shall truly charge and discharge all manner of people, it must at this day, be with an exception of that very large class of persons who are concerned in the immense contracts by which the supply of our armies and great military establishments is to be furnished. One would expect at least something exceedingly strong that should make it the habitual and customary law of this Court, to construe an oath conceived in terms so general as that is, with an exception so extensive and important.

The next statute in order of time, is the 5th of Richard II. ch. 9, and that undoubtedly does give great force to the argument I have been urging, arising from the oath; because it is difficult to conceive words more general than the language of that statute is, giving to this Court a supreme judicial authority over all matters where justice was to be obtained by one party against another, whether Accountants of the King or not. That statute recites, that "Because that grievous complaints hath often times been made of the officers of the Exchequer, for that the heirs, executors, occupiers of goods and land tenants of divers persons which have been impeached in the said Exchequer of debts, accompts, and [97] other demands, and which, although they have offered them there to shew or plead for their discharge of those impeachments according to the law, they have not been always thereunto received heretofore, without having express commandment by writ or letter of the great or privy seal, to the great disquietness, mischief and delay of the said persons impeached, and no advantage to the King." It is perfectly clear, therefore, that up to the 5th of Richard II. notwithstanding the former statutes I have referred to, individuals, who were Accountants to the King, could not obtain even their ordinary discharges without a particular mandate from the great or privy seal. Then it proceeds thus: "It is ordained and assented, that the Barons of the said Exchequer shall, from henceforth, have full power to hear every answer of every demand made in the same Exchequer." The Treasurer is not mentioned here, nor Chancellor of the Exchequer, to have this power, and the prior acts had clearly lost sight of the Treasurer as a judicial officer sitting in the Court of Pleas. Before this time, about the period of the 20th of Edward III. the Treasurer was no longer considered as a judicial officer of this Court in any of the extensive business of the pleas of the Crown, or pleas between party and party. The act then proceeds, "so that every person that is impeached or impeachable of any cause by himself, or by any person shall be from henceforth received in the same Exchequer to plead, sue, and have his reasonable discharge in this behalf, [98] without tarrying or suing any writ or other commandment whatsoever."

Now, without affecting any thing like clearness in a case of this sort, after what I have heard, it strikes my mind that this act does mean to give to the Court of Exchequer as a judicial Court, the fullest latitude to hear every answer that could be made. It is not pressing the present subject too far to say, that here there is a demand made on the part of the persons who make the present application; for they state themselves to be charged with 55,000*l.* as the value of provisions which they say is greatly beyond what they ought, under the circumstances, to be charged with; and they say the Auditors have deducted from their demand 40,232*l.* which they ought not, because they have proceeded upon a mode of calculation adapted to another view of the circumstances and another state of things, and which would be injurious to the complainants, if applied to the particular mode in which, from the necessities of Government, these provisions were at that time supplied by them. Surely that is a sort of demand from the subject which requires an answer, and I protest it is novel to me, that a subject of any country, and particularly of a country where Courts of Justice are so singularly and peculiarly accessible as those of this country are, should look for an answer to such demands to any other place than to a Court of Justice.

[99] I have been induced to dwell a little upon this part of the case, because I find myself confirmed exactly by the same authorities to which I have referred, and shall refer generally, namely, the Judges who delivered their opinions in the *Banker's case*. Whoever follows my argument, will find it is supported by those very high authorities, Lord Somers and Mr. Justice Treby, who there reason from this statute, although with a different view and on a very different subject-matter from the present—namely, in respect of the province and authority of this Court as a judicial Court, sitting in the receipt of the Exchequer Revenue, to issue money which had been received into the Exchequer—yet their general reasoning upholds my present position, for they admit throughout, that whilst the debts and accounts of the Crown are in transitu through the Exchequer, the Court of Exchequer have full power over them. And indeed it must be necessarily competent to the Court from which and under whose sanction every process issues, to look through the subject-matter for which they cause their summary process to be issued. We are no longer a Court of Justice, if, on putting our fiat for an extent, we are not to see whether so much is due from the subject or not: or if we are bound to adopt the conclusions of others who are not a Court of Justice. Those great Judges will be found arguing from this statute, that there was no doubt that the Court had the power in its judicial character to hear every answer of every fair and reasonable demand both in law and equity, which the subject might have.

[100] So the matter rested, till the statute of the 33d of Henry VIII. c. 39 introduced a new mode of recovering debts of the Crown. That statute put every bond and every specialty to the Crown, in the situation of a statute staple as to every purpose of its remedy; but when this act had introduced these new advantages to the Crown, by such mode of enforcing the debt of the Crown, it adverts to the possible cases in which these debts might be answered on the part of the subject, and very anxiously makes provision for the subject's right in every possible case of debts of this sort being attempted to be enforced against them, and it gives power to the constituted Courts. My Lord Chief Baron has already stated, that the statute of the 27th Henry VIII. c. 27, had created a Court of Augmentations, and had constituted new officers for the purpose of enforcing the additional Revenue which, from the dissolution of the monasteries, had come to the Crown. The 79th section of the 33d Henry VIII. c. 39, provides, "That if any person or persons, of whom any such debt or duty is or at any time hereafter shall be demanded or required, allege, plead, declare, or shew in any of the said Courts," the Court of Exchequer having been mentioned as one "good, perfect, and sufficient cause, and matter in law, reason, or good conscience, in bar or discharge of the said debt or duty, or why such person or persons ought not to be charged or chargeable to, or with the same: and the same cause or matter so alleged, pleaded, declared, or shewed, suffi-[101]ciently proved in such one of the said Courts as he or they shall be impleaded, sued, vexed, or troubled for the same; that then the said Courts and every of them, shall have full power and authority to accept, adjudge, and allow the same proof, and wholly and clearly to acquit and discharge all and every person and persons that shall be so impleaded," &c.

This act therefore, while it introduced new remedies for the Crown, giving the proper and necessary privilege of the Crown for the enforcement of those debts, provides anxiously that the subject who was to be charged with them, should have every possible means of being heard in his defence: and it will be found, that several cases in Equity did arise soon after the passing of this act. One of those, the case of *Sir Thomas Cecil* (7 Co. 18), will be sufficient for the present purpose, and that certainly goes a great way to shew how far this Court would give relief to parties against suits, as being within the purview of that act: and that it comprehends in terms, and empowers the Court to give relief in, many other cases than those of mere debts upon bond and other specialties; therefore the equity that is there given must apply to all actions of debt and to such as might arise in the course of such transactions as these, as well as to debts upon bond. Sir Thomas Cecil had conveyed an estate to Queen Elizabeth, to a part of which he had not at the [102] time a perfected title: and the bond which he had given to the Crown, conditioned for performance of the covenants in the conveyance of that part of the estate, as well as the rest, (one of which was, that he was well seized) became forfeited, and was put in suit by *seire facias*. No plea was put in to that bond, but Sir Thomas exhibited an English Bill in the Court

of Exchequer Chamber, and upon that relief was given upon the particular circumstances of the case. Many other cases are cited in Lord Coke, where relief likewise was given upon the same ground, and the Court there also determined, that it was very proper for the purpose of obtaining relief in equity under this statute of 33 Henry VIII. to have recourse to the Court of Exchequer Chamber: so that if it be a subject-matter of equity, that is the proper place where it ought to be shewn; for if it were a subject-matter of plea, it should be introduced upon the record by plea to the *scire facias*.

If it should be said, therefore, that this present application is not in the case of a bond to the King, or of a debt which arose by reason of any matter or power, or things relating to the several officers who constituted the Court of Augmentation, I answer, supposing Government had refused to enter into a contract with the applicants until they had obtained sureties, and that those persons who had given bond for the contractors, were afterwards sued by *scire facias*—would it not have been compulsory upon the Court, under this act, to have heard either the [103] plea of the party to that *scire facias*, or at least to have heard, according to the authority of the case of *Sir Thomas Cecil*, in the Exchequer Chamber, what the party had to say in answer to the suit on the bond? If that be so, it strikes me as an exceeding strong argument, to shew that it does not alter the equity or right of the party, that it comes before us in another shape.

Then by the 13th of Elizabeth, ch. 4, all their lands, tenements, and hereditaments of any kind, are made subject to the payment of the debts of persons of the description mentioned in the act, which is very general, and I believe it could hardly be contended that it does not comprehend persons of the description of those who are at present before the Court. It enacts, (sect. 7) "That all and singular lands, tenements, and hereditaments, which any Treasurer, Receiver, Teller, Customer, Collector, Officer, or Accountant, before-named, hath heretofore, since the beginning of the Queen's Majesty's reign, purchased, or caused to be purchased, to the intent the same should not be liable as is aforesaid (the fraud and covin aforesaid being first found by office or inquisition), shall and may be liable to the Crown debt." Now it seems perfectly clear, that if these accounts should be declared by the Chancellor and Lords Commissioners of the Treasury, any extent or process issuing in consequence of that, under the authority of this Court, would affect the lands of those persons. Then, if they are within the act as [104] to that, it seems to me they are within the act for the purpose of obtaining the redress and equity which that statute acknowledges to be their right by this provision in the second section that—"if any Treasurer, &c. or other accountant which shall receive or be chargeable with any money or treasure of our said Sovereign Lady the Queen, her heirs or successors, and shall, upon the determining of his or their account, (all his and their due petitions to them upon the same account being allowed) or by reason of any farm as aforesaid, be found in arrearages, or to owe unto our said Sovereign Lady the Queen, her heirs or successors, any sum or sums of money, and shall not, within the space of six months next after his or their accounts finished, or debt known, (having allowance of his or their due and reasonable petitions as is aforesaid) truly satisfy and pay all such arrearages and sums of money as he or they shall owe, upon determination of his or their account, &c. it shall be lawful for the Crown to make sale of so much of such Accountant's lands, &c. as will satisfy the debt or arrearages to be determined and adjudged upon his or their account or farm as aforesaid (all due petitions being allowed as aforesaid)."

Now this act, it is quite clear, recognizes the subject's right of petition, and it may be said, that his petition must be personally to the Queen, or her successors. The act however, is perfectly silent as to whom this petition should be addressed—[105]—whether personally to the Queen or her successors, or to the Court. But I take it to be extremely fair and just reasoning, that if it is to the Queen, it must be to the Queen doing justice according to the laws of the realm, and proceeding to a final determination and adjudication, which she can only do by the Judges of the land. Then it would let the party in to prove a case in equity, where he may have the opportunity of shewing that he has been overcharged, and then it would be, if a petition of right, of course referred to some judicial authority—either to the Lord Chancellor or the Judges of this Court. And if, by this statute, we find that the persons accountant should have all their reasonable petitions, we must receive them, in whatever mode they come to this Court. At all events, thus much is clear—that the debt is not to

be enforced as against their land, so long as they can shew grounds to the contrary, to a Court having competent authority to decide upon it—to a Court having a judicial character and functions. I do not mean to say that this goes the whole length of both the questions, but it goes a great way to establish that no debt of the Crown shall be enforced to the extent to which this act means it shall be enforced, so long as the party has a reasonable petition to offer to the contrary—which reasonable petition he should offer to this, or to some other Court having a judicial character and authority.

[106] Certainly these acts of Parliament were made at a time when the business had not completely got into the present course. The employment of contractors, and the impretation of large sums of money to them, is comparatively of very modern date, but however comparatively modern that mode of contracting may be—unless any particular act of Parliament has placed these contractors as debtors to the Crown, in any situation less favourable than any other debtor or accountant to the Crown—these general words in this statute, in my opinion, certainly do comprehend them.

The course of proceeding by *seire facias* is, in great measure, to be traced in Chief Baron Gilbert's book on the Court of Exchequer, pp. 97, 98, and it will be found there, that from the earliest time at which we know any thing of the practice of the Court as against debtors of the Crown, there has been a constant indulgence to the debtor, in affording him an opportunity of making his just and reasonable defence—so much so, that it is extremely well known to be the course of this Court, that although whatever bonds are entered into since the 33d of Henry VIII. may be sent to the Remembrancer, and being then delivered into Court, become from that time, debts of record, —because the bonds of the King have all the benefit of being debts of record, since they were put upon the footing of a statute staple; yet the ordinary process is to sue out a *seire facias*, to which the party may come and plead [107] within four days; if indeed he do not, he is concluded, and the Crown is entitled to judgment. So, by the practice of this Court, although the constant rule is to issue the extent in the first instance; yet an inquisition is then taken upon it, and the party is let in to plead in the fullest manner, that is, he is let in to say that the debt is not so much as you have awarded process for, and such a plea must necessarily let the party in to say, I am overcharged. That is the effect of the mode of proceeding by *seire facias* and by extent. There is a case in Hardres, (p. 324,) *The Attorney General v. Hutchinson and Pocock*, which seems to me to establish this position, that even in the King's debts not on bond, but arising in the manner in which this does, the Court has, at some periods, been in the habit of letting the party in to plead. In that case the proceeding was a *seire facias* due, upon account for 2272l. to which they pleaded the act of indemnity, and the Attorney General having replied the act of vesting, the defendants demurred against any demand. According, therefore, to the practice in this Court, it seems to me that there would be nothing at all unreasonable, but that it would be *ex debito justitiæ*, if the party really had a fair defence to make, —to suffer him, before process of extent issued for the debt of the Crown, if he could shew that so much was not due, to be let in to plead in that case, as well as in the case of bonds given to the King, and delivered into this Court, which are clearly debts of record, and other debts of record where the proceedings are by *seire facias*.

[108] But undoubtedly, it is said, and with great force of argument, that there is no instance whatever of the interference of this Court in a case like the present—that there is not only no instance of any interference of the Court in the stage in which this case is now, but no instance of any interference of the Court pending the taking the public account before the Auditors, as constituted by the 25 Geo. III. or even as they were before that act*. I cannot but say, I feel the force of that argument very strongly, but at the same time I cannot go along with the Court in supposing that there was any particular period in which their original jurisdiction was by any express law taken away. The principal authority I hear of for that, is the authority of Mr. Fanshawe, and I will just offer a few observations upon the passage which Mr. Attorney-General particularly relied upon, to shew, that whatever was the jurisdiction of this Court in that respect formerly, this part of it has been entirely separated and placed in hands totally distinct. The late Attorney-General, of great learning and great ability, we all perfectly well remember, had no better authority to satisfy the Court

* Sed vide infra (*The Attorney-General v. Colebrooke*), where instances are adduced.

that such had been the real state of the case, than a reference to this (Mr. Fanshawe's) book †. [109] My Lord Chief Baron has truly stated that this Mr. Fanshawe was King's Remembrancer of this Court—a man therefore likely to have considerable information. His book was compiled by the express desire of Lord Treasurer Buckhurst, who succeeded Lord Burleigh. It is however remarkable that this subject, at least that subjects like the present, had been treated very elaborately in *The Banker's case*—many excellent writers have written upon the subject of the jurisdiction of the Court of Exchequer—amongst the rest, and high amongst the rest, is Lord Chief Baron Comyn, who had the advantage of great experience in this Court, in addition to his very great general legal learning; and it is remarkable that neither *The Banker's case*, nor Lord Chief Baron Comyn, nor Gilbert, ever mention Mr. Fanshawe as any authority at all with respect to the jurisdiction of this Court. Lord Coke, in the chapter to which I have referred, never once quotes Fanshawe, or mentions him, although he wrote subsequently to his book. I do not wish to detract from the credit of the book: but it is extremely material, that when so important a position as this—that the jurisdiction in matters of account, has been taken away from this Court—is attempted to be supported by citing his authority, to consider what degree of credit is due to it. He says, “the Auditors of the Prest, be those that take the account in the Exchequer.” I have no disposition at all to intimate, for it is not necessary, any difference of opinion from my Lord Chief [110] Baron who spoke before me on that particular point: but I should be inclined to doubt a little, whether the Auditors of the Prest were in fact first constituted in the reign of Elizabeth. I take it, the Auditors of the Prest must have been known officers of the Court: and he who writes in the reign of Elizabeth, speaking of the great known officers, could not be understood to be speaking of officers constituted by an act in that reign. The Auditors of the Prest are, I apprehend, as old as the other Auditors who audit in ordinary Revenue cases. Fanshawe then says, “these other persons, in order that the process might be made out upon them (that is, the Auditors of the Prest), now declared the same before the Lord Treasurer, the Chancellor, and the Under Treasurer only, but they were never entered in the Court of Exchequer, nor examined, nor written upon there, as they had wont to be.”

Now, with great deference to the opinion that has already been stated upon this subject, this I take to mean nothing more than that the accounts now are not entered in the Court of Exchequer, nor examined, nor written upon as they had wont to be, meaning that then that was no longer the case; and that having got into another department, namely, before the Treasurer, the Chancellor, and Under Treasurer, they are only entered and declared there. I take it to be perfectly clear that that is the common course of business. But a question still remains, whether, although these accounts, from the little practica-[111]-bility of their being taken in this Court, have now got into another channel, and although this Court cannot, in its present constitution, still take the public accounts, as a Master in his Chambers can do, and as they did before, and though they are entered into in the office of the Chancellor and Under Treasurer of the Exchequer, for the purpose of settling them in this stage, and ultimately declaring that the accountants, so far as they have adjudged, have done right—the question is, whether that is to be conclusive on the Court.

To be sure, if my Lord Chief Baron is right in considering the declaration of the accounts by the Chancellor of the Exchequer as an absolute adjudication, and as a judgment passed, and only wanting to be sent down in the record to the Great Pipe, in that case it may be said to be final. But where do the Chancellor and Under Treasurer of the Exchequer sit as a Court of Justice? I have used the utmost diligence of investigation, and can find no Court of Justice in this Court that is constituted of Chancellor and Under Treasurer of the Exchequer. Without the Barons, the Chancellor and Under Treasurer has no judicial power whatever—he cannot issue process of any kind whatever—he cannot examine witnesses upon oath—he has no process to execute of his own judgment, but must refer to this Court. It strikes me, therefore, as a strong position to say, that when they, who have no judicial character,

† This book, which appears to have been much quoted and relied on by the Attorney-General, in the argument on the present question, was not afterwards adverted to by him, in arguing the demurrer, in the next case of *Colebrooke v. The Attorney-General*.

have signed these accounts, when they come into this Court, that is to conclude the [112] matter—that they should be considered as absolutely compulsory upon the Court of Exchequer, and that the Court should sit here merely as ministerial officers to grant the process upon declarations of this sort. One reason why I should, with deference, be disposed to doubt that is, because in the earliest times the public accounts of the kingdom, and the accounts of the Prest, were declared by the officers of the Crown, for they were the persons who, in the first instance, had the examination of them. There is a valuable document in Rymer, vol. x. folio 113 ^{*1}, in the 9 Hen. V. by which it appears that the whole of the King's revenues were declared by the Treasurer and the Chamberlain. It is remarkable, that at that period the Chamberlain seems to have been the higher officer, for in Rymer he signs before the Lord Treasurer; but it could not be understood at that time of day that the declaration by them was [113] conclusive as to all those several heads of the King's Revenue, because, with regard to most of them, this Court had then an unquestionable jurisdiction.

I will venture, in a general way, to suggest what is my idea of the power of this Court, as a Court of Justice, superintending the public business in this department in all its stages. It is perfectly well known (and it would be but pedantry to refer to particular cases) that in ancient times every lord of a manor, who had the appointment of any bailiff as well as the King, had also the appointment of his own Auditors between subject and subject. Now, before the jurisdiction of the Court of Chancery had increased to its present extent, and before actions of a better shape, as adapted to the public business, came into use, actions of account were frequent in the case of an inferior lord, and a fortiori in the case of the King. Unquestionably the Crown did, from time to time appoint its own Auditor; but the question is, whether, when the King or a subject Baron appointed his own Auditors, their declaration or judgment on the state of the accounts, was conclusive in any one instance. Undoubtedly it was not conclusive in the case of an inferior Lord or Baron appointing an Auditor. The course was, as we learn from the statute of 13 Edw. I. c. 11, when great grievances were complained of by reason of the acts of injustice which were done by those Auditors whom the Lords appointed of their own authority, and when their servants [114] were often, on the report of the Auditors, thrown into gaol, and lay there in irons until their balances were paid, and no just discharges they had would be allowed) if the person so committed could find friends that would undertake to bring him before the Barons of the Exchequer, he was delivered to them to appear before the Barons, or the Auditors whom they should assign to him, to render his accounts. If the Auditors, so assigned, did not do the accountant justice, he might have a writ *ex parte talis* ² to be returned before the Barons as Supreme Auditors: and Lord Coke says, that by virtue of this writ *ex parte talis*, justice is done to the subject in respect of the reports of these Auditors as in every other case. With respect to the case of subject and subject, therefore the course of justice was this. The Court appointed Auditors, and when these were appointed, the party who was to give in his accounts before them, (and they were judicial characters to a certain degree), was admitted to plead any thing that went to discharge the account, or any particular item which as matter of account was properly pleadable and examinable before them. But in Comyns, tit. Accompt, (E. 14) we find

¹* It is entitled,

“(A.D. 1421) *Declaratio proficueorum Regni & onerum supportandorum.*”

The declarations follow, and the document proceeds thus:

“Suprascripte declarationes ostense fuerunt Domino Regi, per thesaurarium Angliæ, apud Lambhith, sexto die Maii, anno, &c. Nono.

“In ipsius Domini Regis præsentia pro tunc constitutus.

“H. CANTUARIE, Archiepiscopo.

“H. WINTONIENSIS.

“T. DUNOLMENSIS, Angliæ Cancellario.

“P. WIGORNIENSIS, Episcopus.

“H. Domino FITZ HUGH, Camerario Regis.

“W. KYNWOLMARSH, Angliæ Thesaurario.

“Magistris J. STAFFORD, Custode Privati Sigilli.

“W. ALNEWYK, Secretario Regis, Et cæteris.”

²* Fitz. Nat. Brev. 129. Writ *ex parte talis*.

that the course of proceeding before these Auditors was, that if there was any real point essential to the purposes of justice—any point of law which was above the scope and understanding of the Auditors appointed by the Court, the party constantly had reference to the Court by whom every [115] such matter was set right. So the Crown originally, by a paramount right to any inferior Baron, appointed its own Auditors. Then the question arises, whether the statute of the 33d Hen. VIII. c. 39, was not meant to give the subject a remedy, in case the parties so appointed did any acts of injustice, and I cannot but consider that as a remedial act it intended to give remedy to the subject, and that it meant to say, that in every case where injustice is done, or likely to be done, some Court of justice should interpose, in order to correct that, and to receive the plea or points of law or equity which the parties should make, and which the Auditor might not be competent to decide: for it does strike me as being contrary to the principles of justice, that these Auditors, who are ignorant of law, should be understood as actually concluding the Accountant on points of law, save the right the party had to address a petition to the Treasurer and Chancellor of the Exchequer. I think that the result of the examination of the subject is more, that these Auditors may conclude, and be understood to conclude, as to all matters only which properly belong to them as matter of account, and with regard to such questions as are not questions of law or of equity: for it would be totally defeating the purposes which experience of their necessity has pointed out, if this Court were to draw to itself the jurisdiction of these trifling matters, or to interfere in those cases, unless it was where nothing but a Court of justice, as I contend, can give relief. So by a much [116] stronger reason, if these accounts have got the length of being carried before the Chancellor of the Exchequer, and Under Treasurer of the Exchequer, and the Lords of the Treasury, it would be absurd to suppose that this Court would draw from their cognizance those matters which peculiarly and more properly belong to them. But many cases may arise in which these gentlemen, notwithstanding their high character and authority, would be equally as incompetent to decide as the persons to whom they are referred in the first instance: therefore it strikes me, that there does remain in this Court that original superintending jurisdiction, which empowers it to assume a controlling power as to directing them on points of law that may arise, which lie out of the province, knowledge, and skill of those persons to whom, in the ordinary course of business, it goes.

Something, however, remains to be said as applying to the course of business at present. I have already stated the argument founded on the absence of precedent, that the revision of this head of accounts never was submitted to the Court till the present occasion, I admit, that there are very few instances, but what has fallen from my Lord Chief Baron and my Brother Hotham, satisfactorily accounts for that, and perhaps it will hardly happen again. I do not therefore perceive any of those consequences which are apprehended of a constant resort to this Court. I rather think it would seldom be [117] called upon. From the time of Elizabeth down to the beginning of King William's wars, very little of the public business was done by contract that could introduce or give rise to questions of this sort. The facility with which men made fortunes by imposing upon the public, became at length a notorious grievance. When the Commissioners of public accounts were appointed for the purpose of examining accounts, they found immense and shameful balances in the hands of every public Accountant in the kingdom: balances kept in their hands without paying any interest. Were men of this sort likely to come forward with grievances? Assuredly not; but the very man who gave rise to the first case here, a man whose situation we remember with great regret, at the same time that we feel the justice done to the public interest in his case, affords a striking instance of the benefit to be derived from the exercise of the authority of this Court. The Court in that case acted on the suggestion of a very learned person, who, from a sort of instinctive idea of the powers of this Court, said, if these Auditors will not force the public Accountants to come forward with their accounts, the Court must do it: and an application was made to this Court to accelerate the business of those persons. Now that is a strong instance to shew that the Court have the judicial power and authority to direct the Auditors: and it did so in that instance with effect. It has been said that it would be monstrous if this Court were to interfere after the account had been investigated. But [118] the Court could not interfere before in one instance in a thousand, and they would not take it from persons infinitely more competent to that part of the duty than we can be. Before

the constitution of the Commissioners of public accounts, what could the Court have done, when the public business ran to an extent that made it impossible to take the accounts upon the checks of this table? They would have said, the Crown have appointed Auditors, do not come to us to cavil at items, or the discharge of figures:—if you come to us upon some matter of law or equity we must then indeed decide, because no one else can.

I must, before I close, take some notice of the act of Parliament by which we have now, in some instances, express jurisdiction given us. Let me suppose that Auditors constituted by the King—Auditors of the Prest, or those in the time of Elizabeth, had at that time of day said to the widow of an officer, we will not hear your discharge, because you do not produce any vouchers—what authority in this kingdom could be resorted to but the Exchequer, to know whether that would be a case in which the Court would suffer subsidiary evidence to be given in the absence of vouchers. I take it this Court only had that authority. The Treasurer and Chancellor of the Exchequer had no such authority without the Barons; they are not competent to say what ought to be legal evidence before them. Suppose the Auditors had received the Accountants books to charge him with millions of money, and would [119] not receive his vouchers to discharge him, who is to set them right but the Court of Exchequer? It is said there is no danger of injustice or injury; but it does behove a Court of Justice to suppose that such cases may exist by which the greatest injustice may be done by Auditors in the first instance, by the arbitrary decisions of those persons, who, without the aid of legal knowledge, are contended to be the ultimate and definitive adjudicators upon cases of legal difficulty,—they often could not do justice, they might do injustice; and therefore the safety of the subject requires, however unlikely it is that injustice should be done, that the opportunity of appeal should be afforded to him.

To proceed with the argument drawn from this last act of Parliament, the 25th Geo. III. upon which were founded those beneficial public informations, which my Lord Chief Baron and myself have alluded to. The express object and purpose of this statute was to remedy those defects which were found to have existed in the course of taking the public accounts before; that admits unquestionably that all the accounts, at least of this department, were taken before the Auditors of the Prest. But here let me attend a little to the argument I have just quitted:—how little it could be intended, that these Auditors should be persons who were to have judicial authority, subject to no control whatever, when these officers, at the present moment, I believe, are to perform the office by themselves [120] or sufficient deputies, so that those deputies, who are certain clerks, intelligent men in their way, but as little of lawyers as any men, must be supposed to have decided, without control, up to that period, all points of law and equity; and the subject to have no other redress than by petition to the Chancellor and Under Treasurer of the Exchequer. This was the case before Auditors of this description took the account. The course of business was, that when these accounts were declared and came into this Court, they were transmitted to the Clerk of the Pipe, and being then put upon the Court roll, process of course issued, if the party did not receive his quietus.

The business of the office requiring greater expedition, Commissioners of public accounts were appointed; and it seems to me, that this act, with great deference to the construction that has been given to it, in no respect trenches upon the jurisdiction, nor makes any alteration in it, except where its enactments have done it expressly; and where it was necessary to except out of the operation of the several clauses that power which was intended to be reserved to the Exchequer.

The act begins by abolishing the office of Imprest, and leaves all the other officers entire. It then proceeds to authorise his Majesty to appoint by patent those five Commissioners who are now substituted in their place; and these [121] Commissioners are to appoint officers and clerks, all this having a view to the proper and necessary mode in which these accounts should be taken in the first instance; then the five Commissioners are to be subject to the same control as the Auditors. Now, I protest that I do not know what the word “control” in the eighth section, (unless it means the control of the Exchequer, to which the Auditors of the Imprest were subject) can mean. That is a cautious and proper expression to preserve to the Court of Exchequer all that superintending power, which it was necessary, for the purposes of justice, that it should retain, leaving the official part of the duty to be conducted

by those persons who are more competent to do it. Then it goes on to provide, that the Commissioners shall call before them, (this is the only case in which they have any judicial power, and that is given them by the express words of the statute,) by precept under their hands, all persons who shall have received any money by way of imprest. Before that time the officers of the Prest could not call upon the Accountant to appear personally, for that power was not vested in them by common law; and they could not examine them on oath, or compel the production of books, &c. When they saw occasion, they could call for extracts to be made for them, but no more.

Then comes the clause whereon I venture to suggest the difference of my own opinion from those which have already been given. Section the eleventh enacts, "That they shall allow such [122] articles only as the Accountant shall have been authorised to incur, unless, upon special statement of the matter to the Lord High Treasurer, or Commissioners of the Treasury, the said Commissioners shall be directed to make further or other allowances to the said Accountants accordingly, by warrant under the hand of the said Lord High Treasurer, or the Commissioners of the Treasury, or any three of them." Now, the way in which it seems to me that this clause would receive a construction perfectly consistent with what I have said, leaving the control of the Court of Exchequer as it existed from the first over their own Auditors, would be to construe this clause as having relation only to certain known articles of discharge, which persons transacting those contracts abroad, are, by the known constant course of business, authorised to incur; that no other shall be allowed; and that the Lords Commissioners of the Treasury shall be the sole judges of those. But I venture to say, supposing any articles of discharge to depend upon the determination of points of law or matter of equity existing in favor of the party charged, that such are not the articles of discharge to which this clause refers; for it would be a strange thing to say the Lords Commissioners of the Treasury, who never sit as a Court of Justice, should be the persons to decide conclusively, whether this or that contract in writing, and under seal, was to be construed according to the laws of the land, or according to the arbitrary construction which they might put upon it.

[123] Let me suppose, for instance, that the old stores, for which the Commissioners of the Treasury have said that the plaintiffs shall pay 57,000*l.* had turned out to be ruined and gone and devoured by vermin, so as not to be worth any thing; or suppose they had made a gross charge beyond the truth, and that they had done it grossly and outrageously wrong; if it struck every body else so, can it be said that persons, more fit to judge, should not be the proper forum to decide, either by means of a Jury or otherwise, than these persons who have no judicial character or legal knowledge?

Let me suppose again that this contract was only upon the ground that they should be allowed five pence halfpenny per ration, for which they were to find five articles, and that they found that three articles were a losing trade, and that all their profit was to be made upon the two, the salt pork and salt beef: that without that they could make no profit by five pence halfpenny, but be losers by every ration they should deliver out; if in such a case the commanding officer had said, you shall supply nothing but fresh meat, and we will have that at the proportional price agreed on for the ration, they might then be ruined, if they could not sell the three component parts of the ration on the same terms. That would be a question of construction, as to what, in the first place, do the articles say, as applied to a case of that sort: or if they say nothing, what is then the sense of a Court of law [124] upon it? Can it be understood that these and much more difficult questions might not come before the Treasury, and are they to sit as a Court of Justice to decide those nice points of law and equity? I apprehend that was not intended. Section 12 says that the Commissioners may examine all Accountants on oath, and also all other persons whom they may think fit to examine, touching the receipt and expenditure of money. Those powers were necessary to be given them from the defect that existed before. Then it is enacted in section 14, "That when the examinations of each account shall be completed by the said Commissioners, they, or any three of them shall, and are hereby required to make up a state thereof, and lay the same before the Lord High Treasurer, or the Commissioners of the Treasury, who, after due consideration of all particulars, shall grant their warrant to the said Commissioners to prepare the same for declaration, in the manner and form which has been accustomed."

Then there is another article more peculiarly belonging to these gentlemen to

judge of; that no Accountant shall be allowed in his account any sum which he shall issue or pay over to any Sub-Accountants, unless he shall have transmitted to the said Commissioners regular accounts thereof: unless proof shall be produced, to the satisfaction of the Lord High Treasurer, or the Commissioners of the Treasury, that the failure in transmitting them did not arise from wilful neglect. Then the Commissioners are to [125] call upon persons to whom money has been issued, to deliver their accounts: this is a clause not unworthy of attention. The Commissioners shall, so often as they shall think fit, call upon such persons to whom sums of money have been or shall be so issued and paid, to render to them an account within a time limited:—that was wanted before—and on failure of the accounts being delivered accordingly within the time so limited, the Commissioners are required to include the names of all such defaulters in their certificates, to be transmitted to the office of his Majesty's Remembrancer, in order that the usual process may issue thereupon: and in case they shall see cause, they are required to give notice thereof to His Majesty's Attorney General in England, His Majesty's Advocate in Scotland, or His Majesty's Attorney General in any of the colonies or plantations belonging to the Crown of Great Britain, as the case may require: in order that such motions may be made by such officer to the Court of Exchequer, or other proper Court; and such further or other process may be issued in order to his moving the Court of Exchequer in England or Scotland, or the proper Court in the colonies or plantations, for special process to be issued against such defaulter or defaulters as may be deemed necessary. Now these applications are to be made in all cases of this sort to the Court of Exchequer here or in Scotland, and these motions to be made for the process, and what is to be done on such process, must, of course, be according to the dis[126]-cretion of those Courts. That is, not by virtue of any power given by this act to the Court of Exchequer expressly, but they are to do justice in these cases by awarding process by virtue of the constitutional power inherent in them prior to this statute.

By section 23, "No article shall be allowed in the account of any person intrusted with the expenditure of the public money, without a written voucher or other evidence of the actual payment of every sum so claimed to be allowed, notwithstanding any allegation of papers being lost or destroyed, except on application to the Court of Exchequer, who shall, and they are thereby authorised and required, on such application, to call before them as well the said Commissioners or some person on their behalf, as the party accounting: and shall cause notice thereof to be sent to the Attorney General, and, after hearing as well the evidence which shall be brought on the part of the Crown by the Attorney General, or the said Commissioners, as that which shall be brought on the part of such Accountant, shall make such order as they shall think fit." Now this is a general direction to the Commissioners of public accounts, in order to hold those persons to a fair and expeditious rendering of those accounts: and they lay down, as an injunction to them, that no discharge shall be allowed without a written voucher. Having made that a general enactment does not take away the jurisdiction which the Court of Exchequer had before; but it strikes me, [127] that this is to be understood as part of the jurisdiction belonging to the Exchequer originally, or the parties would have had no redress when proceeding before the ancient Auditors; whereas, if a complainant had come to this Court, and stated that the Auditors refused to admit any matter of discharge in their accounts, because all their papers had been lost, had perished at sea, could it be doubted that this Court would have interposed?

These, I think, are the principal provisions of this act. I have already stated what I think is the fair and proper operation of it—that it really was not intended to take from this Court any power it had before. It could only be to shew, that in other respects this Court must be supposed to have the same jurisdiction: for this is the only instance in which the application is directed to be made in case of vouchers: but many other cases might be put. Suppose the Auditors of public accounts were to refuse to receive that which was legal evidence of discharge. Take the case of a man who had the King's pardon. Was he to plead it before this Deputy Auditor? Clearly not. He could only plead that before this Court; for, as Lord Coke says, speaking of the writ *ex parte talis*, those matters of law, of which the Auditor could not judge, were brought before the Court of Exchequer. Suppose books were produced to charge a man which were not legal evidence, as if they were made out by his clerk without his privity, and [128] items of charge should be founded upon such

loose evidence, and they had been admitted—and the question was, whether they were properly admitted. What could the auditors have done? I will not waste time in putting a great variety of cases of points of law that might arise, and which the Auditors and the Lords Commissioners of the Treasury are not competent to decide.

These are, in general, the grounds upon which I felt myself compelled to form my opinion, that this Court has never been deprived of that judicial character which originally belonged to it, and which is derived from the earliest documents in the Court,—the cognizance of taking accounts for the charge and discharge of the subject. With regard to the mode in which that may or can be, with propriety, done, from the dearth of precedents, I can hardly venture to speak; but it seems to me that it might be practicable, from ancient precedents, to point out a mode in which the Court might act. If there is any doubt whether the party has had a fair measure of equity dealt out to him upon the present occasion, I see no sort of objection to the Court staying its process, and not suffering judgment to be entered upon the record till the party had an opportunity to plead,—or, as it does in cases of Statute Staple, issue a *seire facias*, in order that the party may be let in to plead. If that should fail, they may do it, as in *Sir Thomas Cecil's case*, on a bill to be filed by the petitioner, to which the Attorney General might be made a party: [129] or in the form of an issue, upon the particular circumstances of the case, in which not only the Treasurer and Chancellor would be assisted by the Barons: but the Barons also might have the benefit of their concurrent jurisdiction, for, from the history of this Court, the Treasurer and the Chancellor of the Exchequer, as it appears to me, ought in such a case to have their due weight. I apprehend, therefore, that it might be done with perfect propriety in some such mode,—and I, for one, cannot see any great difficulty or danger that would be likely to ensue.

My Lord Chief Baron and my Brothers say, they never heard of any issue being directed out of this Court. Nor have I; but if the introduction of this new regulation, by holding public accountants with a tighter rein has drawn their attention to this Court, as to a Court of redress from actual or possible injustice, and the question is fairly brought before the Court, I cannot see that it is any objection to the exercise of the jurisdiction that there happens to be no particular precedent, to ground that which is in them an act of justice. If we should think, when the question came properly before us, that we were authorized to pronounce the party entitled to a remedy, I conceive, humbly when opposed by such authority, that it might be made the subject of an issue: because there is no question on which a Jury of English merchants would be more conversant or more competent to decide. And as to any legal question, I think the Court would be most fit to decide it, upon a view of the contract.

[130] With respect to the vast influx of business this would throw upon the Court, there is not much to be feared from that. I think it would be found that this Court has in itself sufficient power to make such a sort of traffic, and the resort to it not a very gainful speculation to those who should adopt it.

With regard to this Court taking upon themselves the practical examination of the accounts, I deprecate it. We have no longer any check upon the accounts as to mere matter of figures and allowances: this Court, the instant they heard it, would say, we cannot appoint you better Auditors than the Crown has given you; but when you come to matter clearly out of their knowledge, and out of their power to attain a full and complete mastery of, it strikes me as different. It is not likely to be a subject which will often present itself in this Court, because acts of injustice are as little likely to happen here as in any Court upon Earth; but if such should occur, God forbid there should not be another forum, for the ultimate decision, than an application to characters of this sort, however high they may stand in point of rank and integrity.

As far as respects the shape in which the present application is now brought on, I have considerable doubt. The ends and purposes of justice seem to require that we should hold in our hands the power I have been contending for, and I will not depart from it, till I am driven from it by precedent, or a positive, clear, [131] and distinct clause of an act of Parliament. The circumstance of there being no appeal, however, I think, precludes the possibility of our going into a question of so great a magnitude and extent upon a summary application; though I still think some attention due to the subject, to see whether it is not that sort of case which has so

much of reason or of law or equity in it, as to induce the Court, before it decides it definitively, to send it to some further mode of enquiry; and if the Court had been of the same opinion with me, it might have been a hint, perhaps, to those persons before whom it originally came, to prevent any further litigation upon the subject, by a re-examination of these articles, and a mitigation of the charge. When I say that, I speak with unfeigned deference to those who have examined these accounts. They are extremely competent to the subject, and more likely to be in the right than myself: yet according to the view I have of this case, I incline to think, particularly with regard to the manner of construing a contract, allowing only by rations, that some injustice has been done; but it is, perhaps, for the benefit of the country, that I should be overborne by the much higher authority of my Lord Chief Baron and my Brothers, and I therefore acquiesce.

HOTHAM, Baron *. In delivering my opinion upon the present motion, I certainly need not [132] do more than say that I acquiesce entirely in my Lord Chief Baron's opinion, after the very elaborate opinion which he has been so good as to deliver. The bench, the bar, and the public, must feel themselves extremely obliged to him for the very laborious investigation which he has bestowed upon the question. I shall, however, (as there is unfortunately a difference in the Court upon the question) state very shortly my reasons for concurring with my Lord Chief Baron; but I do not think it necessary to enter much into that part of the question which respects the jurisdiction of the Court, because it is impossible for me to add any thing to what my Lord Chief Baron has stated upon that part of the case. I think that the principal point for our more immediate consideration is, whether, even admitting the jurisdiction of the Court up to the full extent that is contended for, it is proper for us, in our discretion, to exercise it on the present occasion; for it is not argued or contended:—it is not even suggested, that at all events and under any circumstances we are bound so to do. If the point should ever be brought before the Court by plea to a bill or information, it will then be the time to enter into and to decide the question. We shall then be driven so to do; but though my present inclination is most strongly against the jurisdiction, for the very convincing reasons which my Lord Chief Baron has stated, yet, when the necessity of deciding it shall arise, I shall then think myself, for the first time, bound to deliver a decided opinion on that part of the case: it is enough for me therefore to [133] say at present, that circumstanced as this case is, and complex and difficult as it appears to be, we ought not, in my opinion, to entertain it summarily on motion.

On the point of jurisdiction, however, I will say a very few words. We cannot but observe, that it seems clear there always was a fundamental distinction between the auditors of the Exchequer and the auditors of the Prest; those very distinct officers being sometimes confounded, has given rise to difficulties and doubts which in their constitution did not really exist. The Auditors of the Exchequer, or those Auditors who were attendant upon the Court, were always under its direction, the Barons being, as Lord Coke says, the sovereign Auditors of England. But the Auditors of the Prest were under the immediate and exclusive direction of the Chancellor and Treasurer. Mr Madox gives several instances in his second volume, (ch. 24, s. 7) of Auditors being appointed *ad libitum*, and for particular purposes, by which it is most manifest, that they could not have been considered as known constant stationary officers of the Court. Certain clerks were appointed to audit the foreign accounts, and they seem to have been regular settled officers. But antecedently to their existence in preceding times, the accounts of some part of the revenue were usually audited, as he observes, by some of the Justices or Barons, or by clerks or persons assigned *hac vice* for that purpose by the King, or by the Treasurer and Barons, or by the King's Council at the Exchequer. So that, although sometimes the Barons [134] themselves, or some or one of them examined the accounts, the superintendence of that duty does not seem to have made a part of the original or necessary business inherent in the constitution of the Court; if it had, that duty must have fallen on some known officers of the Court, and the Auditors would not have consisted

* In point of order, this, and the short judgment delivered by Mr. Baron Thomson, should precede Mr. Baron Graham's, but they have been postponed for the reason given in the note prefixed to it in page 88.

of such a variety of persons, or have been named sometimes by the King, sometimes by the Treasurer and Barons, and sometimes by the King's Council.

It appears also, from many instances mentioned by Madox, that on the occurrence of any very extraordinary accounts, they were taken, and could only be taken, by Commissioners under special commissions: so that there certainly was a time when the taking of accounts made no part of the settled inherent jurisdiction of the Court vested in the Barons; and the uniform conduct of the Accountants is, in my mind, a very strong argument against the Court's having this peculiar jurisdiction: for, if it vested in them, would they not, indeed must they not, have compelled every Accountant to report his accounts to them. On the contrary, they have never interfered with them, but they have been invariably settled by the Treasury, from the time of Queen Elizabeth down to the late parliamentary appointment of Commissioners for auditing the public accounts, the same form of words has uniformly run through all the appointments of Auditors, namely, that the office was granted to them to [135] audit, &c. by and with the authority and consent of the Treasurer and Chancellor*. This Court therefore never seems, as to them, to have been considered as the immediate superintending power, and one can hardly suppose—what one necessarily must, to support the other side of the argument—that every one of those patents, from the 39th of Elizabeth to the year 1785, has been illegal, and a direct invasion of the ancient constitution of the Court of Exchequer. Such an interference of the Court as is now prayed for, would therefore necessarily go the length of overturning all the proceedings in the Auditors' office from the time of Queen Elizabeth. A measure which might, eventually, be followed by such a consequence, is therefore not to be adopted hastily, but requires a much more solemn consideration than can be given to it in this summary mode of proceeding.

These are some of the doubts which I entertain on the subject of the jurisdiction itself. But be that point as it may, and supposing the jurisdiction, even after what my Lord Chief Baron has so fully and ably stated, to be with the Court, supposing it clear and indisputable, I am prepared to say, that on such a motion as the present, resting altogether on our discretion, whether we ought to grant it or not, my opinion is decidedly in the negative.

[136] In the first place, we are not now on a case of money appearing by the records of the Court to be charged on an Accountant, where there can be no doubt of our jurisdiction: but we are in the singular situation of having no record nor judicial proceeding whatever brought before us. We have no instrument or document of any kind with which the Court have any thing to do, judicially, and we are called upon, as a Court, without vouchers, or any means of judging, to pronounce on the construction of the terms of a contract made above forty years ago: and that construction depending on many circumstances which might have been and probably were well understood by all the parties at the time of its being made, but which, after so many years have elapsed, must require much more explanation than we can now be furnished with. We are desired to come to a judicial determination which shall control the judgment of Commissioners, acting under the sanction of their oaths, and appointed by act of Parliament, in the stead of the ancient Auditors, for the very purpose of expediting the public accounts—of correcting mistakes and abuses in them—of doing justice to individuals on the one hand, and of protecting the interests of the public on the other. And we are pressed to do this in a mode, namely, on motion, which precludes all possibility of appeal from our judgment.

It cannot but be recollected, that during the last century, if the wars in which this country [137] has been involved have not been more frequent than heretofore, yet at least they have been infinitely more various and extensive, our fleets and armies have been much more numerous—contracts, of course, for their subsistence much larger, and a spirit of enterprize in carrying war into various and distant parts of the world, called much more into action than when it was confined to narrower limits, within which its operations were usually circumscribed in former times, and yet all contracts, multiplied and enlarged as they have been, have hitherto always rested between the Treasury and the Accountant, without the interposition of this Court, excepting in the few instances which have been stated by my Lord Chief Baron; and

* See the form of their appointment in a note to the following case of *Colebrooke v. The Attorney-General*, post, page 160.

it is observable, that in the case of Mr. Durand, nothing in the end was done upon it. The claims made by contractors, when their accounts were to be settled, we may at least say, have not always been thought by the Auditors, nor since by the Commissioners, so perfectly satisfactory and unquestionable, as not to call, in many instances, for examination and correction. Such investigations have not unfrequently turned out disadvantageously to the individual; and, according to the decision of the Auditors or Commissioners, the contract in question has sometimes proved either a mine or ruin to the contractor; and yet, where so many interests—where the fame, the fortune, the expectations, and resentments of the Accountants, must have so frequently and so strongly urged [138] them to disengage themselves from a tribunal which so often spoke death to all their hopes; not an instance is to be found, for two hundred and fifty years, of the investigation of such a question being transferred from the Auditors to this Court, by which the contractor might at least have taken the chance of a more favourable determination. I state this always with the exceptions that have been mentioned by my Lord Chief Baron.

Can it be possible, then, that such innumerable instances of unqualified submission to the authority of the Auditors, would have been made by men injured beyond reparation in their own conception, if they, or any of their advisers, had thought the point was even disputable? But let it not be forgotten, that what has been done by the Court in one case cannot be conclusive on any other; all cases must stand or fall on their own merits, they must be decided on the peculiar circumstances affecting each; and though such an interposition may be perfectly proper in one case, it may not only be unnecessary, but inconvenient and unjust in another. The fact of this Court having been so very rarely appealed to for so many years, under circumstances so obvious to sanguine and disappointed men, is surely a strong ground for doubting, at least, very much the jurisdiction, but, at all events, for refusing so novel an application, the effect of which would be, to throw all transactions of this nature between the Treasury and private [139] individuals into endless delay, confusion, and expence.

But is it quite clear, if this Court were to take the case out of the hands of the Commissioners and of the Treasury, what process is to be issued, and against whom? This is a difficulty that requires some consideration; suppose the Treasury, who, it seems to be allowed, have, upon this subject, a concurrent jurisdiction at least with this Court, were, after we have possessed ourselves of it, to proceed to determine upon it themselves. Is it quite clear that we have the power of enjoining them? If we have not, then, suppose the Board of Treasury and this Court both proceeding upon it, but drawing different conclusions from the same premises should pronounce opposite judgments. What is then to be done? Clashing jurisdictions cannot exist together. These are some of the difficulties that may arise from our interference in this summary manner, and it is very remarkable, that the statute (25 Geo. III. c. 52, s. 11), mentioned by my Lord Chief Baron, directing the auditing and examining of the public accounts, enacts expressly, that the Commissioners shall allow such articles of discharge only as the said Accountant shall have been authorised to incur; unless upon a special statement of the matter,—To whom?—to the Lord High Treasurer or Commissioners of the Treasury, the said Commissioners of public accounts shall be directed to make further or other allowances to the said Accountants accordingly, [140] by warrant under the hand of the said Lord High Treasurer, or of the Commissioners of the Treasury. Not a word is here said of any application to or interference of the Court of Exchequer; and the Legislature could hardly have overlooked it in this instance, when, in the 23d clause of the same chapter, it directs, in the event of written vouchers being lost, that an application shall be made to this Court expressly, and not to the Treasury. The fair inference to be drawn therefore, from this Court being mentioned in one clause, and omitted in the other, is that it was the intention of the Legislature to give the jurisdiction to this Court in the one case, but to exclude it in the other.

Before we enter then on so untrodden a path, and overturn, as I before said we must, the course of proceeding in the Auditors Office from the time of Queen Elizabeth, we should consider well the probable consequences that would ensue. In the first place, we should involve this Court in so much business of a most voluminous nature, and attended with much nicety and intricacy of figures and calculations, as would of itself employ every moment of our time. But in that I beg not to be misunderstood, I do not mean to say, that whatever the weight of business may be, we, as the Judges

of the Court, are not bound to give our time and our best abilities to the discharge of it; it is our duty so to do, and we must get through it as well as we can; the public have a right to exact from us our utmost [141] services, and which, I will only add, those who have gone through the office we hold know to be sufficiently laborious. But have the rest of the people of England no right to some portion of our time? Is the Court of Exchequer to be open to no other business and no other suitors? For I will venture to say, that if every dissatisfied Accountant should find his way into this Court, after a dispassionate investigation of the Commissioners shall have been exercised in his particular case, it would be folly for us to attempt to attend to any other business. This is another cogent reason for not plunging ourselves hastily and officiously into the investigation of such voluminous and intricate accounts; and for our not entering into the minutiae of detail, which every Court of Law and Equity have found themselves indispensably obliged, for the necessary dispatch of business, to delegate to special officers particularly appointed for the very purpose of getting through those details, which, as a Court, it would be impossible for us to do.

But if we are in every instance to correct the error of the Commissioners, if they shall commit any: *ex vi termini*, it must be our duty not only to tell them wherein they have erred, but to point out to them also what they ought to have done. Are we now prepared so to do? I profess that I cannot say in a summary manner what would have been a good or a bad bargain for the public, and a fair one for this contractor, forty years ago. Nor can I say what ought to [142] have been the true construction of the contract at the time, under circumstances totally unknown to us, and which, at this distant period, cannot be unravelled or explained to us. Can we know the different prices of the various commodities at the respective markets where it might have been necessary or adviseable, or practicable to have purchased at the particular time, and under the then existing circumstances of the war; or are we now to ascertain the amount or difference of freights from the different ports in Europe, at which the articles then actually were, or might, or ought to have been shipped, without having any reference to the certain or probable places of destination in America, all depending on doubtful events and the chances of war? I state these as some of the many circumstances which must be taken into consideration before any man has a right to pronounce on a contract made so long ago: and to shew the absolute impossibility of this Court entering on such an enquiry.

But it was said, that to avoid all difficulties, we might direct an issue. Is that a serious proposition? Could a Jury ever get to the end of so complex an enquiry? The thing is impossible. But another short answer is, that from the beginning of time to the present day, no such issue ever was directed. The present application then, being pregnant with difficulty, and loaded with inconvenience, I am of opinion, that it is too novel and dangerous to be granted; [143] and though the Court has, in some instances, as I before stated, Mr. Rigby's for example, a few years ago, interposed for the purpose of calling on the Auditors to proceed in what was their duty and particular province, namely, to prepare the accounts for declaration: yet to transfer such their peculiar office to the Court itself is a very different consideration. Such cases, therefore, however properly decided, can never guide in one like this. The Lords of the Treasury are the known, tried, and proper persons for making such contracts as this, and afterwards the Commissioners, for winding them up and settling the account with justice to the individuals and to the public: and I will add, that till the Judges of this Court shall become, what it is to be hoped they never will, political characters in this country, they must be peculiarly unfit to interfere in a sort of business that may so frequently, and sometimes perhaps unavoidably must, turn on political hinges.

The Legislature has in its wisdom constituted certain persons armed with large and important powers, to be exercised under the sanction of their oaths for the execution of this duty: the judgment of these officers, so constituted, ought not, in my opinion, to be drawn into question without strong grounds for imputation; and I confess that I do not see my way sufficiently clear to pronounce summarily, that in the present instance they deserve any, without a great deal more evidence than that which we have [144] before us. The Board of Treasury is always open to any application which public Accountants, who think themselves aggrieved, are entitled to make to them: to that Board they may and ought to resort, and it is not permitted to them to take it for granted, as was hinted at in the argument, that on such an application

justice would not be done to them. I am therefore decidedly of opinion against receiving the present motion.

THOMSON, Baron. After the very full and able discussion which this subject has received both from my Lord Chief Baron and my Brother Hotham, I shall content myself merely with declaring my opinion, that the Court ought not to comply with this application which has been made to it, to interpose with directions to the Commissioners of public accounts, respecting the articles of the account now depending before us, and attempted to be brought in question; and therefore that this order ought to be discharged.

Order discharged.

[145] The following case having established, after full argument, on principle and precedent (notwithstanding the more than doubtful obiter opinion of the majority of the Court on the preceding motion) the jurisdiction of the Barons, sitting as the Court of Exchequer, over the Commissioners for auditing the Public Accounts, and what is scarcely less important, the proper mode of obtaining redress to be adopted by the subject seeking relief in such a case; and that it may be pursued in the first instance, although the Accountant have not been, in fact, sued or impleaded,—the Reporter has, with considerable difficulty, procured authentic materials for furnishing a correct report of both the cases: and having surmounted the labour of reducing the substance of the very voluminous transcripts of the short-hand writers employed in taking the arguments and judgments, and carefully collating the subject-matter, with the original briefs and the notes of the Gentlemen engaged professionally in arguing the question, some of whom have kindly taken the trouble to revise the whole,—he now feels himself fully sanctioned in venturing to commit to the press these decisions of the Court, establishing points of such vital importance; although he had not the advantage and security of personally hearing them pronounced: and he hopes, that by their publication, he is rendering an essential service to the Profession and the Public.

The obvious causes of the great length of these cases are the abstruse subject-matter and novelty of the doctrine, the remote sources of the reasoning furnished by the unusual labour and research of the Bar engaged on either side, (and on the former occasion, of the Bench also) the variety of the arguments adduced, and the number of precedents cited from the archives of the Court: but that inconvenience has been deemed not worth consideration where so much valuable information is supplied by the arguments and consequences so momentous result from the decision.

[146] SIR GEORGE COLEBROOKE, BART. AND OTHERS *v.* THE ATTORNEY-GENERAL AND OTHERS. Demurrer. 1819. Saturday, 28th Feb. 1807. 20th, 22d, 23d November 1805. 28th January 1806.—Jurisdiction. The Commissioners for auditing the public accounts, as appointed under the 25th of Geo. the 3d, ch. 52, are amenable to the jurisdiction of the Court of Exchequer, and subject to their control: that statute, in forming them into a Board for the performance of the duty of that branch of the original business of the Court, being held not to have constituted them an independent judicial body, nor to have destroyed or transferred the original authority of the Barons of the Exchequer sitting as a Court of Judicature over all matters of revenue accounts. The Court of Exchequer has still the same controuling power, in its judicial capacity, over the Commissioners for auditing the public accounts, as it previously had over the former Auditors of the Prest.—Public Accounts. Semble, Public Accountants, therefore, who may have reason to be dissatisfied with the determination of the Board, in disallowing their articles of discharge or imposing surcharges on them, have a right to the interposition of the Court of Exchequer in their behalf, on a suit instituted for that purpose: and the Court will relieve the complainants on a case of equity being made out by them, by referring the accounts back to the Commissioners to review their allowances, &c. or they will, as they were formerly wont in the case of the Auditors of the Prest, direct them to make such special allowances to the Accountant as shall seem to the Court to be just, and to prepare the same accordingly for final declaration.—Quere whether the declaration of accounts by the Commissioners for auditing the public accounts and the Treasury, be final, and concludes the Court of Exchequer. Semble, not. Practice. An Accountant
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seeking relief in this Court from the determination of the Board, should proceed by bill to be filed against the Attorney-General. The Court will not interfere on motion upon a petition. Vide *Ex parte Colebrooke*, ante, page 87. — Demurrer to such a bill over-ruled.—Construction of Statutes. The statute of 25 Geo. 3d., ch. 52, has not given to the Lords Commissioners for executing the office of Lord High Treasurer, any judicial authority over the Commissioners for auditing the public accounts, in exclusion or derogation of the paramount jurisdiction of the Barons of the Exchequer.—The statutes providing for the relief of subject Accountants, who have equities against the Crown, held not to be confined to cases, where the subject be actually sued or impleaded, but he may proceed by bill in equity in the first instance, and as it were *quia timet*, and that during the passing of his accounts before the Commissioners.

The plaintiffs, on the rejection of the preceding petition, filed the present bill against the Attorney-General and the surviving assignees of [147] Sir George Colebrooke, on the same grounds, claiming, as before, to be entitled to certain allowances in their accounts, which the Commissioners had refused to make to them, and also to be relieved from surcharges.

The short substance of the matters stated in the bill is, that the plaintiff, Sir George Colebrooke, together with certain persons whose representatives the other plaintiffs were, had entered into contracts (in 1759 and 1761) with the Lords Commissioners of the Treasury, for victualling the British troops in North America;—that they had from time to time supplied provisions accordingly to the amount of 384,347l. 17s. 7½d.; that after the expiration of the contracts (in 1766), the contractors delivered in their accounts, stating a balance to be due to them of 47,600l. at the office of one of the Auditors of the Imprest *, for the purpose of getting them passed; that not having been done, and the accounts remaining still uninvestigated, they were, in 1786, laid before the Commissioners for auditing the public accounts (then newly appointed under the recent act of Parliament), for the same purpose, in pursuance of their precept.

The bill then stated, that the Commissioners had, upon the investigation of the accounts, charged the Accountants (as they alleged unjustly) [148] with a sum of 57,725l. 16s. 5½d. as the value of provisions remaining on hand in the stores of the preceding contractors, Kilby and Baker, and delivered over to the Accountants; and that the Commissioners had also surcharged them (unjustly), with a sum of 40,432l. 19s. 7¼d. as an over-charge in value on the provisions furnished by the contractors, according to the price contracted to be paid.

The plaintiffs, therefore, prayed that the defendants might answer the premises; and that the plaintiffs might be declared to be entitled to, and to be allowed the sum so surcharged:—and that the Commissioners for auditing the public accounts, might be directed, by the order of this Court, not to charge the plaintiffs with the sum of 57,725l. 16s. 5½d. in the statement of their account.

To that bill the Attorney-General put in a general demurrer, for that it contained not any matter in equity whereon the Court could ground any decree, or give the complainants any relief against him.

20th. Nov. 1805.—The Attorney-General (Perceval), Leycester, and Mitford, now appeared, to support that demurrer.

They admitted, that (if the Court had jurisdiction in the present case, and if the complainants had pursued a proper course in adopting this [149] proceeding by bill against the Attorney-General) the statements in the bill were such as the Court would probably consider ought to be answered. They professed, therefore, that the principal object of the demurrer was to bring before the Court the question of its having jurisdiction to exercise a judicial authority over the Commissioners, in the matter on which the bill was founded. That question would be, in substance and effect, whether, in a case where the accounts of a public Accountant have undergone a course of investigation in the regular manner, before the Commissioners for auditing the public accounts, and a statement of those accounts has been accordingly prepared by them, for the purpose of being submitted to the Lords Commissioners of the Treasury for final declaration—the Barons of this Court have power to interfere on the behalf of the Accountant (complaining, by bill, against the Attorney-General), and by their order to require the

* Commissioners for auditing the public accounts were not at that time appointed.

Commissioners to make allowances, which they had in the exercise of their authority under statute (25th Geo. III. ch. 52), refused to sanction, or to strike off surcharges which they had thought proper to impose. Another question, they stated, would arise on the nature of the proceeding, which would be, whether, if the Court possessed any such jurisdiction, an Accountant considering himself aggrieved, might, before any suit should be instituted against him, apply to this Court for redress, by means of a bill, to be filed against the Attorney-General, founded on an alleged claim against the Crown.

[150] On those points they insisted,

First, that the Court had no such jurisdiction; and they submitted, that the present demurrer was founded on as plain and obvious a principle as if it had been put in to a bill filed in this Court by the failing party, in an ordinary action at law, complaining that the jury before whom it had been tried in a Court of competent jurisdiction, had not done him justice by their verdict; for, they contended, the Board of Commissioners were now the proper and only constitutional tribunal for the investigation of public accounts, established by the authority of Parliament, and that their determination, when it has received the confirmation of the Treasury, is final and conclusive; and they submitted, that if in the present instance the party complaining had been, in fact, aggrieved and wronged by the determination of the Board, his only immediate source of appeal was to the Treasury: or that as his ultimate resource, he might make application to the Crown by the only mode known to the Constitution, the subject's petition of right.

They stated, that the chief propositions on which they meant to rely, and which their arguments would be offered to support, were—that the Commissioners for auditing the public accounts as at present constituted under the 25th of Geo. III. ch. 52, are not subject to the controul of this Court as to the exercise of their judgment and discretion in performance of their duty of audit—[151]ing the public accounts; for that whatever jurisdiction in matters of public accounts the Court might have had before, it was, since that statute, incompetent to the Court so to interfere with the official conduct of the Commissioners as to make any order on them, directing them to sanction any charges which they may have previously refused to allow, or to withdraw any surcharges which they may have judged proper to impose on the Accountants; that the act of Parliament by which the Board of Audit was created, in order that they might supply more efficiently the place of the former Auditors of the Imprest, had given them full power to take the accounts of public Accountants, and had subjected them to no other controul or superintendence than that of the Treasury; the eleventh section having expressly enjoined them to make no allowances but such as they shall be directed to make by the Treasury, to whose declaration and determination the act finally refers the audited accounts, thus constituting the Board of Auditors, and the Lords Commissioners of the Treasury exclusively and conclusively, a sole and entire Court for the investigation and passing of the public accounts; so that wherever they shall not have made to the Accountant sufficient allowances in their audit, the Commissioners were expressly subjected, by the terms of the statute, (section 11) to the further order of the Lord High Treasurer or Commissioners of the Treasury, to whom alone the ultimate power of redress had been exclusively given: and to them only, on [152] all such occasions, was the Accountant, in every case of supposed injustice, directed to apply, and that, upon special statement of the matter of complaint. In fine, that subject only to such controul, the Commissioners for auditing the public accounts now formed a judicial forum, with full authority, in the words of the statute, to “try and examine the several accounts and vouchers which shall be transmitted to them from time, with as little delay as possible,” (section 10), and that therefore, excepting the Treasury, they were not responsible to, or controulable by any other authority whatever: for that from the general tenor and purview of the statute, it was to be collected, that their decision was to be final: and therefore if the Court of Exchequer ever had any jurisdiction or authority over the Auditors of the Prest, the statute of the 35 Geo. III. had virtually taken it away as fully as if it had expressly and in terms so provided.

They denied, however, that the Barons of the Exchequer ever had any judicial power over the Auditors of the Prest, independently of the Treasurer, and if they had, they asserted, that by the 25 Geo. III. that controul was, if not in words, in effect and by operation of the provisions of the act, abolished with respect to the Commissioners appointed, and to be appointed, under it.

By that statute, they observed, the present Commissioners for auditing the public accounts were, [153] in terms, expressly substituted in the place of the Auditors of the Imprest (section 1), and were invested with all the powers and authorities (section 8) of those Auditors in the exercise of their duty, and were declared to be subject to such control only as they were subject to, and to no other: and they noticed that the act gives the Commissioners many other and higher powers (such as examining Accountants on oath (section 12), and others) than those Auditors formerly had, so that they were placed on a very superior footing, and by a higher authority. The statute, however, having referred to the office of Auditor of the Imprest in describing and fixing the duties and powers of the Commissioners, rendered it material to the investigation, that the actual character, functions, and authorities of those officers, and the control to which they had at any time been subject, should be enquired into and ascertained. As the summary, therefore, of what they had been enabled to collect respecting them in the course of their researches on the subject, they observed, that they appeared to have been first appointed and endowed with the high authority and powers which they afterwards exercised, in the second year of the reign of Queen Elizabeth, superseding the then existing office of the Auditors of the Exchequer; and that they had continued from that time till the 25 Geo. III. to act with very great latitude of discretion in the judicial functions of examining and passing the accounts of public Accountants, and adjudicating on the allowance and disallowance of every article [154] of discharge submitted to them by the Accountant; that their determination was afterwards in the regular course laid before the Treasurer and Chancellor of the Exchequer, for their final declaration, with which the Barons (unless where one or more of them may have been required to assist the Treasurer), have never had any thing to do, nor have they ever taken on themselves to interfere, and that accordingly there are no instances to be adduced, wherein the Barons have in any respect assumed jurisdiction over the conduct of the Auditors of the Imprest, which may not, when explained, be distinguished from such an interference as would afford ground for establishing that they had any authority so to interfere in their judicial capacity as a superior Court, to whose control the Board was subject. From the absence of instances, therefore, wherein the Court had ever exercised a controlling power and jurisdiction over the Auditors of the Imprest, they urged that there could never have been any inherent authority in the Barons, under which they might have superintended the conduct of the Auditors of the Imprest, or redressed complaints of their acts; and if not, *à fortiori*, they could not have any such jurisdiction over the Commissioners for auditing the public accounts, constituted by the high authority of an act of Parliament rendering them an independent judicial body.

They acknowledged that a necessary conclusion to be deduced from these propositions would [155] be, that the Board of Commissioners must be considered a judicial Court, from which there was no appeal but to the Treasury, beyond which there could be no further appeal: and they anticipated that it would be objected that such a Court would be an anomaly; but they insisted that it was, nevertheless, fully competent to the Legislature to create such a tribunal; and the only question would then be, whether the Audit Act had not, in effect, virtually so constituted the Commissioners for auditing the public accounts, referring the Accountant solely to the Lord High Treasurer, or the Commissioners for executing that office, as the last resort. Thus, they submitted, the Legislature had, itself, as if anticipating such an objection, supplied the defect by furnishing a substitute, and accordingly the Accountant is given the opportunity of appealing to the very high and competent authority of the Lords Commissioners, and of being heard before them by Counsel, when, after due consideration of all the particulars, they are directed to grant their warrant to the Commissioners to prepare the accounts for declaration as before accustomed, and that declaration of the accounts is final and conclusive in the nature of a record*.

With a view to shew that the statute had so constituted the Board of Audit as the immediate Court, and the Treasury as the Court of appeal [156] from their determination: they entered into a minute and critical investigation of the several sections of the act of Parliament, and contended, that as efficacy and promptitude in the performance of their duties by the Commissioners, had been the chief objects of

* Vide pages 112 and 113 of Mr. Baron Graham's judgment in *Ex parte Colebrooke*, ante.

the statute, which was apparent from all parts of it, it had created the Board of Audit a competent judicial body, for the full adjudication, in the first instance, of all matters in difference between the public and the Accountant, subject always to the control of the Commissioners for executing the office of Lord High Treasurer, and to them only; and finally, amongst others, as a strong and particular instance of the extent of authority given to the Commissioners by the Legislature, they adverted to the provisions in section 19, where the act (after directing the names of defaulters in delivering their accounts to be transmitted to the office of his Majesty's Remembrancer, that the usual process may issue), has required, that if the Accountant can state any special reason for justifying a delay of the process, that statement is to be made, even on so important a judicial occasion, not to the Court of Exchequer, but to the Treasury. They urged further, that not only had the statute thus expressly invested the Lords Commissioners of the Treasury with the entire and ultimate control over the Commissioners for auditing the public accounts; but by having mentioned the only instances wherein the Court of Exchequer was thereby authorised to interfere, it had, on the well known principle of construction, virtually [157] excluded this Court from all authority or jurisdiction which it might before have had in every other case. The only occasions on which the act had authorized and empowered—a word importing an original and first delegation of such an authority—the Court of Exchequer to act, they observed, were in cases of fines being set on Sub-accountants (the Court of Exchequer being then authorised to set and impose such fines as on application to them for that purpose, they shall think fit, section 20)—and where the Accountant may have lost necessary vouchers, in which case, also, the Court of Exchequer, on application, are authorised and required to call before them the Commissioners and the party accounting, and after notice to the Attorney-General, and on hearing the evidence on all sides, they are to make such order as they may think fit, (section 23). As an authority on that point, they cited the argument of Lord Somers in *The Banker's case* (State Trials, vol. xi. p. 147), who labours much to shew that the jurisdiction of this Court was anciently considered to be very much restrained even in what was “immediately their business, viz. matters of account depending before them, in which they could make very few allowances, however just and reasonable in themselves, without a particular authority under the great or privy Seal,” (p. 147 a.)—and they observed, that the whole of Lord Somers's very elaborate argument in that case, goes to establish that this Court has [158] no such power as the plaintiffs attribute to it, but that the Treasurer, as the highest authority in the Court, alone has that power, and that the Barons are subordinate and ancillary to him (p. 151) in all matters regarding the passing and allowing of the public accounts, for which his Lordship cites the Mirror, cap. 1, sec. 14, where it is said that “the business of the Exchequer (the Barons) is only for the King's profit, and to hear and determine torts done to the King and his Crown in right of his fiefs and franchises, and the accounts of bailiffs, &c. by the view of a Sovereign who is the Treasurer of England.”

That this Court, when composed of the Treasurer and Barons, had a superintending authority in certain respects over the Commissioners for auditing the public accounts, analogous with that of the Court of King's Bench, over magistrates and others whose authority emanates from that Court, they did not deny; or that the Court might order them to proceed in the exercise of their functions, if they wholly neglected their duty; but they submitted that they could not (nor could the Court of King's Bench in the instance put) prescribe to them in what manner their duties should be performed, the utmost which they could do being to order them to review their determinations, not that they should alter them in particular respects; for that the Commissioners were, for the purpose of their duties, like magistrates, &c. invested with a judicial character, and were not merely ministerial officers.

[159] They then traced, in elucidation of these arguments, the statutory history of the appointment of Auditors of the Revenue, beginning with the act of the 27 Hen. VIII. ch. 27, establishing the Court of Augmentation, with Auditors, and which was confirmed by the 7 Edw. VI. ch. 2, till, by the 1 Mary, sess. 2, c. 10, that Court was dissolved, though afterwards ineffectually attempted to be annexed to the Court of Exchequer by letters patent, to which was appended a schedule of articles for their regulation and guidance. The appointment of Auditors of the Prest having been first established by charter in the 2d Eliz. with full power and authority for the determination of all accounts of persons to whom money had been imprested, with

reference to the appointment of the Auditors of the Court of Augmentation, that would be the period from which it would be most useful to commence the proposed enquiry, as from that time the office acquired the importance of judicial authority emanating from the Treasury, being, in effect, a transfer or delegation of that part of the Treasurer's duties to competent persons of rank and responsibility, and which never had formed any part of the business of the Barons of the Exchequer independently of the Treasurer, although, as ancillary to that high officer, they might often, in his presence, and under sanction of his authority, have assisted him in that duty as they were formerly sometimes wont to do, but not as a Court to whose competency their presence was necessary. By the terms of the commission to the Auditor, he was directed to [160] audit, &c. "and by and with the advice, authority, and consent of the Lord High Treasurer of England, the Chancellor, and Under Treasurer, there to determine, &c.;" the determination of the account being distinctly reserved to the original authority, the heads of the Court of Exchequer*.

They then referred to Madox (Hist. Exch. cap. 24, sec. 7), for an account of the manner in which Auditors were anciently appointed by the Crown, which was in the same manner as the Barons and great men of the kingdom appointed theirs for auditing their own bailiffs' accounts, and of the duties of such Auditors at that period.

They next applied themselves to the consideration of the object, nature, and effect of the present bill, to shew that it could not, on principle, nor in form or substance, be supported. They observed that it would be attempted to be justified by the provisions of the 33 Hen. VIII. ch. 39, s. 79, giving power to the Courts in which subjects should be impleaded by the Crown to plead [161] in bar any good matter of discharge; but they contended, that a party could not be considered to be in a situation to avail himself of the equity of that act, unless some legal or equitable proceeding were pending against him in any of the King's Courts. That, they urged, was the result deduced by Sir Edward Coke from the case of *Sir Thomas Cecil* (7 Rep. 20), who could not have filed his bill, if process had not been sued against him on his bond; nor could the Court have made a decree. They submitted, therefore, that as the Court could not now interfere to prevent the issuing process when the account should be declared, the present bill was at least premature, and could not be entertained till the actual commencement of a suit by the Crown, and by way of defence thereto. Such was the opinion of Lord Somers in *The Banker's case*, p. 148, who says, speaking of the stat. 5 Rich. II. c. 10, "The power (of ordering payment of money out of the receipt) is most directly restrained to the receiving of pleas in discharge of persons impeached for debts or accounts, and can never be extended to cases where parties come as plaintiffs to recover demands originally against the King; nor is there the authority of any law book pretended to warrant such interpretation." And they insisted, that the mode of proceeding now adopted was such as could not be rendered available or effectual against the Crown.

They then suggested, that if the Court should be of opinion that it had jurisdiction in this case [162] it would impose on them the duty of investigating the items of a most extensive account, most of it involving an enquiry into the price of provisions so long ago as that it could not now be ascertained. Having insisted that in the present case there was no matter of law arising on any question depending on legal principles, which could even apparently justify the interference of the Barons as a Court of Law, they submitted, that to give the Court jurisdiction in it there must be an inherent right in them to take the accounts from the hands of the Auditors at any time, and under any circumstances, and to proceed themselves to the audit on the application of the accountant, which not only would render the office altogether insufficient and nugatory, but would draw to this Court a duty which could not be performed by means of its ordinary and only modes of proceeding in analogous cases—a reference to the Deputy Remembrancer, or (still less) by the intervention of a Jury

* The following is the commencement of the form of the appointment of Auditors of the Prest, by letters patent, in the reign of Elizabeth:—

"For certain good causes moving us, we do ordain and appoint, that from henceforth there shall be two Auditors, called Auditors of the Prest and Foreign Accounts—that they shall have power and authority to hear and determine the accounts of the Crown, in the same manner as the two Auditors lately appointed and assigned for the aforesaid purposes in the Court of Augmentation."

on an issue; and they again strongly contended, that if the Court ever did possess such an authority over the ancient Auditors of the Court, or of the Imprest, since the statute of the 25th Geo. III. they had no longer any right to exercise it, all controuling power being by that act vested solely in the Lords Commissioners of the Treasury, with the two exceptions expressly provided for by the 20th and 23d sections of the act, by which this Court have now their separate duties particularly assigned to them. In all other respects, the Commissioners are declared to be entirely and exclusively subject to the direction [163] of the Treasury, who alone have now the whole judicial authority under the act of Parliament, if indeed the Treasurer had it not before, and that wholly and exclusively at common law.

They also pressed much, as an integral objection to this course of proceeding, its utter inefficacy, from the impracticability of affecting the Commissioners for auditing the public accounts through the medium of the Attorney-General, by any decree which the Court might make against him, which must be wholly nugatory as to him and them; because the Attorney-General has certainly no authority or control over the Commissioners by virtue of his office, or otherwise, and no power or means of compelling them to adopt any line of conduct which might effect the object of the party now applying to this Court; inasmuch as any decree which the Court might make as against the Attorney-General in such a suit as the present, could not be operative on the Commissioners, who were not before the Court, and would not be bound by any decision which the Court might pronounce against the Attorney-General; and he, on the other hand, had nothing to do with the conduct of the Auditors, and was not under any responsibility for their acts, nor liable for what the Commissioners should have done, and had no power to direct them as to what they were to do in the execution of their office.

Adverting again to the remedy by petition of right, as the only mode of redress open to the [164] subject, they cited the authority of Lord Somers, in *The Banker's case*, who says, "I might proceed to very great numbers of instances where the subject was put to his petition for the allowance of just and reasonable pleas by way of discharge, upon accounting in the Exchequer" (*Banker's case*, p. 147): and he cites (p. 150) *Everle's case*, (Ryley, 251), as an authority to shew that that was the proper and only remedy.

They finally contended, that whatever doubts might have formerly existed as to the authority of the Court of Exchequer in such matters, the Audit Act had entirely removed them, by constituting a competent Court for the complete adjudication of all matters of account between the subject and the Crown, entirely annulling thereby, the obsolete Court of Accounts, which, in remote times, had certainly formed one of the constituent Courts of the King's Exchequer, and had established in its stead a tribunal better adapted for the prompt and efficient performance of that branch of the public business. They therefore submitted that this demurrer, founded on the ground of the Court having no jurisdiction over the subject-matter of the bill, ought to be allowed.

22d, 23d Nov. 1805. 28th January 1806.—Plumer, Fonblanque, and Dauncey, in support of the bill, contended, first, that the Court of Exchequer, "the sovereign Auditors of the Kingdom," as they are termed in the books of the [165] highest legal authority (a), had full jurisdiction in the matter now brought under their consideration by this bill, to interfere both to urge and to control or check the Commissioners for auditing the public accounts in the exercise of their important duties; and, secondly, that the mode of proceeding by bill against the Attorney-General, which had been resorted to and adopted upon the present occasion, was the proper and only course for redress to be pursued by parties in the situation of the plaintiffs, seeking, as they did, to be relieved from the consequences of the erroneous determination of the Commissioners for auditing the public accounts, by the interposition of this Court, in their behalf; whose duty it therefore was to relieve them, in a case like the present, where the facts, charged by the bill, and admitted by the demurrer, furnished the party complaining with an equity on which such a suit might be founded, and that therefore it ought to be entertained.

(a) Com. Dig. tit. "Court of Exchequer," D. 3, Subdivi. "The Court of Accounts," and the 4th Inst. 115.

They much pressed the topic anticipated that it was glaringly incompatible with the system and constitution of British jurisprudence, and every principle of the law of England, that a tribunal (if indeed the Board of Commissioners for auditing the public accounts could be so called) such as they formed, and constituted as they were, being nominated and appointed by the Crown should be subject to no sort of appeal. The particular duties entrusted to them were no less than the ad-[166]-judication and determination of counter-claims, involving rights and interests often of immense pecuniary amount and great legal difficulty between the Crown and the subject accountant—the individuals being in no way connected with the law—and who, however well chosen they might be in point of integrity and all other moral respects, for their office, were deficient in a most essential and indispensable qualification for so important a charge in that they were persons who were not possessed of any legal knowledge or fitness, and could not therefore be properly invested with any judicial character or authority, without which they could not be considered competent to the ultimate discharge of such extensive powers. Yet such were the persons who were contended to be authorized to decide finally, and determine conclusively on all questions pending between the Crown and the subject, regarding the allowance of the articles of discharge in an accountant's accounts, without appeal or being subject to the revision or superintendence of any Court of law, erected for the due administration of justice in the kingdom: or at least with only the semblance of an appeal; for it was obvious that an application to the Treasury, a body in all respects of the same nature as themselves, if they were not merely a higher department only of the same office, and whose ultimate determination, if it were conclusive, would be open therefore to precisely the same objections as might be urged on the ground of that defect in the inferior branch of the same official body.

[167] They insisted, therefore, that there must exist somewhere a controlling and superintending power over the conduct of the Board of Commissioners for auditing the public accounts, that the dispensers of such power should be invested with a legal and judicial character, so as to form a competent constitutional tribunal, which might revise, and, if necessary, reform their acts; for those acts, involving to an incalculable extent the rights and claims of the accountant (although at the first glance they might appear to proceed and be founded upon the mere investigation of matters of account, and articles of charge and discharge, and sometimes of simple matters of fact) must often necessarily depend on the determination of nice, intricate, and important points of strict law, as when (which must frequently happen) the Commissioners would have to decide questions turning on the legal construction of contracts, or the admissibility of evidence and other difficulties in the solution of which legal knowledge must be necessarily requisite, and which could only be satisfactorily determined by lawyers, clothed with judicial authority.

They then submitted, first, that on the fair construction of the 25th Geo. III. the Board of Commissioners for auditing the public accounts, either were a body of officers, whose duty was chiefly ministerial, constituting, collectively under the authority of the act of Parliament, a minor branch of the Court of Exchequer, for the purpose of relieving it from the burthen and waste [168] of time of performing those subordinate duties which the statute had therefore delegated to them: or it was at the utmost an inferior dependent tribunal, and even if distinct from the Court of Exchequer, still always subject to the ultimate control and jurisdiction of the superior Court, whose inherent and constitutional authority the statute has neither destroyed nor taken away, nor transferred; and were the statute to be otherwise construed, the subject who might be aggrieved by any arbitrary and unjust determination of this official Board, would be wholly without means of redress for want of some legal authority to which he might appeal or complain, and the law would, for the first time, be found to endure an anomaly in the acknowledged existence of a possible wrong, without furnishing the means or power of providing a remedy.

They then proceeded to shew, by reasoning founded on documents produced, after a most extensive and laborious research from among the records of the Court—from the History of the Exchequer, since the earliest period known—from the nature and origin of its constitution and creation, and the objects of its power and duties—and from the continued usage and course of its practice, down to the present day, derived from the information of the various text writers and reporters particularly referred to

hereafter in the course of the argument (a), and from the archives [169] of the Court—that the Barons of the Exchequer had always been invested with, and had exercised exclusive jurisdiction as a Court of law at all times, in all matters any way affecting the King's revenue, and more especially in whatever related to the passing of accounts, as between the Crown and the subject; and that over all persons as well official as private; and they insisted, that if it could be satisfactorily shewn that this Court had ever possessed and exercised such jurisdiction as was now ascribed to it, it would be incumbent on those who should deny that it still possessed it to produce some strong authority for that proposition, or to shew that by some express and unequivocal act of Parliament it had been, in positive terms, destroyed or transferred; for they insisted that so important and weighty a consequence could not be established by any construction or inference, however apparently obvious, deducible from the mere constructive import or tenor of the language of an act of Parliament.

They affirmed, as the result of their united investigation, that no instance could be produced in history, or on record, of any Lord High Treasurer of England, or Treasurer of his Majesty's Exchequer, or since the disuse of that office^{*1} the Lords Commissioners of the Treasury having ever [170] exercised or considered that they possessed a judicial authority apart from and independent of the Barons of the Exchequer, or as constituting a distinct and separate Court; but that on the other hand the Barons, sitting alone, had constantly assumed and exercised such authority, with all its incidental judicial functions, although it occasionally happened, that in former times the Treasurer, as he had a right to do, sometimes sat in judgment with the Barons. But they denied that it was necessary that either the Treasurer or the Chancellor of the Exchequer should take their seat on the bench, in order to make the Court complete and perfect; for that it was clear that it has never been thought essential or necessary to the exercise of the judicial authority of the Barons, sitting as a Court of Law or Equity, that the Treasurer, or any other officer in early times, or the Lords Commissioners of the Treasury, or Chancellor of the Exchequer since, should be present in Court, to authorise or give effect to the judicial proceedings, of the Barons, who had at all times constituted the efficient Court of Exchequer; that the Treasurer, or any other officers of the Court, had never, either singly or collectively, exercised as a Court without the Barons any distinct independant judicial authority within the scope of the duty of the Court of Exchequer in any branch of its jurisdiction: and still less could it be shewn or contended that the Treasurer had ever possessed or assumed a controlling authority over the Barons, sitting in judgment as a Court, or that he, or any other officer, was authorised or required to dis[171]-approve or sanction any of their proceedings in their judicial character.

In support of these several propositions, they referred very fully to Madox's History of the Exchequer^{*2} as affording copious and extensive information on the subject, and materially elucidating the present questions. From the 23d Chapter in particular they read many passages, to shew the instances in which the Treasurer and Barons had acted together judicially, and the still more frequent occasions where the Barons had so acted alone, and without the presence or concurrence of the Treasurer. They also referred largely to Coke's 4th Institute (Chapters 11, 12, and 13), for the same purpose, and produced extracts from a manuscript of Madox in the British Museum, where the distinction between the judicial powers and duties of the Barons, sitting as the Court of Exchequer, and the ministerial office of the then established Auditors of the Court, and the occasional special Commissioners appointed to that duty by the King, is well defined and explained. In the earliest period (they observed as matter of history) the whole duty both ministerial and judicial of examining and passing the public accounts, devolved on the Barons themselves, who were sometimes associated with the Treasurer, but oftener sat alone. They however, from time to time, [172] appointed certain persons to take the ministerial and interior part of that

(a) And see the judgment of Mr. Baron Graham, in the preceding case of *Ex parte Colebrooke*.

^{*1} There is in the British Museum a MS. letter of Camden, (which was adverted to in the argument) wherein he states that he considers the Treasurer of England and Treasurer of the Exchequer to have always been one and the same office.

^{*2} Vol. i. ch. 2, sec. 10, ch. 4, sec. 5. Vol. ii. ch. 20, sec. 8, ch. 21, passim, ch. 22, ss. 8, 9, and chapter 23, passim.

duty off their hands—probably that they might be enabled to give more of their time to the judicial functions of their office. Those ministers were variously denominated at different periods; sometimes they were called *Auditores compotorum Scaccarii*, and sometimes *Clerici ad compotos audiendos*. An oath was administered to them for their good abearance in their office, (*Mad. vol. ii. ch. 24, s. 7*), and they officiated, in the first instance, as Auditors, the Court, that is, the Barons of the Exchequer, still holding a control over them, as the supreme Auditors of the public accounts of the realm, to whom they and all other succeeding Auditors of every description, however appointed or designated, and whether temporary or permanent, were always subject and responsible.

On the fact of the appointment, so frequent in the earlier periods of the business of the Court, of persons as special Commissioners for taking the Accounts (their attention having been directed to it, by the Court requiring an explanation of the nature and occasions of such appointments, on account of the difficulty which had occurred to them from their having apparently neither proceeded from, nor been under the authority of the Court of Exchequer, having always emanated wholly from the Crown), they observed, that such special commissions were applicable to three distinct classes of cases occurring under special circumstances—first, where the accounting party should [173] require, on his own behalf, as matter of favour, that his accounts should, in the first instance, be taken before persons who were competent to make him allowances beyond the amount of the money which had been imprested to him, as where he should have expended more than he had received: in which case, as the power of the ordinary Auditors of the Prest was limited to taking accounts of the money imprested, their authority was at an end when that should have been accounted for, and they might have considered themselves not entitled to give credit to the accountant for any thing beyond that amount. 2dly, they might have been appointed, with reference to the statute 2d Henry VI. ch. 10, to relieve the Court from responsibility in doubtful cases: or, 3dly, where the articles of the accountants' charge or discharge had been furnished or paid abroad in a foreign country, or in Ireland, which might have been considered out of the jurisdiction of the Court of Exchequer, who were styled Sovereign Auditors in England; but in all those cases, they submitted, the Commissioners would still be and were subject to the control and authority of the Court of Exchequer.

In further illustration of the power of the Barons over the Auditors of the Crown, of the Court, and of the Prest, and indeed over all persons connected officially or personally with the public accounts, by reason of their acknowledged duties, as constituting the Court of Exchequer, they called the attention of the Court to the pur- [174]-port and language of the following acts of Parliament, which had, from time to time, been passed in respect of the duties of the Court, and the powers with which it was ever considered to be invested.

The earliest in point of time (the 20th of Edward III. cc. 1 & 2), commands the King's Justices of both Benches, and the Barons of the Court of Exchequer, to do right to all men, without regard of letters, and without delay. The 5th of Richard II. ch. 9, the next relied on, is to the same effect, and moreover empowers them (the Barons) "to hear every answer of every demand made in the Exchequer, so that every person impeached or impeachable for any cause by himself, or by any person, shall be from thenceforth received in the Exchequer, to plead, sue, and have his reasonable discharge in that behalf, without tarrying or suing any writ or other commandment whatsoever." By the 10th Chapter of the same year, which was an act passed for securing to persons retained to serve the King in his wars or embassies, the benefit of their covenants, in respect of money then received by them: and for allowing them the advantage of those covenants in their account at the Exchequer, the Barons of the Exchequer are required "to do right to the party according as the law and reason demandeth." And that act also provides, that "if any thing be due unto them by the same account, that thereof, by certificate of the same Exchequer, the Treasurer and Chamberlains shall make payment [175] or assignment to them without tarrying or suing other warrant or commandment of the Great and Privy Seal in that behalf." Then the 33 Hen. VIII. c. 39, s. 79, enacts, "that if any person, of whom any such debt or duty shall be demanded or required, allege, plead, declare, or shew, in any of the said Courts, good, perfect, and sufficient cause and matter in law, reason, or good conscience, in bar or discharge of the said debt or duty, or why he ought not

to be charged or chargeable to or with the same, and the same cause, &c. being proved in such one of the said Courts, and every of them shall have full power and authority to accept the said proof, and to acquit and discharge him." Lastly, the 13th Elizabeth, ch. 4, sec. 2, (which enacts, that accountant's lands shall in certain cases be sold to pay the Crown's debt) saves to the accountant the allowance of all his due and reasonable petitions upon the same account. In all those several statutes, they submitted, the legislature had distinctly recognised and uniformly acknowledged the inherent jurisdiction of the Court, as existing in the person and office of the Barons, in all things regarding the passing and allowing of public accounts, and in some of them had enjoined them (the Barons) to perform that duty on the behalf of the subject, of themselves and without other authority than their own constitutional jurisdiction. That duty is also noticed by the express terms of the oath of office (*a*), taken by the Barons, the 2d article of which is, "that [176] truly he shall charge and discharge all manner of people, as well poor as rich." The 4th article is, "nor none other person's right shall he disturbe, let, or respite, contrary to the laws of the land." The 8th article requires, "that as hastily as he may them (the people) goodly to deliver, without hurt, to the king." So that on the whole it fully appears they have not only the power, but it is their duty to take care that right be done on any complaint regularly brought before them of the Auditors in former times, or the Commissioners in the present day having neglected or perverted their duty in any respect, whether it tend to the injury of the Crown, or the aggrieving of the subject.

On the case of *The Bankers*, which had been much relied on in support of the arguments used in favor of the demurrer, they observed, that although the question there was entirely distinct from the present, as it concerned the then questionable power of the Barons to order an issue of the public treasure—yet in principle it was an authority favourable to the objects of this bill, as it had fully established the theory, that the Barons, as a Court, are supreme Auditors, and have authority over the King's treasure while yet in transitu, as was said by Lord Chief Justice Treby, in the course of his argument, (p. 142,) on a question involving no less a point, than whether the Barons had power to control, and so far command the Treasurer, (and that even, his Lordship considers a great and arduous point) as to order an issue of the public money on a claim submitted to them [177] by a subject. His Lordship certainly was of opinion that they could not do so in that case, necessarily admitting, that cases might occur in which they would have power so to order the Treasurer.

Lord Chief Justice Holt, however, they observed, on the other hand, was of a different opinion even on that high question, and that very learned Judge's incidental dicta in that case, as well as those of the other Judges, are very strongly in favour of the opinion that the Court possesses the authority now contended for. He says, "if you make the Barons only Judges of the right of coming in of the King's money, you make them Judges but of half the business which belongs to that Court (the Exchequer), for the Barons have the judicial power over the whole Court of the Exchequer, and to say, that the Treasurer and his officers have no correspondence with the Court of Exchequer, is not true, for all the books take notice of them as persons that all belong to the Court of Exchequer." The same learned Judge also furnishes an answer to the suggestion, that the subject's proper and only course for redress in a case of this sort is by petition of right to the King. He says, "suppose the King purchased land that is charged with a rent, the King must take the land together with its burthen, but in such case it would be hard to drive the grantee of the rent to his petition of right to the King. No, certainly, he may come to the Court of Exchequer by way of petition to the Barons, who may give him relief."

[178] As to the seemingly adverse dicta cited from Lord Somers's argument in the same case, they observed, that if taken as applicable to the subject-matter then before the Court, they would be found to be confined to that particular point which was founded on a mere naked demand of money due from the Crown, not at all affecting the present question of the authority of the Barons to make, or to order allowances to be made to an Accountant by the Commissioners for auditing the public accounts, which all the Judges who delivered their opinions in that case, either for or against the authority of the Court to order an issue of public money out of the receipt of the Exchequer, held to be the peculiar province of the Court; and their

jurisdiction being on the one hand acknowledged to be plenary whilst the accounts were pending, was, on the other, contended to be wholly confined to questions arising while the treasure is in transitu.

They then brought forward the following various instances which had been found after a very diligent search among the records of the Court¹ set on foot for precedents since the argument on the preceding petition of Sir George [179] Colebrooke, which they offered to shew the usage with respect to the controlling power of the Court over the Auditors of the Prest, and as fully establishing, as to them, the jurisdiction of the Court, by their constant exercise of it, to interfere on the part of the subject, and order the Auditors to correct and amend their determinations, as well on the allowance as on the disallowance of articles offered by Accountants in their discharge. The first material case produced by them was that of Henry Slingsby, the Master and Worker of the Mint^{*2}, in Easter Term, 32 Chas. II. which was as follows.

[180] Easter Term, 32 Chas. 2. Sabi. 1^o die Maij, Anglia Turr. London. *Slingsby's case* ^{*3}.—On the motion of Sir Robert Sawyer, K. C. on behalf of his Majesty, (Mr. Ward having been also heard on the part of the Accountant, Slingsby,) it was ordered that Mr. Slingsby should produce unto the respective Auditors of the imprest, copies of the accounts then depending before them, and that they the Auditors should mark therein what sums they disallowed. Counsel to be heard on both sides on Friday then next, and Mr. Chancellor of the Exchequer was desired to be then present in Court[†]. Afterwards, on the same Friday, the following order was made—reciting the former order and the hearing of his Majesty's Attorney and Solicitor General, and Sir Robert Sawyer, and Mr. Lechmere, on behalf of his Majesty, and Sir Francis Pemberton, K. S. L. Sir Francis Winnington Pollexfen, and Ward of Counsel for Slingsby, by the Chancellor, Chief Baron, and the rest of the Barons of the Court of Exchequer, concerning some of the allowances craved by the said Accountant, Slingsby, and which had been disallowed by the Auditors, both of the said Auditors of the Imprest being in Court—that the said matter concerning the said allowances should be further heard on a future day, to which it was accordingly adjourned, on which day, (the order proceeds), upon full hearing of the said counsel on both sides, and

^{*1} These were furnished by the industry of Mr. Vanderzee: one of the sworn clerks in the King's Remembrancer's Office, who instructed the present Master of the Rolls, and the other counsel, who argued on the part of the plaintiff; and the Editor is enabled to vouch the known accuracy and learning of that Gentleman in this department, for the fidelity of the transcripts and extracts which follow.

^{*2} EXTRACTS from the Original Accounts, as Altered by Order of the Court.

In the margin "Officium Magistri & Operator' monetar' dni Regis Auri & Argenti, viz.

"Ex'. T. DONE, Audr.

"Declarat'. xxvij^{mo}. die Maij, 1680.

"L. HYDE.

"J. ERNLE.

"ED. DERING.

"S. GODOLPHIN."

One of the items, as disallowed, stands thus:—

"Pro damno & vast' sup triat' monet' auri & argenti in hoc anno xliiij s. Nil allocat': Quia per Judic' Cur' Sceij onus portand' per magistrū & operator'."

The following is another disallowance:—

"Pro monet' dat' Capitolinis anglie, Wardens of the Tower, & al' hoc anno ut usualiter dat' fuit in regard' ad festum nats Dni. Nil. Existen' disallocat' per Cur'."

These may serve as specimens of the whole accounts, which are very long, proceeding item by item through all the Accountant's articles of charge and discharge.

^{*3} Termino Pasche a^o. xxxij. Car. sedi Mercurij xix^o. die Maij. Lib. Min' & Ord': incipien' an^o. 32^o. Car. 2ndi. No. XII.

† By minute entered, East. Term, 32d Chas. 2d. Mercurii 28^o die Aprilis, an^o. 1680. Lib'. Min. incipien' Term. Pasch. an^o. 32^o. Car. 2ndi.

after long debate of the said matters, and upon consideration thereof [181] had by the Right Honourable the Chancellor, Chief Baron, and the rest of the Barons of the Court, it was ordered by the Court, that some of the charges disallowed should be allowed, and that so much of others which had been also wholly disallowed, as Slingsby should make oath that he believed were such as the King was to bear the charges of, and not himself, should be allowed, and that the residue should be disallowed, and so on, going through the whole of the account, although already passed by the Auditors, item by item: and the order concluded, by requiring the Auditors of the Imprest to make up the said account, and the several subsequent accounts of the said Mr Slingsby, according to the directions in that order. Nine days after the date of that order, Slingsby's accounts were declared before the Lords Commissioners of the Treasury. The accounts so altered by allowing some charges, and disallowing others, refer to the order of the Court, and are marked "per Judicium Curie," and sometimes "per ordinem Curie," and sometimes "per Curiam."

Having put forward the above case, although subsequent to some of the following, in order of time, as being directly and conclusively in point, in establishing the jurisdiction of the Court over the Auditors of the Imprest, before the appointment of the present Commissioners, they produced the following instances, to shew how frequently the Court exercised a directing and controlling authority over those officers, observing, that those instances having occurred since the [182] reign of Elizabeth, they proved that nothing had been done on the establishment of Auditors of the Imprest, to render them independent of the Court of Exchequer.

25th Nov. Mich. Term, 3 Jac. *Knevytt and Martin's case* *.—In Trinity Term, 3 Jac. I. The Warden of the Mint (Sir T. Knevytt), and the Master Workers (Sir R. Martin and his son) of the monies, appeared in Court, and took their oaths according to the course of the Court, and two Auditors of the Imprest were assigned to take their accounts; and in Michaelmas Term following, time was granted to them by the Court to deliver objections to the Auditors, touching their accounts †.

Mich. Term, 3 Jac. I. *Sir Richard Musgrave's case*.—In Michaelmas Term, 3 Jac. I. Sir Richard Musgrave, Master of the Ordinance, having appeared in the Court of Exchequer to account, and an Auditor of the Imprest having been assigned to take it, he applied to the Court for time to finish it, and collect his discharges, which was granted.

Hilary Term, 5 Car. *Sir George Carey's case* ‡.—They then produced a decree of the Court of Exchequer, in the case of *Sir George Carey*, [183] (11th February, anno 5 Car.) which commenced by setting out the bill that had been filed by the then Attorney-General, in Trinity Term, 21 James I. against Sir George Carey, reciting that he (having been Treasurer of the Wars in Ireland) had received money (1,800,000l.) by imprest, to be employed in the business of the late Queen (Elizabeth), and then King (James), as by five several accounts exhibited by him into the Court of Exchequer, and remaining of record there, appeared, in which said accounts the said late King had been greatly wronged by the errors, &c. and frauds therein committed, and more particularly in the 11th, and charging him to be indebted to his Majesty, in a considerable balance for so much, neither accounted for in his 5th account, nor transmitted in specie to England—and then follow the items complained of. The decree then stated the answer of his representatives, denying the errors and frauds, and other material allegations of the bill—that the cause coming on to be heard, (witnesses having been examined on both sides), the account was referred, by order of the Court, to two of the Auditors of the Prest, and two of the Auditors of His Majesty's revenue (by name), who were to report thereon, and they were thereby authorised, for their better information, to make use of the depositions which had been taken in the cause—that a certificate of their report was afterwards returned by them to the Court, submitting it for

* Lib. Ord. No. 3, p. 51 b.

† Without more particularly noticing the various other instances which were brought forward of the interference of the Court on similar applications, it will be sufficient to refer to the records from whence they were taken, viz. the Decree Books, and the Order Books, during the reigns of James the 1st, and Charles the 1st and 2d: the most important of them only are selected and stated fully in the argument.

‡ Decree Book, No. 3, Easter Term, 5 Chas. I. p. 347. Same book, p. 352.

their consideration—that the cause was thereupon appointed to be heard again [184] in the Exchequer Chamber, before the then Lord High Treasurer of England, and the Barons of the Court, in the presence of the counsel on both sides, when (the decree recites) the Court, being fully satisfied on reading the certificate of the said Auditors, (after long debate by the counsel on both sides), for that the Court conceived that the said George Carey ought not to be charged in his accounts with monies received by Vry, Babington, and Robert Bromley, for the reasons mentioned in the certificate and accounts, and proofs, then read in Court, as well of the Auditors and others examined in the said cause, and for other matters appearing of record in this Court: and for that it also appeared that for the errors, frauds, &c. committed in the said accounts, by the said Vry, Babington, and Robert Bromley, there had been a former decree in this Court against them, of satisfaction to be made to his Majesty; and the Court being fully satisfied by the said certificate of the said Auditors, and by the other proofs then made in Court as aforesaid, and upon view of the said accounts, that the 3d, 4th, and 5th, accounts were just and true, and with much care passed and approved by two Auditors and six Commissioners, thereunto authorised by the then late King, under his Great Seal of England, above twenty years past, by which said commission, the said Commissioners thereunto authorised by commission under the Great Seal, by which they, being persons in great offices, and of great quality and trust about his then Majesty, had power to [185] charge and discharge the said George Carey, which discharge, under their hands and seals, should be to him, &c. a good, perfect, lawful, available, and sufficient acquittance and exoneration, and full discharge, &c. &c. it was therefore “ordered and decreed by the Court, that the said cause, and the said defendant, should stand and be clearly and absolutely dismissed out of this Court for this matter, without any further motion to be had therein, touching or concerning the same.”

“Per BARONES.”

[The Court enquired whether these cases now adduced had been brought before them on the former occasion of Sir George Colebrooke's petition, and being informed that they had not been then mentioned, they expressed themselves to be much impressed by their authority, and that they had materially affected their former view of the question.]

Term Pasch. an. 29th Car. 2 di. Jovis 3^o die Maij. *The Attorney-General v. Beckford*.—The last case produced was a decree in a cause of *The Attorney-General v. Beckford*, in the 29th Chas. II. By that bill, the Attorney-General, charging fraud, prayed that the defendant, who was a sloop seller to the Navy, might be ordered to produce his books, and come to an account.—The books being produced and examined, and the cause heard on the evidence, it was ordered by the Court, that the defendant [186] should go to account before the Auditors of Imprest, who were to be armed with a commission to examine witnesses, and the Commissioners and Officers of the Navy were ordered to bring in all books and papers relating to the defendant's accounts. The Auditors having made their report, exceptions were taken to it, and it was referred back to the same Auditors, and one of the Auditors of his Majesty's Revenues in this Court; and they, or any two of them, of whom the Auditor of the Revenue was to be one, were to review and correct the report as they should see cause. Their report was also referred back to them, and another Auditor, (the Court directing them very particularly as to the allowances which they were to make, and on what account). It was afterwards referred to the Commissioners of the Navy, at the request of the Attorney-General, and on their report, the cause came on finally to be heard before the Right Honorable Sir John Erle, Knight, Chancellor and Under Treasurer of the Exchequer, and the Chief and other Barons, when, on reading all the reports and proceedings in the cause, and hearing counsel on both sides, the Court declared that the defendant had duly accounted, and the said Chancellor, Lord Chief Baron, and the rest of the Barons, did seriatim and solemnly deliver and declare their judgments, that the defendant was not nor is guilty of defrauding his Majesty, or any others, in all or any the matters charged against him in or by the said information; and therefore it is this present day ordered and adjudged by the [187] said Chancellor, Lord Chief Baron, and the said other Barons, and by this Court and the authority thereof, that

the said defendant go without day as to the said information and the several matters and things therein contained, and be absolutely from henceforth discharged the same.

(Signed)

J. ERNLE.

EDW. THURLAND.

WILLIAM MONTAGUE.

VERE BERTIE.

TIM LITTLETON.

In all those cases they observed, generally, that it appeared the Barons had exercised jurisdiction over the Auditors, and that as a Court acting judicially, the Chancellor and Under Treasurer being desired to attend, as he might be on the present occasion, if the Court should think fit to interfere as prayed by the bill.

Assuming then that they had established their position, that, during the earlier periods of the history of the Court of Exchequer, up to the 25th year of the reign of Geo. III., the Court had exercised a jurisdiction—a judicial controlling authority over the Auditors of the public accounts, by whatever name they might have been called, and in whatever manner appointed, and that whether as officers of the Court, or of the Crown; they then proceeded to inquire whether the act of Parliament (25th Geo. III. ch. 52) had either destroyed, diminished, or transferred that authority which the Court of Exchequer had [188] been shewn to have possessed and exercised up to that time: or whether, by substituting Commissioners for auditing the public accounts in the place of the Auditors of the Prest, the legislature had rendered the new officers independent of that controlling power which the Court judicially exercised over the more ancient. And they insisted that the onus lay on those who supported this demurrer, to shew that the act of Parliament had expressly taken away the ancient inherent judicial control of the Court of Exchequer over all persons appointed to the duty of passing the public accounts: but yet they undertook to shew that the statute had not only not done so, but had by its provisions more than reserved to the Court its authority entire, for it had in some respects augmented it. For that purpose they relied much on the 8th section, providing that the Commissioners to be appointed under the authority of the act having been declared to be invested with all the powers and authorities, should be subject to the performance of the same duties, and liable to the same control which the auditors of the Imprest then were by law, usage, or custom, subject or liable to, except as the same are or should be altered or affected by that act; and they submitted that it was the duty of the Court to exercise that control which they were acknowledged to possess for the benefit of the subject, whenever in a proper case application should be made to them for that purpose. They then proceeded to various other clauses of the act, on which they [189] reasoned in the same manner as Mr. Baron Graham will be found to have done in the course of his judgment in the preceding case^{*}, deducing the same conclusion.

On the point of the propriety of the present mode of proceeding as adapted to accomplish the object of the complainant, its consistency with the course of practice, and its ultimate efficiency, they adverted to the following cases, from the books, in addition to those already cited from the records of the Court, (which they observed, would of themselves have been sufficient to warrant the course adopted in this instance) as establishing that it was not only according to the practice of the Court in all similar cases, but that there was no other mode by which redress could be sought—*Sir Thomas Cecil's case* (7 Co. Rep. 19), *Sir William Hix v. The Attorney-General and Cooper* (1 Hardr. 176), *Whitchill v. The Attorney-General and Others* (ib. 395). On citing the next case of *Pawlett v. The Attorney-General* (ib. 465), they remarked that that was a particularly strong authority in favor of the complainants in this bill, both as establishing, (after very much argument, in which the question of the proper course being by petition of grace and favor, was discussed) on deliberation, that the subject might be relieved in equity against the king: and that by means of a suit by bill [190] against the Attorney-General, who, they insisted, had been properly made defendant in the present case. They also cited *Burgess v. Wheate* (1 Blacks. 123), a MS. case of *Fitch v. The Attorney-General* (Trin. T. 10 Wm. 3), and *Ex parte Durand* (3 Anstr. 743). And they insisted, as the result of all those authorities, that the subject had a right to compel the Commissioners for auditing the public accounts by means of the decree of this Court, to do the accountant right and justice as between him and the crown; and that by bill against the Attorney-General; and therefore

* See the judgment, ante, from page 119 to page 127.

the complainants filing the present bill were entitled to a full answer from him, and consequently the present demurrer ought to be over-ruled.

The Attorney-General, in reply, disclaimed any general denial of the jurisdiction of the Court of Exchequer over the accounts of the king's revenue, insisting, however, that their jurisdiction did not extend to permit them to interfere to regulate or control the conduct of the Commissioners for auditing the public accounts, appointed by the 25th Geo. III., in the course of the duties intrusted to them by that act; for that they were thereby invested with a concurrent jurisdiction with this Court in all matters of account. He contended, that the remedy by petition of right, in cases of similar supposed grievances, was not taken away by any statute, neither had a right of suing the Crown, in the first instance [191] by bill in Equity, been given to the subject—that there was no foundation for such a right, and that the establishment of it would be mischievous and dangerous. He insisted, that the instances which had been adduced during the period of the reign of James the First, as cases wherein this Court had interfered to control the Auditors conduct, by ordering a revision of their acts, had all been in point of fact authorized by letter of privy seal, issued for that express purpose, by that King, at the commencement of his reign, enabling this Court to do what otherwise it would not have had authority to have done.

Another objection was also now taken to the present bill—that it called upon the Court to interfere to direct the Auditors in mid-course of their duty, and before they had completed the act which was made the subject-matter of complaint. He took a distinction, founded on the mode of proceeding which had been adopted, between the present case and the instances already referred to, that although the subject could not proceed by bill against the Crown, but was restricted to the petition of right, the Attorney-General might apply by information, and he was in all those cases the acting party. As to the cases cited from the books where the Attorney-General was made defendant to the bills, he observed, that there were in almost all those cases suits actually pending against the complainant, or other persons were defendants with the Attorney-General; and he admitted that a [192] party so impleaded in this Court might apply by bill to the Court for relief, when the remedy which he would obtain would be in the nature of an injunction, and then the great difficulty opposed to the plaintiffs in the present case could not arise, namely, as to what judgment the Court could pronounce, or whether it could make any decree at all.

He ultimately adverted to the ground on which the case for the Crown was put at the commencement, that if the Court of Exchequer had ever had a jurisdiction to interfere in the way now prayed, that power had been virtually, if not expressly, taken away by the particular provisions and general tenor of the 25th Geo. III., and was transferred entirely and exclusively to the Treasury; and that therefore this Court had no jurisdiction to entertain the present bill.

Cur. adv. vult.

28th February 1807.—The Court (consisting of Maedonald, Lord Chief Baron, and Hotham, Thomson, and Graham, Barons) this day pronounced judgment, by declaring the

Demurrer over-ruled*.

[193] ROOTH v. QUIN AND JANNEY. Friday, 30th April 1819.—Semb. A partnership firm may protect themselves from liability to pay bills accepted by one in the name of all the firm, by notice by public advertisement in newspapers, proved to have been received by the payee and indorsees, that the partnership is dissolved; although the dissolution has not appeared in the *Gazette*: and that even where the partnership is not for a definite and limited period, or might be dissolved at pleasure, but is for a stipulated continuing term, dissoluble only on certain conditions, which have not been performed: so that it is doubtful whether the partnership continued to exist in point of law or not, and there was no special contract among themselves, that the firm was not to be liable for the acts of individual partners.—In an action against other partners on a bill accepted by one in the name of the firm, the admissions in his answer filed to a bill in equity against

* The Attorney-General then put in a full answer on the merits, but the cause was afterwards put an end to by compromise.

him, are not admissible in evidence against the rest. —If the plaintiff, in such an action, be an indorsee, the defendants must shew that the payee had notice of the resolution of the rest of the firm to dissolve the partnership, and be no longer answerable for any such bills: and if that be not done, it is not sufficient to prove that the indorsee had notice, for he is entitled to avail himself of any circumstance which would operate in favour of the payee.

This was an action by the indorsee against the defendants as acceptors of two bills of exchange, dated the 5th January, 1814. The defendant Quin had suffered judgment to go by default. Janney pleaded the general issue. On the trial at the Sittings after Trinity Term 1816, before Mr. Baron Richards, a verdict was found for the plaintiff for the amount of both bills, subject to the opinion of the Court on the following case:—

The defendants carried on business as cotton manufacturers at Manchester, in co-partnership, for several years, before the bills in question were drawn. The bills were accepted by the defendant Quin, in the co-partnership name, and indorsed to the plaintiff. The partnership between the defendants commenced in the month of February 1803. There was no written agreement between them as to the duration of the partnership; but the terms upon which they began, and agreed to carry it on, were, that it should be for the [194] term of five years certain, and for such further time as they should agree upon; and that if either party should, after the expiration of the said term of five years, be desirous of withdrawing himself from the concern, he might do so upon giving six months notice of such his intention to the other party, or forfeiting the sum of 200l. The capital to be advanced by Janney was 600l. and by Quin 300l. and each was to have an equal moiety of the profits, and the said sums were actually advanced.

On the 5th June, 1813, the defendant Janney, who wished the partnership to be put an end to, caused to be inserted in three of the Manchester papers this advertisement. “The partnership heretofore subsisting between James Quin and Joseph Janney, both of Manchester, in the county of Lancaster, manufacturers and merchants, under the firm of Quin and Janney, in this day dissolved.” Several copies of these newspapers were taken at a news room, where the plaintiff was very much in the habit of reading the public papers. The plaintiff, on or about the 5th of June, 1813, received a circular letter, dated 4th June, addressed to him by Janney, in these words: “The partnership heretofore subsisting between Mr. James Quin and myself, as manufacturers and merchants, under the firm of Quin and Janney, was this day dissolved. I have to request you will not sell any goods on the credit of the above partnership, as I shall not be answerable for any debts which from henceforth may be contracted in the [195] partnership name, or on the partnership credit.” The defendant Janney also about the same time sent a notice of the dissolution of the co-partnership, signed by himself, to the *London Gazette* office, to be inserted in the *London Gazette*; but the person who had the conducting of the *London Gazette* refused to insert it, as it was not signed by the defendant Quin.

No notice was given by the defendant Janney to the defendant Quin, of his intention to withdraw himself from the said partnership six months before the said 4th day of June, nor did it appear that any notice at all was given by the defendant Janney to the defendant Quin, of such intention: nor did the defendant Janney pay the said sum or penalty of 200l. to the defendant Quin. The defendant Quin, after the 4th of June, 1813, continued to trade, using the firm of Quin and Janney, and the bill for 150l. was accepted by him in that name, after the said 4th day of June, 1813. The plaintiff's answer read on the trial by the defendant, stated that the plaintiff had been informed and believed that the bill was drawn in payment of a debt due from the defendant before the said 4th of June, 1813, to William Kirkpatrick (the drawer, payee, and indorser). Both the bills were fairly indorsed to the plaintiff, for a full and valuable consideration, and without any collusion with the defendant Quin.

When the defendants had closed their case, the plaintiff, who at first made out a *prima facie* case [196] only on the bills, offered, in evidence, a bill in Chancery, filed by the defendant Janney, against the defendant Quin and the plaintiff, and the defendant Quin's answer thereto. The admissibility of this answer in evidence was objected to by the defendant Janney, who defended separately. That answer, amongst other matters, stated that the defendant Quin refused a proposal by the defendant Janney,

to dissolve the partnership, unless all the co-partnership accounts were adjusted by reference to an accountant; and thereupon the said defendant Janney took upon himself to attempt to put an end to it; and on the 2d of June, 1813, entered the partnership warehouse during the night, and took away the books and accounts, and the stock and utensils of the trade, and sold the same, no part of the proceeds of which he had paid to the defendant Quin, and inserted the said notice in the newspapers, and sent the circulars above mentioned:—that in the month of March, 1813, the defendant Quin gave the defendant Janney 120l. to pay part of the debt due to Kirkpatrick, which debt was due in May, 1812, for goods sold, and for which the above mentioned bill of 150l. was given in payment, but that such sum was appropriated by the said defendant Janney, to his own use; that since June, 1813, the defendant Quin had carried on trade under the firm of Quin and Janney, for the benefit of the said partnership, not conceiving the same to have been regularly dissolved, and that a debt of 189l. was contracted after the 4th of June, 1813, that is to say, in January, [197] 1814, with William Carson (the drawer, payee, and indorser of the other bill), for goods sold by him in January, 1814, for the use of the business, which the defendant Quin carried on for the benefit of the said partnership, in the partnership name; for which debt the above-mentioned bill of 189l. was accepted by the defendant Quin, in the partnership name—and that the said bills were not indorsed to the said plaintiff, in order to enable him to obtain payment, and that there was no collusion between the plaintiff and the defendant Quin, in respect thereof.

The first question for the opinion of the Court was, whether the answer was admissible evidence of the facts therein contained, or any of them. If the Court should be of opinion that it was, then such facts were to be considered as part of this case, and a copy of the said bill and answer might be referred to by either party. If not, they were to be rejected.

The second question was, whether the plaintiff was entitled to recover in respect of both or either of the bills. The verdict, in that case, to be entered accordingly for the plaintiff, on both or either of the bills—otherwise for the defendant, in the same manner.

4th Feb. 1818.—The case was first argued in Hilary Term, 1818, but Mr. Baron Wood having, on that occasion, noticed that the special case was defective, in not stating a very material fact,—namely, whether [198] the payee had had notice of the matters now urged against the liability of the partners; for if he had not, the indorsee would be entitled to avail himself of any circumstance which might have been used on behalf of the original payee:—the case was therefore sent back to be amended in that respect: and it now came on again to be argued upon the questions raised by the state of facts.

Parke, in support of the verdict, contended, first, that the admissions in the answer of the defendant Quin, were admissible in evidence against the defendant Janney, in this case, citing the authority of *Grant v. Jackson* (a), where Lord Kenyon held, that although the answer of a defendant in that case was not admissible to prove the partnership, yet when once a partnership was established, the admission of one would bind all, and that because when the answer was put in, the defendant was equally liable with the others; and he also cited the case of *Wood and Others, Assignees of Hussey v. Braddock* (1 Taunt. 104), on the same point, where it was determined, that an admission, made by a partner after the dissolution of the partnership, concerning joint contracts made during the existence of it, concludes the other partners, but

The Court intimating that they were against him on that part of the case, for that it was a rule in Equity not to receive the answer of one party against another, under such circumstances, [199] called on him to support his verdict on the other ground.

He then submitted that Janney, as the partner of Quin, was bound by the acts of the latter during the subsistence of the partnership—that the partnership between them was subsisting in point of law, at the time when the bills were drawn, it not having been regularly or effectually dissolved—that it was not in the power of one partner, where there was a permanent partnership established by agreement for a given period, or as in this case dissoluble only on certain terms and conditions which had not been observed and complied with (for six months notice had not been given, nor had the 200l. been paid) to dissolve such a contract by mere notice of its dis-

(a) Peake's N. P. C. 268, (3d edit.).

solution, or thus to discharge himself of all the legal liabilities inseparable from his legal character.

On the principle of partnership obligations with respect to third persons, and the power of one of several partners to bind the rest, he cited the case of *Peacock v. Peacock* (16 Ves. 49), where the Lord Chancellor took a distinction between such partnerships as are of definite, and such as are of indefinite duration, observing, that where partners are not under agreement for any precise period, they may dissolve at any time, subject only to the proper accounts, the converse of which must be, that where there be such an agreement, the part-[200]-nership cannot be so dissolved; and the same proposition was laid down by the Master of the Rolls in the case of *Featherstonhaugh v. Fenwick* (17 Ves. 293).

[Wood, Baron, enquired if it was meant to be contended that a partner was so inextricably bound by his articles as to have no means of freeing himself by notice or otherwise, from the engagements of an improvident member of the firm; in answer to which it was submitted, that he would generally be so involved as a partner, unless protected by the special terms of his original engagement, and notice were given to the public.]

Littledale, contra, insisted, that the partnership in the present case had been dissolved, by what had passed between the parties, and that the defendant Quin had no right or power at the time when he accepted the bill in question, to charge the other defendant.

The Court suggested here, that from the shape which the question had assumed, it should be argued as if it were (admitting the continuance of the partnership) whether the defendant Janney could protect himself from debts incurred by the acts of Quin, by the notice which he had given, that he would not be answerable for any debts contracted in the partnership name.

[201] It was then submitted, that he was protected by such notice, and that the point had been already decided by recent cases. In *Lord Gallwey v. Mathew and Smithson* (1 Campb. N. P. 403, and 10 East, 264), it was held by Lord Ellenborough, that the authority of a partner to draw bills was only an implied authority, and not essential to a partnership; and that that implication might be rebutted by notice being shewn to have reached the person taking such bills that the firm did not authorise individual partners to draw in the name of the whole, and on that ground the Court proceeded in refusing the rule. So also was it in the case of *Willis v. Dyson* (1 Starkie, 164).

Parke, in reply, relied on the fact that the present partnership was not for a limited time, or determinable at pleasure, but for a definite period, and to continue with all its legal consequences till certain acts were done by such of the partners as might wish to dissolve it: and he insisted, that until that time they would all be necessarily liable to the responsibilities incident to such an engagement, and on that he submitted [202] the distinction was founded, which took this case out of the principle of the determinations which had been cited; for that it does not appear from the reports of those cases, what was the nature of the partnerships there, as whether their dissolution had been made to be subject to certain conditions, or whether they were for a limited term, or to depend wholly on the will of the parties—that from all that appeared, they were most probably of the latter description: and the determinations in those cases, he observed, seemed to be grounded on an assumption of fraud and collusion between the partners, whereas in the present case such an inference was expressly negatived by the finding of the Jury. So that there was as yet no decision on the point applying to the present case, which was one requiring from its importance and frequency, most mature consideration, as seriously affecting the daily transactions of mercantile people.

RICHARDS, Lord Chief Baron, (having read the material parts of the case of *Lord Gallwey v. Mathew*). It appears from that case that Lord Gallwey gave Mathew his acceptance as a loan: and that it was done at some personal risk; which, although not adverted to in the judgment of the Court, is certainly, as reported in the printed

* The Court took occasion to observe that it was with much reluctance they received determinations at Nisi Prius, on questions brought before them for more deliberate consideration, however high the authority cited might stand in their estimation; and expressed a desire that the citing such cases might be discontinued, on occasions requiring more elaborate research.

case, a very material feature in the circumstances. Lord Ellenborough's judgment is however delivered in very general terms, and deserves serious consideration. This is undoubtedly a question of vital importance to the commercial [203] world, and therefore the Court think that there ought to be a new trial, on which occasion a bill of exceptions may be tendered, or some other course adopted which may carry the question further, that it may receive the most solemn decision.

Per Curiam. There must be an order for a new trial,—on payment of costs.

The Court were all clearly of opinion that the answer of Quin, which had been tendered in evidence, was not admissible as against Janney.

ONIONS v. NAISH. 1st May 1819.—The Court will not grant a rule for setting aside a verdict on the affidavit of the failing party, stating that one of the Jury was a relation of the successful party, and that they were in habits of friendship and intimacy together, and particularizing the various instances and expressions on the part of the jurymen, of partiality and prejudice—which are detailed in the body of the case.

Littledale moved to set aside the verdict given for the defendant in this action, which had been tried before the Chief Baron at the last Sittings, and for a new trial, (the costs of the day to abide the event) on an affidavit made by the plaintiff, stating that the trial having been postponed from a former day, the defendant, in the mean time, obtained a rule for a special jury—that when the cause was called on only eight special jurors [204] were sworn—that of the four common jurors added, one was a relation of the defendant, with whom, both at his house and elsewhere, the defendant had been in the constant habit of associating familiarly, and on terms of intimacy and friendship during the whole of the interval between the postponement and trial of the cause; and that he (the Jurymen) had during that time frequently expressed himself in strong terms in favour of the defendant's case: and the affidavit mentioned various instances of a display of prejudice in favour of the defendant, all which the plaintiff swore had come to his knowledge during and since the trial of the action. The affidavit also stated, that the deponent had reason to believe that the Jury had given their verdict under a misapprehension of certain points in the case; but

The Court refused to grant a rule to shew cause, observing, that it would be a very dangerous precedent to set aside a verdict, upon such grounds as were now offered in support of the present application.

Nil.

[205] **BLIGH v. BENSON.** 1st May 1819.—The Court will not, on a bill for tithes, praying a discovery of documentary evidence, order a tithe book of a former rector, shewn to have been in the possession of the defendant's attorney, to be produced, unless it clearly appear from admissions in the answer that it would assist the plaintiff's case.—The possession of the attorney however is within the control of the plaintiff.—But where the Court refuse such a motion for the above reason, they will not do so with costs, if enough be shewn to give colour for the application.

Bligh moved that the defendant in this bill (which was a suit for tithes) might be ordered to produce and leave in the hands of his clerk in court, a book made and kept by a former rector of the parish, relating to the tithes of the parish, then in the possession, power, or custody of the defendant.

He stated that he founded this motion on an admission in the defendant's answer, that the book now required to be produced, was in the custody of the defendant's attorney, and related to the matter in issue, and that it would furnish evidence in favour of the plaintiff, and he read the following passage, (which was in answer to an interrogatory, whether the book was not in the custody of the defendant, and whether (in substance) it would not appear therefrom, that the pretended modus was in fact only a part of a general composition, contributory amongst the whole parish) as making such admission. "He (the defendant) hath been informed, &c. that a certain book relating to the tithes of the parish of Romaldkirk, which was kept by Dr.

Browell, who was formerly rector of the said parish, was produced by the defendant's attorney, but not by the defendant at the trial in the said amended bill, and former answers of the defendant mentioned; and that it was so produced [206] with the view of proving that the modus or ancient customary payment of twelve shillings and ninepence in and by the former answers of the defendant insisted upon with respect to the farm or lands called Doe Park, in the occupation of the defendant, was a good and valid modus, or ancient customary payment, covering tithe of agistment, and all prædial tithes in respect of the said farm or lands; "and he denied that the book was or ever had been in his possession. In a subsequent part of the amended answer, the defendant stated, that he had been informed and believed, that there were in the said book entries of divers sums under the denomination of tithe farm, but did not know if such sums amounted to the sum stated by the plaintiff as being the composition, but that if there were such entries, and if they were of such amount, yet the defendant insisted that the validity of the modus did not depend upon any other payments for any other part of the parish. Upon those passages it was submitted to the Court that the plaintiff was entitled to the production of the book by the defendant, the possession of his attorney being his possession, and was subject to his control; *Wright v. Mayer* (6 Ves. 281), *Fenwick v. Reed* (1 Mer. 123)—and that the subsequent admissions in the answer, shewed that the book contained matters favorable to the plaintiff's case. And it was further contended that the book itself was not, from the nature of it, such a document as the defendant was entitled to the exclusive possession of, or to give in evidence on his own behalf only.

[207] Lovat was to have opposed the motion, but the Court did not require to hear him.

The Lord Chief Baron. This book is part of the defendant's evidence, and the rule is clear that you have no right to call upon your opponent in this way to expose his case to his adversary. It would be opening a wide door to perjury. Besides, you must shew in all cases of an application for production of papers, that they would be evidence making in your favor: and that must be shewn by admissions in the defendant's answer. Now here there is nothing like an admission even under the "if," that the book, when produced, would assist the plaintiff's case.

The Court therefore refused the application.

Lovat then applied for costs, which

The Court refused: the Chief Baron giving as the reason that the application was not without some colour: for although the Court would not compel a defendant on a bill for discovery to disclose his evidence: yet it was also a rule, that, when the plaintiff could shew that the defendant was in possession of evidence which might serve him if produced, it would be against conscience to allow him to withhold it—that here it had been shewn that the defendant possessed a book (for the possession of the attorney was under the control of the defendant) which in great probability at least might have contained evidence favourable to the plaintiff's case although it was not suffi-[208]ciently admitted by the answer to authorize the Court to grant the application.

Per Curiam. Motion refused, without Costs.

MEMORANDUM. 7th May 1819.—The rule of this Court (1st February, 1792) is, that exceptions set down for argument are to be called on at the sitting of the Court, the effect of which is, that where the plaintiff does not attend to support them, they are to be struck out, and the defendant may then move, as of course, that they be overruled—and where the defendant does not appear, they are allowed.

By minute of this date, the Court announced, that on and after Monday next, they would strictly adhere to the rule of the 1st February, 1792, touching the argument of exceptions at the Sitting of the Court.

The effect of that order is, that where plaintiff does not appear to support them, the exceptions would be struck out, and defendant might then move, as of course, that the plaintiff's exceptions be overruled, not being brought on according to the course of the Court: if, on the other hand, the plaintiff appears, and the defendant does not attend to argue the exceptions, they are then allowed.

[209] BEESTON v. WHITE. Saturday, 8th May, 1819.—A defendant, against whom in an action for damages, on a tort, a verdict has been taken, subject to the award of an arbitrator, held to be discharged from the debt by his certificate, obtained before the entering up of judgment, where he had become bankrupt, between the verdict and the making of the award, and that execution could not be sued out on the judgment: because the plaintiff might have proved the damages recovered under the commission by production of the record.—Nor can he support such execution for the costs.—A *fieri facias* issued on a judgment entered up under such circumstances, and executed, set aside on the terms of the defendant undertaking to bring no action against the sheriff.

Comyn, in last Hilary Term, obtained a rule, requiring the plaintiff to shew cause why the writ of *fieri facias*, issued and executed in this cause, should not be set aside, on the ground that the defendant had obtained his certificate under a commission of bankrupt, and for other irregularity, on an affidavit which stated the following facts. The plaintiff had brought an action against the defendant for damage done by his barge to that of the plaintiff, which came on to be tried at the Summer Assizes for Berkshire in 1816, when a verdict was taken for the plaintiff for 2000*l.*, the damages laid in the declaration, subject to the arbitration of a barrister, who was to make his award by the 1st day of the following Michaelmas Term. The arbitrator afterwards, on the 1st of January, 1817, (the rule having been enlarged) awarded to the plaintiff 80*l.* for his damages and costs, and the plaintiff, on the 8th, signed final judgment, which he entered as of Michaelmas Term, 1816. On the 7th of December, 1816, the defendant having become bankrupt, a commission of bankruptcy was issued against him, and he obtained his certificate on the 10th of December, 1817. The plaintiff sued out a writ of *fieri facias*, on the 15th of January, 1819, under which the sheriff levied on the same day, taking certain goods and chattels in the possession of the defendant, to a [210] considerable amount, then detained by him (the sheriff), and which was stated to be not the property of the defendant, but of other persons by whom he was employed as a lighterman and carrier.

Under these circumstances, it was urged, that as the judgment which had been signed in this case, related back to the first day of the preceding term, (*Braquer v. Langmead* (14 East, 197)) the plaintiff was entitled to prove his damages under the defendant's commission: and that not having done so, he was barred by the certificate.

Puller shewed cause. He contended that the amount of damages having been referred to an arbitrator, the plaintiff had no perfect right to any liquidated sum, and therefore could not, at the time of the defendant's bankruptcy, have proved any debt under the commission: for if he had proved for the whole sum found by the verdict, it would have been expunged—that the defendant was not discharged from this debt, by the operation of the bankruptcy, the statute 5 Geo. II. c. 30, s. 7, having only provided for his discharge from all such debts as should be due from him at the time when he became bankrupt, and the plaintiff's demand of damages, for the present tort, could not become a debt till the arbitrator should have made his award, which was subsequent to the defendant's bankruptcy, and was not therefore till that time proveable under the commission; and he cited the authority of the Court of [211] King's Bench, in the case of *Ex parte Charles* (7 T. R. 20), where it was held that a sum of money given by a Jury to a plaintiff, who sued for a breach of promise of marriage, and had entered up judgment on the verdict, was not a sufficient petitioning creditor's debt, to support a commission against the defendant, who, between the verdict and entering up judgment, had committed the act of bankruptcy. He also submitted, that an action could not have been maintained on the verdict, until the damages had been ascertained by the arbitrator: nor could judgment be entered up in this case without a rule for signing it previously obtained by leave of the Court, *Hayward v. Lubbock* (4 East, 310). Admitting for an instant, however, that the plaintiff had no right to sue out execution for the damages recovered, he still might do so for the costs, which were part of the debt, and which clearly could not be proved under the commission, according to the decision of the Chancellor, in the case of *Ex parte Hill* (11 Ves. 646).

Cur. adv. vult.

8th May.—RICHARDS, Lord Chief Baron, now delivered the judgment of the Court: the short substance of which was, that the plaintiff ought to have proved his debt

under the commission, as he might have done, the damages being a debt of record, and the record alone sufficient legal evidence of it. And he observed, that if an action had been [212] brought upon the judgment, instead of suing out execution upon it, and a plea of bankruptcy had been put in, the proper evidence would have been an examined office copy of the record, which would be conclusive.

The Court therefore made the rule absolute, for setting aside the fieri facias, and restoring to the defendant the goods which had been seized—requiring, however, that the defendant should undertake not to bring any action against the sheriff of Berks.

IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

KIRKBANK AND OTHERS v. HUDSON AND OTHERS, AND THE ATTORNEY-GENERAL. Monday, 10th May 1819.—A gift of the residue of a testator's personal estate to trustees for the perpetual endowment and maintenance of a school, would be a valid bequest, and not within the statute of the 9 Geo. II. ch. 36.—But if after such completed bequest, the testator goes on to recommend the trustees to collect the residue, and lay it out at a convenient time in the purchase of freehold lands, &c. for that purpose, it comes within the statute, because the word "recommend" is imperative on the trustees, and leaves them no discretion, but raises a trust, which must be carried into execution, unless there be in some other part of the will an express option given to them in terms so to lay out the money, or not, in their discretion.

The plaintiffs, the next of kin of the testator, filed this bill to obtain a declaration by the Court [213] that the following gift and bequest in the will of Richard Dickinson, was void, and for an account and distribution.

The testator, (having by his will given to the defendants Thomas and Samuel Hudson, all such freehold and other messuages, lands, &c. as were vested in him by way of mortgage, for the purpose of enabling them to reconvey,) gave and bequeathed (after payment of all his debts, legacies, and funeral expences, &c.) the residue in these words:—"I give and bequeath all the rest of my monies, goods, effects, and personal estate whatsoever, to be a perpetual endowment or maintenance for two schools;" (naming them) and he appointed the said Thomas and Samuel Hudson (the trustees) and the survivor of them, and the rectors for the time being of the parishes in which the schools were, and their successors, for ever, patrons of such schools, with certain directions as to their conduct. Then, after giving his library of books, and his book-cases, to the two schools, he proceeds thus:—"And I recommend that at a convenient time my money shall be collected together, and laid out in the purchase of a freehold messuage and tenement or lands which are freehold, to be a perpetual endowment for the two schools, by an equal portion to each of the schoolmasters in every year, after all incidental expences are paid; provided, and my will is, that my estate and effects so vested in trust shall be suffered to accumulate until the annual proceeds shall amount to 100l. per annum for each schoolmaster; and then the net annual [214] proceeds shall be applied for the endowment of the said two schools as aforesaid."

Jervis and Simons, for the plaintiffs, insisted that this bequest was a devise of money &c. to be laid out in land within the 9th of Geo. II. ch. 36: for that the word "recommend," used in the will, was imperative upon the trustees, and created a trust which must be executed; and that principle was fully established in *Person v. Garnet* (2 Bro. C. C. 38). In *Malin v. Keppleg* (2 Ves. 333, 529), it was decided that the word "recommend" indicated desire, and was even stronger than the word "request," and that it excluded discretion. They also submitted, that words apparently giving trustees a discretion to lay out the money in land or not, would not protect a bequest from the operation of the statute of Mortmain, as was decided in the case of *Groves v. Case* (4 Bro. C. C. 67, and 1 Ves. jun. 548) where the bequest was of 600l. to be laid out in lands, &c. and till an eligible purchase could be made to be placed out at interest, which was held to be void, on the ground that it was a devise of land, because the trustees must have laid out the money in land. And they cited further *Chapman v. Brown* (6 Ves. 404), and *The Attorney-General v. Davies* (9 Ves. 545), with the other cases therein referred to, as additional authorities to the same effect. The case of *Grimmett v. Grimmett*, which they assumed would [215] be relied on by the

defendants, they submitted, had been subsequently over-ruled by the cases of *English v. Ordl* (Highmore on Charitable Uses, p. 82), *Grievess v. Case*, and other subsequent decisions.

Martin and Lynch, for the trustees, and Raithby for the Attorney-General, contended, that the word "recommend," as used in the present bill, was not imperative, but that the testator obviously meant to give his trustees a discretionary power, for that in this case there existed a distinction from all those cited, the testator having first given the residue of his personal estate absolutely to the charity: then he recommends them, in the way of advice, to lay out the money to be collected in land, for the benefit of the charity; but he does not thereby imperatively impose on them a duty to discharge in so doing, or in effect create a positive trust, which must necessarily be executed: and whenever trustees may, by exercising a discretionary power given to them by their testator, (and which very slight words would give them) preserve the charity from the effect of the statute, the courts have always supported the bequest, on the principle laid down by Lord Hardwicke in the cases of *Soresby v. Hollins* (Burn's Eccl. L. 556), and *Grimmett v. Grimmett* (Ambl. 210). In the latter case the Lord Chancellor's words are, "where there is sufficient room for the Court to say there is a discretionary power in the trustees to lay the money out one way or [216] other, either in the funds or lands, I have determined such a devise to be good," and that decision has never yet been over-ruled. Here the recommendation was not mandatory, and its adoption rested wholly with the trustees.

They submitted, that in all cases where words of recommendation had been determined to create a trust, the trusts held to be created were lawful, and such as might legally be raised; whereas here, there was a discretion given to elect one of two trusts, the one lawful, the other unlawful; and in such a case the executors might reject the one, and adopt the other. They further urged that the laying out the money in lands would in this case be a void condition, and yet the gift would be good, because it would be a condition subsequent, and being illegal, need not be performed; Co. Lit. 206 b. As to the cases cited on the construction of the word "recommend," they submitted that although the case of *Cunliffe v. Cunliffe*, and those upon which the decision there was founded, had been somewhat opposed by the other decisions, yet they were still subsisting authorities, and entitled to respect; and in a case like the present, differing as it did in so many important circumstances from all others, might fairly be cited in aid of the general principle on which the defendants relied.

Jervis having replied, the Lord Chief Baron took time to look into the cases.

Cur. adv. vult.

[217] RICHARDS, Lord Chief Baron, now delivered judgment (having stated the objects of the bill) as follows: The money out on mortgage being the personal estate of the testator, belongs to his next of kin clearly, if not otherwise disposed of by his will. Then the question for the Court is, whether this bequest of the residue is void under the statute of the 9th of Geo. II. ch. 36. On the one hand, it is contended, that the money is given to be laid out in land at all events, in which case it would certainly be void. On the other, it is said, that it lies in the option of the trustees, whether it shall be so laid out or not, if so, the bequest would then as clearly be good. Now that entirely depends on the construction of the will—(his Lordship read the words of the first part of the bequest, as far as the recommendation). So far no doubt the disposition to the charity is quite complete, and no further directions were in fact necessary to give it effect. The will, however, proceeds thus—(here his Lordship read the words of the recommendation). Upon these words the whole question arises, and it depends on whether they are mandatory upon the trustees, so that they must in all events lay out the money given in land, or whether they may not so lay it out, if they should not think it advisable. If they are obliged so to lay out the money, the bequest would be void certainly; if, on the other hand, an option has been given to the executors, it is hardly necessary to say that they may legally give effect to the bequest. That was so decided by Lord Hard[218]-wicke, in the case of *Soresby v. Hollins* (Burn's Eccl. 556), and afterwards in the case of *Grimmett v. Grimmett*. At that time there was a much greater inclination manifested by the Courts to support such charities than subsequently prevailed, for Lord Northington, or rather Sir Thomas Clark, soon afterwards broke through the rule of Lord Hardwicke, for in the case of *English v. Ordl* (Highmore on Char. Uses, 82), he first doubted the propriety of the decision in *Grimmett v. Grimmett*. Then in *The Attorney-General v. Tyndal* (Ambl. 614),

Lord Northington seems to have disapproved of that case, as did afterwards Lord Commissioner Eyre and the other Commissioners, in *Grieces v. Case*. With the greatest veneration for the name of Lord Hardwicke, I confess it is difficult to say that an election was given to the trustees in that case; but it is a strong decision, and establishes, that where an option is given, the bequest may take effect. But his Lordship there says, "It was said, the rule of construction is the same now as it was before the statute of Mortmain. That is true. But suppose the trustees in this case would not act, the trust would devolve on the Court, and I would order the money to be placed in the funds, and not invested in lands. Sir Joseph Jekyll always did so before the statute." So that it appears he considered that the statute, by making a charity incapable of taking lands, made no difference in the rule of construction, and I am willing to proceed upon that proposition. Then the question will [219] be, whether in this case any power of election has been given to the trustees *1. The older cases of those which have been before considered, as to the trustees having an election, appear to have turned on their being authorized to judge of the eligibility of the purchases of land to be made by them, which might enable them indirectly to decline to purchase altogether; but the later decisions, and particularly that of *English v. Ordl*, have gone on the principle that a bequest of personalty until land could be purchased, or an eligible purchase made (*Grieces v. Case*) is directory and not discretionary. In this case the testator recommends that his money shall be laid out in land. Now, if in ordinary cases not at all relating to charities the word "recommend" has been held to be equivalent to a command, and to raise a trust (and there are many cases wherein that expression has been determined to be imperative on executors) I cannot so distinguish this bequest to a charitable use, as to avoid the effect of those decisions. In *Pierson v. Garnet* the terms of the bequest are very strong; the testator bequeaths the residue of his personal property to Pierson, his executors, administrators, and assigns, shewing clearly that he intended to give him something absolutely, yet Lord Kenyon held that the subsequent words, "it is my dying request," that if the legatee should die without issue living, he [220] should make a certain specific disposition of it, were imperative, and created a trust, giving an interest which could not be disappointed; and he rejected altogether nice critical distinctions between "I recommend" and "it is my dying request;" holding that both expressions in effect, gave to words of entreaty a mandatory import; and other cases are there referred to in which similar decisions were made. In short, all the cases, excepting only that of *Cunliffe v. Cunliffe* (Ambl. 686), have ruled, that in the case of executors and trustees, words of recommendation, request, or desire, are imperative, and create a trust; and the reason why it was held not to have had that effect in that case was, that the first gift was of the absolute ownership of the property, and the devisee had power to diminish it *2 in his life-time. His Lordship then adverted very minutely to the case of *Malin v. Keighley*, which he considered quite conclusive on this point. He observed, that it [221] was impossible to read the sentiments delivered by that incomparable Judge, Lord Alvanley, without perceiving the infinite pains which he took to arrive at just conclusions. His words are, adopting the opinion of Lord Kenyon—"I will lay down the rule as broad as this; wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless

*1 His Lordship had observed, during the argument, that he much doubted whether Courts of Equity had considered the effect of the word "recommend" in Sir J. Jekyll's time, as they have since done.

*2 There is, besides, another distinction in the case of *Cunliffe v. Cunliffe*, even as shortly reported in Ambl., which takes it still further out of the principle on which the decisions in the conflicting cases proceeded, but it does not appear to have been adverted to in the reported arguments. There were in that case two annuities, one of them of considerable amount, charged on the property, bequeathed to Cunliffe; whereas, in *Pierson v. Garnet*, although there were annuities charged, the bequest to Pierson was expressly after the death of the annuitants; and in *Malin v. Keighley*, there was no charge upon the bequest. In *Frosmorton, decd. v. Bransford v. Hobday* (3 Bur. 1618), the Court held, that a charge upon a devise would give a fee, although there were no words of inheritance, a fortiori in a doubtful disposition of personal property it may be taken to have the effect of making absolute a gift which the words of recommendation might otherwise render conditional.

he shews clearly that his desire expressed is to be controuled by the party, and that he shall have an option to defeat it. The word 'recommend' proves desire, and does not prove discretion." In this case the word "recommend" comes precisely within that rule. As to the convenient time expressed in the recommendation, that means merely on a proper opportunity. Let us suppose that this was a bill filed by an heir-at-law, upon the recommendation to lay out money in freehold land at a convenient time, could any one doubt that the heir would be entitled to take the money as land? It is quite clear that he would. I do not consider that it makes any difference, that in this case the legatee happens to be a charity. This bequest is, within all the cases, clearly an express trust, and one which must be executed. Lord Alvanley says, in the case of *Malim v. Keighley*, "if a testator shews his desire that a thing shall be done unless there are plain express words, or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust." Now are there any such express words in this will as have the effect of leaving to the trustees a discretion? I certainly see none, and therefore [222] think the plaintiff has succeeded in this suit*. His Lordship then pronounced the following

DECREE.

Declare that the bequests in the will of Richard Dickenson, the testator in the pleadings named, both as to the money of the said testator, out at interest on mortgage, as also of the residue of his personal estate to charitable uses, as in the will mentioned, are void under the statute: and that such money on mortgage, and residue belong to the next of kin of the testator with the usual directions—costs up to the hearing to be paid by the executors out of the assets—subsequent costs, and further directions, reserved.

[223] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

BOWMAKER v. MOORE, SHIRREFF, AND TRELF. Monday, 10th May, 21st & 23d April 1819.—Where the defendant in an action of replevin entered into an agreement with the plaintiff to refer to arbitration a prior action of replevin between them, and then entered and standing for trial at the assizes, and also other matters in dispute between them, but not the second replevin suit:—and that all proceedings should in the mean time be stayed till the award should be made, and which was stipulated to be published by a future certain time, but afterwards further enlarged by the plaintiff and defendant, all without the concurrence or privity of the surety in the replevin bond, whereby, in point of fact, the suit was delayed, and the surety placed in a different situation by the delay which might have been prejudicial to him, whether it actually turn out to have been so or not—held to affect the conscience of the defendant in equity; and therefore the Court granted a perpetual injunction to restrain him from proceeding against the surety, on an assignment of the replevin bond, obtained upon a return of eloignment.

This cause was heard finally on the merits before the Lord Chief Baron at the last Sittings after Term.

Martin and Tinney, for the plaintiff, contended generally, that the defendant Moore, by having entered into the arrangement with Shirreff noticed particularly in the judgment hereafter, had discharged the plaintiff, Shirreff's surety in the replevin bond, by placing him in a different situation from what he would otherwise have stood in if the proceedings had not been so stayed. The arguments and authorities relied on were in substance the same as on the former occasion, when the question was discussed on the original motion (ante, vol. iii. p. 214), on the decision of which they now mainly relied; and they cited, as an additional case on the part of the plaintiff,

* His Lordship afterwards added, that if he were inclined to criticise the word "recommend," it might be carried to a great extent, amounting to a command, unless where the party were an entire stranger: and that it was much the safest course to abide by the plain words.

The Bank of Ireland v. Beresford (6 Dow. Rep. D. P. 233). They urged, that the ground of the decision on the motion, in the case of *Moore* [224] v. *Bowmaker* (2 Marsh. 81 and 392, and 6 Taunt. 379, S. C.) in the Common Pleas, and on the demurrer, was not founded in fact, as the surety had sustained an injury by the delay: and it had not occurred to the Court of Common Pleas that a bill would lie in equity to compel the landlord to proceed with the suit under the circumstances of this case.

Jervis and Roupell for the defendant Moore, insisted, as the principal point in their case, that the plaintiff was not placed in a worse situation by any part of the arrangement which had taken place between the parties, because they contended that the defendant Moore could not, under the circumstances, have obtained judgment in the action before Michaelmas Term, when he became entitled to judgment by virtue of the cognovit: and that all that had been done must necessarily have operated in favour of the plaintiff as surety in the bond, and could not in any respect prejudice him.

The Lord Chief Baron having stated that he should consider the case before he delivered judgment, observed that he was of opinion that the determination of this case on the former motion was right: and that there were several propositions in the case in the Common Pleas, as reported, to which he could not assent; and particularly that which assumed it to be necessary that the surety should be damaged by the change effected in his situation, before he could be considered to be dis-[225]-charged: for that it would be quite sufficient to discharge him, that he might possibly be injured by the change.

Cur. adv. vult.

RICHARDS, Lord Chief Baron, now delivered judgment:—

There have been already two decisions on the points in this case in different Courts, and certainly the judgment of the Court of Common Pleas (*a*) is quite at variance with that of this Court (ante, vol. iii. p. 214). It is very extraordinary that the determination in the Common Pleas was not cited or adverted to when the matter was argued on the original motion for this injunction, which the Court of Exchequer thought proper to grant.

[Here his Lordship stated the case very fully.]

The question now before us is really therefore in effect, whether under the circumstances of this case (which are certainly very peculiar, and such as I have never met with before) the Court of Common Pleas have determined rightly in deciding that at the time when the action was brought in that Court the present defendant, the plaintiff at law, had a right so to proceed against the complainant in this suit.

[226] Now it is most material to observe, that even at common law, it was always the duty of the party who sued the replevin to prosecute his suit, and the sheriff ought to take pledges of prosecution (F. N. B. 68). At length, by the statute of Westminster 2 (13 Edw. I. c. 2, s. 3), it was provided that sheriffs should, from thenceforth, not only receive of the plaintiffs pledges for the pursuing of the suit, but also for return of the beasts if return should be awarded. Then by the 11th of Geo. II. c. 19, s. 23, sheriffs were empowered and required, in every replevin of a distress for rent, to take in their own names from the plaintiff, and two responsible persons as sureties, a bond, in double the value of the goods distrained, conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained in case a return should be awarded, before any deliverance be made of the distress.

The suit so to be prosecuted, as we all well know, is carried on in the first stages in the Sheriff's Court, and may be determined in the inferior court; but that is now so very seldom done, if ever, in practice, that I cannot attach any consideration of importance to the fact of the cause having been removed by the defendant, for it being almost a mere formality and of course, so to remove such actions by the writ of *accedas ad curiam*, it can have no effect in determining this case. The [227] cause was certainly removed in point of fact, and it is said by mistake, and through forgetfulness of the engagement. The course is, on the removal of the cause, that the parties must begin again in the superior Court, and declare *de novo*, and the declaration must be delivered by the plaintiff, or if he do not deliver it in due time, the defendant may sue out a writ *de retorno habendo*. It should also be observed that it is clearly a

(a) *Moore v. Bowmaker*, 2d Marshall, 81 and 392, and 6 Taunt. 379.

local action in whatever place the beasts or goods may have been taken, or to whatever place they may be afterwards driven or removed.

The material facts of this case are, (and the dates are very important to be attended to) that Shirreff occupied a farm of Moore's as his tenant, under an agreement entered into between them on the 13th July, 1810; that afterwards the rent becoming in arrear the plaintiff, on the 3d of February, 1814, executed a replevin bond to the Steward of the Liberty of Bury St. Edmunds, as co-surety with another person (the defendant Trelfs) for the return of the goods of Shirreff, the defendant Moore's tenant, which he had distrained on the 19th January, 1814. The bond contained the usual condition. There was at that time another prior replevin cause pending between the same parties, which stood ready to be tried at the then ensuing Spring assizes for Suffolk, having been in due time entered for trial. On the 23d of March, the defendant Moore entered into an agreement with his tenant (without the consent or knowledge of the plaintiff in the present suit) to refer matters in [228] dispute between them to arbitration, the tenant (the defendant in the action, on the replevin bond) giving him at the same time as part of the arrangement a cognovit in the first replevin suit, authorizing him to enter up judgment of non pros, unless he should pay the rent, for which the first distress was made by the first day of Michaelmas Term following. Under these circumstances they entered into that agreement of the 23d of March, and its terms are very material. They are, that all differences then subsisting between Shirreff and Moore, touching the following matters, that is to say, the construction of the agreement of the 13th July, as to the time of payment of the rent, and the covenant of the defendant Moore, the landlord, to keep the buildings in repair, which he was charged with having broken, should be referred to arbitrators, whose award was to be conclusive, and to be made on or before the 23d of May then next, or such further time as they should require, not exceeding the 24th of the next June (and that limitation of time it is very important to keep in mind) the costs of the replevin and of the reference to be in the discretion of the arbitrators. Then they are directed as to what particular subject matters they are to proceed to arbitrate upon, &c. and then comes a clause providing that they shall have power to arbitrate on the matters aforesaid only, and none others then depending between the parties. The agreement then concludes with a clause, that nothing therein contained shall be construed so as to prejudice the distress made by [229] Moore on the 19th of January, 1814, (the second distress) or to discharge the sureties of the defendant Shirreff in the replevying of such distress. And pending the reference, it is agreed (which is a very material part) that no proceedings shall be taken in the action of replevin upon such distress. The agreement therefore notices the second distress now in question, but that was not then ready for trial, nor were any proceedings had in the Steward's Court.

The bond entered into by the plaintiff was in the usual form. The award we have seen was originally to have been made by the 23d of May, or some other day not exceeding the 24th day of June; but the parties, without the privity of the plaintiff, enlarged the time till the 10th of July, 1814. Moore removed the plaint on the 24th of April into the Court of Common Pleas: he did therefore proceed pending the reference; but as he admits that it was by mistake, that proceeding must be considered as not having taken place. On the 7th of July the award was made. Then, on the 20th of August following, the defendant Shirreff confessed the second action of replevin, but judgment was not to be entered up till the first day of the following Michaelmas Term. The rent not being paid in the mean time, the defendant Moore, having entered up judgment in the former action, and levied on the tenant Shirreff's goods for his whole demand, afterwards entered up judgment also on the confession in the second action of replevin; and the High Steward of the Liberty having re-[230] turned an eloignment to the writ of retorno habendo, Moore procured an assignment of the bond, and brought the present action against the plaintiff, and he then filed this bill, on the ground that he was discharged from his obligation as surety for Shirreff in consequence of what had taken place, as has been already stated between Moore and him without his privity, on the equity that the plaintiff was thereby placed in a different situation from that in which he would have been if the arrangement made between the litigating parties had not taken place, and that such arrangement might have operated to the plaintiff's disadvantage.

It certainly appears that the Court of Common Pleas thought that that circumstance was no objection to the action against the plaintiff; but they admitted the law

to be, that if by any arrangement entered into between the obligee and the principal, the surety would be placed in a different and disadvantageous situation, it would have the effect of discharging him by virtue of the rule originally adopted from the courts of Equity, but now considered to be established law, as it must be held to be in every Court in Westminster Hall. The question was again brought before the Court of Common Pleas, by demurrer, on which occasion they seem to have considered that the rule could not operate in this case as in that of bail: because the sureties in a replevin cannot, like bail, at all times interpose in the suit, and because the sureties in this case had not been in point of fact prejudiced by the delay.

[231] The same question afterwards in an application for an injunction came before this Court upon the same facts, and the then Lord Chief Baron whose great patience of investigation and learning we all well remember, was clearly of opinion that the injunction ought to be granted to restrain the action under the circumstances then disclosed, on the ground of the tenant being prevented by the act of the landlord from doing that for which his surety undertook. I much lament that the Court of Common Pleas was not upon either occasion apprized of that decision in this Court.

Several points have been suggested in argument against the plaintiff's equity. It has been said, that if the judgment confessed in the second action of replevin, were by collusion, and a fraud upon the surety, that would have been a ground for setting it aside. There does not however appear to have been any fraud: for none is proved. The cognovit, on the contrary, did not accelerate the judgment, nor did it give the defendant in the replevin more than his due: and the sureties having no controul over the action against their principal, could not do any thing in it.

The real and only question in the case is, whether the surety was, in point of fact, placed in a different situation, by what had taken place on the arrangement between the principal and the obligee, and whether by such change of situation he might have been prejudiced, not whether he did in fact actually sustain any injury in consequence.

[232] A creditor taking a surety is bound to notice the nature of his engagement, and to protect him. The surety is entitled to every advantage which the principal would have had under any circumstances. Then has this agreement to refer these disputes any such effect? The object of that reference was certainly confined to the first replevin, but it reached the second in its consequences. The allowances claimed by Shirreff might have lessened what was due to Moore on the second distress. The surety might be benefited by proceeding according to the condition of the bond, but could not be injured. The award too was originally to have been made by the 24th of June, and if it had been then made the situation of the surety might not have been altered by the agreement. There is a stipulation that nothing in the agreement shall prejudice the distress of the 19th of January, but if it might have such an effect, that alone would be sufficient in equity to discharge the surety, and by last clause of the agreement no proceedings were to be taken in the action of replevin upon the distress. It was urged for the defendant that he is not the obligee of the bond; that there was no privity between him and the plaintiff; and that nothing which passed between the defendant and Shirreff could affect him; but I think, that although there was no direct privity between them, for the present purpose it amounted to the same thing, and that he was in substance the obligee, as he would have a right to an assignment of the bond if the condition were broken, and the sureties were intended for his benefit and protection, and they are so considered at law. One object of the [233] bond was, the due prosecution of the proceedings, and they were stayed by the act of Moore. When Bowmaker entered into the bond, it was probably on the faith of the implied contract, that the proceedings should not be delayed, and he might have calculated on his principal continuing solvent for a given time, during which there would be no risk. If so, a procrastination might have been extremely injurious to his interests, and that was a very probable consequence of Moore's agreement with Shirreff. Yet Moore stipulates for a delay which might indeed benefit Shirreff, but not his surety, whose benefit Moore was also obliged to regard, and he might say *non habet in fœderis veni*. I am not at liberty in such a case to enquire whether any inconvenience did actually arise to the plaintiff in consequence of the agreement between Moore and Shirreff; for if the plaintiff was discharged by any thing which took place between them, he was discharged at the time when the agreement was entered into between them. The defendant in the replevin suit could not have moved till the 24th of June by the terms of the agreement. At that time even, however, he might perhaps have

proceeded to trial at the ensuing Summer assizes: and if he had so proceeded I might have felt more difficulty in the case; but the time for making the award was afterwards enlarged by Moore till the 10th of July, when the Term was over, and no trial could be had till the next Spring. There was therefore, in fact, a difference made in the situation of the surety by the delay occasioned by the arrangement between the principal and the obligee, and whenever that be [234] the case, and the surety may possibly be prejudiced by such delay and change of situation, it is my opinion, whether right or wrong, that it affects the conscience of the obligee, and operates to discharge the surety. I must therefore decree

A perpetual injunction.

I cannot in this case give costs.

HEWITT, GENT. v. FERNELEY. Wednesday, 12th May 1819.—The Court will not stay the *postea* in the hands of the associate, for the purpose of having an attorney's bill on which an action has been brought, and a verdict recovered, referred for taxation, and to be endorsed according to the *allocatur*, where the Jury expressly found a "verdict for the plaintiff for the amount of his bills, subject to taxation."—They discharged a rule which had been obtained to shew cause why such an application should not be granted with costs.

Jervis, on a former day, had obtained a rule on behalf of the defendant, calling on the plaintiff to shew cause why his bills of costs should not be referred to be taxed, the *postea* to remain in the hands of the associate in the mean time, and to be endorsed according to the Master's *allocatur*—proceedings to be stayed. He obtained the rule on an affidavit, stating that the present action had been brought for the recovering of 576l. 7s. 11d. the amount of certain bills of costs delivered by the plaintiff to the defendant, for business done; that the defendant objected to three of them to the amount of 334l. 17s. 6d. and that on the trial the Jury returned the following verdict by their foreman, "We find for the plaintiff for his bills, subject to taxation."

The affidavit added, that no investigation, as to the correctness of the charges, took place in Court, [235] the Lord Chief Baron having ruled that that could not be done on the trial.

Parke now shewed cause. An attorney may bring an action for the recovery of his bill of costs before taxation, the only preliminary required by the statute (2 Geo. II. ch. 23, s. 23) being, that he deliver his bill signed a month before; but the act has not required that it should be previously taxed. It is laid down in Tidd, (page 324, (6th ed.), to be the rule, and the cases have established it, that an attorney's bill cannot be taxed on the trial of an action brought upon it, nor after verdict—*Williams v. Frith* (Douglas, 198), *Hooper v. Till and Wife* (ib. 199), *Clarke v. Taylor* (Barnes, 124): and the reason is obvious, because the attorney being obliged by the act, to deliver his bill a month before the action, the defendant is precluded if he do not procure it to be taxed in the mean time, *Anderson, Administrator, v. May* (2 Bos. & Pull. 237).

On the point of the special finding, he submitted that the Court always rejected conditions annexed by Juries to a verdict for a sum certain, as in the case of *Taylor v. Wiles* (Cro. Car. 219), where, on non assumpsit, the verdict was for 33l. 6s. 8d. "if by law it may be," the Court held, that what was found after the amount of damages was void.

Jervis, in support of the rule, contended that the verdict must be taken as found; in this case [236] the special finding being quite consistent with law, whereas in the case cited it was not. Had the verdict been for the amount of the plaintiff's bills, without that qualification, the defendant might perhaps have been bound, but that he would not admit; because, in the case which had been cited from Douglas, judgment had been suffered by default, but there is no authority establishing that such a qualified verdict, delivered on a trial, may not be taken, and it ought to be abided by. In effect, it was nothing more than the common case of a verdict passing for a plaintiff, subject to a reference. To have referred the bill before would have admitted a liability.

RICHARDS, Lord Chief Baron. We are of opinion that it would not be safe to grant this application after verdict. We should be giving a defendant an opportunity

of taking his chance of a trial, and afterwards permitting him to come to the Court to reduce the quantum found. There is nothing in the distinction of the decisions cited having been verdicts on judgments by default: or if there were any, it would rather operate against the argument: because a verdict after trial is of a higher and more conclusive nature.

GRAHAM, Baron. I am clearly of the same opinion; there should certainly be every possible check imposed on the conduct of attornies; for the courts in which they practice are in some degree responsible for their conduct; but I think with Lord Mansfield, that when a verdict has once es-[237]tablished the client's liability, it would be dangerous so to qualify it as is now attempted.

WOOD, Baron. I am also of the same opinion; it would be attended with most mischievous consequences if we should grant this motion. We have no authority so to change a verdict.

GARROW, Baron. The law is sufficiently jealous of the conduct of professional men, and has provided many wholesome regulations as checks upon their conduct, but we are not to carry that jealousy so far as to say we will not allow them the benefit of a verdict found for them by a Jury. I consider that a verdict so found is not less conclusive than a judgment by default.

Per Curiam. Rule discharged, with costs*.

[238] THE KING v. HARVEY. On an immediate Extent in Chief. Wednesday, 12th May 1819.—The Court will not grant a new writ of extent of the date of a former tested several years before (between 8 and 9 in this case) on the ground that the defendant has been since found to have been further indebted to the Crown, and to have had at the time of issuing the first extent, property not then known to belong to him, and though his goods and chattels seized and sold under that writ, produced only so much as would satisfy but a very small part of the Crown's original debt.—But a new writ of present teste should be issued, which may be done at any time on application to a Baron, where, while the Crown debt be unsatisfied, the defendant becomes possessed of newly-acquired property.

Clarke moved for an order for leave to issue a new writ of extent of a former teste (the 28th November, 1810) on an affidavit, stating the issue the writ of that date for the sum of 900*l.* due from the defendant to the King, for the amount of property duty and assessed taxes, received by him from the parish of which he was collector: that on the 4th of January, 1811, an inquisition was held, finding the defendant possessed of certain goods and chattels of the value of 299*l.* 15*s.* which the sheriff seized; that after the issuing of the extent it was discovered that a further sum of 883*l.* was also due from the defendant to the Crown, which still remained unpaid; and that since the holding the inquisition, it had been ascertained that the defendant, at the time of issuing the extent, was interested in certain leasehold estates, which had not been seized into the King's hands.

It was suggested that the motion had for object the over-reaching a fraudulent conveyance.

But the Court refused the application; for that it would be attended with very mischievous consequences if the Court should grant such an order; as it would have the effect of bringing before a [239] Jury all the circumstances relating to the transfer of the property after so long a period, to the probable prejudice of bona fide purchasers.

On application being then made for a writ of the present date, they said that that would be granted of course out of Court by a Baron; for while the King's debt remained unsatisfied, a new extent might at any time be had without motion, if the defendant should subsequently have acquired any other property.

Nil.

JARDINE v. HAYES AND BONNEY. Saturday, 15th May 1819.—The affidavit of service of subpoena on a bill filed for obtaining an injunction, to stay process at law, in this Court, served on the attorney of the plaintiff at law, must state

* An affidavit was put in, denying the terms of the special finding; but the Court, as it appears, did not proceed upon that.

positively that neither the attorney nor his client knew where to find the defendant, nor where he might be served with the process, or it will be considered insufficient on a motion for that purpose, however full it may be in all other respects.

An injunction was moved for on an affidavit, made by the plaintiff's attorney, which stated that the defendants having recovered a verdict for damages, on which they had entered up judgment, and had brought actions against the bail; that a bill was filed on the 28th of April last, in this Court, for an injunction to restrain further proceedings in the actions both against the principal and the bail; that on the 13th of this instant, May, the deponent applied to the defendant's attorney in the actions at law, and tendered him a subpoena, and enquired of him, if he would appear for the defendant Bonney, when he said that he had received no instructions to appear, and therefore should not: and that he [240] also refused to inform the deponent where the said defendant was to be found, or whether he knew him personally or not.

The Court refused the motion, because the affidavit was insufficient, in not stating as the practice of this Court requires, that neither the deponent nor his client knew where the plaintiff was to be met with, nor where he might be served with the subpoena.

Nil.

[241] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

NOEL AND OTHERS v. LORD HENLEY AND OTHERS. Monday, 10th May 1819. Gray's-Inn Hall, 13th and 14th January. Exchequer Chamber, 3d and 4th Feb.—Construction of Will. Devise of testator's real estates in A., derived from the bounty of a collateral branch of his family to trustees upon trust to sell, to pay off two mortgages on another real estate inherited from his ancestors in B. and devised by his will in strict settlement—and to pay to his wife 5000l. in part satisfaction of 10,000l. secured to her by their marriage settlement out of certain trust funds—and to pay a legacy of 3000l. to a legatee, one of the present plaintiffs, (he being also one of the devisees of the residue of the money to arise by the sale of the said real estate), as soon as sufficient monies should have arisen by the said sale, and after satisfaction of the payments in the will before directed to be made thereout, the legacy to carry interest from the testator's death—and also to pay such part of such other of his just debts and of the other pecuniary legacies by him thereafter given and bequeathed, or which he should give or bequeath, as his personal estate not thereafter specifically bequeathed and the personal estate bequeathed to him from the same source as the first mentioned real estate, should not extend to pay and satisfy: and after such payment to invest the same in government securities in their (the trustees) names, in trust to pay the dividends in a certain prescribed manner for the benefit of the plaintiffs and their families: and, after giving various other pecuniary legacies, he directed that all the legacies given by him should be paid in full, without any deduction for the legacy duty, and (where no time had been mentioned for their payment) within twelve calendar months—he then gave all the residue of his personal estate to his wife whom he appointed executrix, and he made the trustees executors of his will—the testator's wife died in his life-time:—Held, that the trust, for the payment of those particular debts and legacies out of the real estate devised to be sold, was not a general exemption of the personal estate to the extent of their amount, in all events: but that it was only a partial exemption, on behalf of the person to whom he had bequeathed the residue (his wife): and that that bequest having lapsed, the residue of the personal estate was no longer exonerated in favour of the next of kin, but had again become chargeable with all the burthens, to which personalty is primarily liable, viz. the personal and proper debts of the testator, and legacies not otherwise provided for—once more exonerating the devised estate, in favour of the trust on behalf of the residuary legatees.—It was therefore declared that the mortgage on the estate in B. should be paid off out of the personalty, and that the other (which was an incumbrance on the derivative estate in A. before it became the testator's property) should be paid out of the produce of that estate: that the 5000l. which had lapsed was not a resulting trust

for the benefit of the heir-at-law, but was (as well as the payment of the mortgage debt which was not originally the proper debt of the testator) a simple charge on the devised estate, which might be discharged by the devisees: and that it was not obligatory on the trustees to sell the devised estates absolutely in the first instance.—Real estate being devised in trust to sell at such time or times after the testator's decease, as should seem most advisable, either together or in separate parcels, by auction or private contract—the trustees to stand possessed of the produce of the sale, and the rents and profits accruing in the mean time upon the trusts of the devise.—Held not to invest the trustees with an unqualified discretion in respect of the sale, or to entitle them to retain the accumulation of the mesne rents and profits to answer the exigencies of the will; but that the residuary cestuis que trust were entitled to receive their respective proportions of the accruing rents and profits from the end of the year after the death of the testator, on the principle of the rule laid down in the case of *Sitwell v. Barnard*: the words “as should seem most advisable,” being held to be equivalent to the phrase, with all convenient speed.—A legacy bequeathed to be paid out of the rents and profits, and the produce of sale of a real estate devised to be sold for the payment of such legacy inter alia being in a subsequent part of the will directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty.—Held, that the duty on that particular legacy must be paid out of the same fund, and not out of the personalty, the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund.—Practice. If the testator's personalty be clearly more than sufficient for payment of the debts, legacies, funeral, and other expences, &c. so that there be no occasion to resort to the produce of the estate devised to be sold for the purpose of creating a subsidiary fund for the exigencies of the will, the Court will proceed to decree execution of the trusts in exoneration of the fund, without waiting for a final report, which would, in strictness, be necessary, or until all the devised property should be sold.

[S. C. Daniell, 211. Varied, nom. *Noel v. Noel*, 1823, 12 Price, 214. Discussed, *Louch v. Peters*, 1834, 1 My. & K. 489; *Attwood v. Small*, 1835-S, 6 Cl. & F. 232; *Attorney-General v. Giles*, 1860, 5 H. & N. 255. Referred to, *In re Turnbull*; *Slipper v. Wade*, 1905, 1 Ch. 726.]

The plaintiffs, who were beneficially interested under the will of the late Lord Wentworth, filed [242] the present bill against the trustees under the will—the heirs at law—and the next of kin of the testator, for the purpose of obtaining a declaration of the trusts, and a decree for their being carried into execution.

The bill charged that the testator by his will (dated 8th June, 1815) had devised to trustees (the defendants, Lord Henley and Sir J. Burgess) all his real and personal property, the first of which consisted of two distinct estates, and which, for the sake of distinction, may be called shortly his Leicestershire estate, and his Rowney estate, the former being his own estate of inheritance (and which he had devised by his will in strict settlement), and the latter derived to him from the Rowney family. That latter estate he had by his will devised to the trustees upon the trusts in question, as follows: as to such of [243] his real estates as he had power to dispose of under the marriage settlement, or will, or as the heir at law of Thomas Rowney—in trust to sell, at such time or times after his (the testator's) decease as should seem most advisable; either together or in separate parcels, and at one or several times, &c., either by public auction and sale, or by private contract, as should appear most advantageous: and they the said trustees were to stand possessed of the monies to arise therefrom, and of the rents and profits in the mean time upon the following trusts:

First, to pay off a sum of 2000l., charged on some part of the said estates, and which sum was a charge upon the Rowney estate by mortgage before it became the property of the testator; 2dly, to pay off a sum of 20,000l., described by the will, to be then due and owing and secured to Mary the widow of Lord R. Manners, by mortgage of part of the testator's Leicestershire estate, and all interest thereon up to the time of payment; and, 3dly, to pay the sum of 5000l. to the testator's wife, in part satisfaction of 10,000l. secured to her by their marriage settlement out of certain trust funds: and the sum of 3000l. to the plaintiff Noel (both to be paid as soon as sufficient monies should have arisen by the said sale, and after satisfaction of

the former payments therein before directed to be made thereout, and to carry interest from the testator's death), and also to pay such part of such other of his just debts, and of the other pecuniary legacies by him therein after given and bequeathed, or which he should give or bequeath, as his personal estate not therein after specifically bequeathed and the personal estate of the said Thomas Rowney should not extend to pay and satisfy. And, after such payments, the trustees were directed to invest the residue in government securities, in their names, in trust to pay the dividends and annual proceeds of one moiety thereof to the plaintiff Noel for life, and after his decease to pay his wife an annuity of 200*l.*, and transfer the said moiety to his children, to vest when they should become of age or marry, subject nevertheless to the appointment or will of Noel, with other especial directions as to the manner of such children taking. And as to the other moiety (and also the first mentioned moiety, if there should be no children of Noel to take it), to pay the dividends to such persons as the plaintiff Anna Catherina, the wife of the plaintiff Biscoe, should appoint; or in default thereof to her own use; and after her death to pay the moiety to her children, subject to an annuity to Biscoe, in nearly the same way as the other moiety had been directed to be paid to the children of Noel, excepting only their eldest son, who was excluded from any share; and in case there should be no children living of either, the whole of the residue to arise by such sale was, with all convenient speed, to be laid out and invested by the said trustees in the purchase of freehold estates in fee, in England, as near as possible to the testator's other estates, to be settled to the same uses, and upon the same [245] trusts as the testator's Leicester and Warwick estates comprised in his marriage settlement, or such of them as should at that time be capable of taking effect: the produce of such stock, in the mean time, to be paid to the persons who would be entitled to the profits of the estates if purchased. Then after giving other pecuniary legacies, the testator directed that all the legacies given by him should be paid in full, without any deduction for the legacy duty; and all legacies in respect of the payment of which no time had been mentioned, were directed to be paid within twelve calendar months. He then gave all the rest and residue of his personal estate and effects whatsoever, which should exceed the payment of his debts, not otherwise provided for, legacies, funeral, and testamentary expences, to his wife; and he appointed her and his trustees executrix and executors of his will.

The bill then stated, that the testator died in April, 1815, having survived his wife, leaving certain of the defendants his next of kin—that his personal estate was, exclusive of such parts thereof as had been specifically bequeathed, more than sufficient for the payment of all his debts, and for which the real estates were not made the primary fund, his funeral and testamentary expences, and his pecuniary legacies, and the residuary bequests of the purchase-money arising from the sale of the real estates given in moieties as aforesaid—that the plaintiff Noel had six children between the ages of sixteen and four years; [246] and Catherina Biscoe had nine children, besides her eldest son, two of whom (daughters) had attained the age of twenty-one years, and the rest were infants from sixteen to four years old.

The plaintiffs then charged, that it was the duty of the executors to proceed to sell the lands, and perform the trusts of the will—that until the sale and investment of the purchase-money, the trustees ought to pay one moiety of the rents and profits of the real estates directed to be sold, accruing from the death of the testator, to plaintiff Noel; and the other to plaintiff Anna Catherina Biscoe, after having paid thereout the interest on the charges and incumbrances thereon—that a competent part of the testator's personal estate ought to be appropriated and applied in payment of the legacy duty, attaching upon the residuary bequest of the purchase-money to the plaintiffs and their children; but that the trustees acting in concert with other defendants (the testator's next of kin), had refused to do so; and that the executors declined to proceed to a sale of the said estates without the direction and authority of this Court.

The bill then having suggested that the defendants, the next of kin, pretended that the plaintiffs were not entitled to the rents and profits of the estates directed to be sold, except they should not be sold within a reasonable period after the testator's death—nor to call upon the next of kin to pay the legacy duty on the said residuary bequest out of the testator's personal estate; but that it ought to be deducted from the said bequest—charged the contrary, and prayed a decree accordingly.

The defendants Lord Henley and Sir J. B. Burgess, by their answer, submitted the questions of the right of the parties to the judgment of the Court, and particularly

whether any duty was payable on the residuary bequest under the 45th Geo. III. : and if so, whether that bequest were a legacy within the meaning of the exonerating clause of the will. They stated that they had very considerably reduced the amount of the testator's personal estate, by having made large payments to the next of kin, which had rendered it insufficient to satisfy the 2000*l.* and 20,000*l.* : and submitted that therefore it had become necessary that a sale of the estates should take place as soon as possible for their indemnity, more particularly as landed property had become considerably decreased in value ; and that they ought to be permitted to retain the rents and profits until the same should be sold.

The cause came on to be heard on the 29th April, when

Martin and Newland appeared for the plaintiffs, and

Fonblanque and Belt for the defendants, the trustees and executors.

[248] Dauncey, Wingfield, Shadwell, and Lovat, for the heirs at law and next of kin.

West, for the infants interested under the will, and

Longley, for defendants to a supplemental bill.

The Court having decreed the will to be established and the trusts to be performed, referring it to the Deputy Remembrancer to make the necessary enquiries, and take the usual accounts : the Deputy Remembrancer on the 18th December, 1818, made his report, and the cause now came on for further directions.

January 12.—Fonblanque and Belt for the trustees, objected in limine that the Court could not proceed on the present report, till all the estates devised for sale should be sold ; and they submitted that the only regular course was to move for leave to make a separate report, or for a reference to ascertain whether it would be proper that any part of the estates not yet sold should be sold ; but on that

The Lord Chief Baron observed, that although the objection was a proper one on the part of the trustees, and that the course suggested would have been the more regular proceeding, he still hoped that the objection might be overcome : for, as in this case, it was quite clear that the money already brought into Court, arising from the sale [249] of such part of the estates as had been sold, was more than sufficient to pay all the incumbrances, debts, legacies, and expences (and if there were not, nothing could have been done even on a separate report) ; and as therefore no mischief could arise from proceeding without the final report, he would not put the parties on an objection of mere form to the inconvenience of so long a suspension of the good effects, to all the persons interested in the property, of discharging it from the burthen of debts and legacies : and there being enough in Court for that purpose, he should consider himself at liberty to order that the Deputy Remembrancer go on with the decree, which could however be suspended from time to time, on application to the Court, as often as there might be reason for it, looking only to the exigencies of the will.

Martin and Newland for the plaintiffs, then submitted to the Court, that the plaintiffs who were tenants for life of the trust funds, were by the express words of the will, and on the principle laid down in the case of *Sitwell v. Bernard* (6 Ves. 520), entitled to the rents and profits of the devised estates till sale ; for they contended that, from the language of the will, it was clear that the testator intended to benefit the plaintiffs Noel and Anna Catherina Biscoe very largely : that the words of the bequest shewed that the legacy of 3000*l.* was to be paid out of the general pro [250] duce of the estates, whether that were the produce of the sale, or of the rents and profits, the legacy having been declared to be intended to bear interest from the testator's death ; and such interest must necessarily arise from the rents and profits. In *Sitwell v. Bernard* the rule is laid down decisively, that where a residue is given after various legacies, those legacies shall be payable at the end of a year from the death of the testator : the Chancellor there holding that convenience was to be called in to aid the construction of wills, as to the commencement of the period of enjoyment by the tenant for life ; that the beneficial enjoyment is not to be postponed by the accidental difficulties, which, in most cases, present themselves to impede the early execution of wills, and the putting the property, of whatever nature it be, into a disposable state : and that, where that could not be done for any time, the end of the year is to be taken as the period at which it is to be rendered beneficial. There being therefore nothing in the will indicative of any intention on the part of the testator that the surplus rents and profits of the estates, devised to be sold, should accumulate to form an aggregate fund, they urged that the plaintiffs Noel and Biscoe were entitled to a proportion of

the rents and profits, if not from the death of the testator, at least from the end of the year after.

Fonblanque and Belt : Benyon, Pepys, and Longley, contended, on the other hand, that the present case was distinguishable from *Sitwell v. Bernard*, [251] because there the direction was imperative that the trustees should lay out the residue, with all convenient speed, meaning as speedily as possible ; whereas here the testator had given them a full discretion by the words at such time or times, and in such manner as they should think most advantageous ; and here also they had duties to perform, which rendered it desirable that they should augment, as much as possible, the produce of the estates devised to meet those duties. They urged therefore that the plaintiffs were not entitled until an actual sale should be effected, and in the mean time the rents and profits ought to form a fund in the hands of the trustees to answer the exigencies of the will.

[Lord Chief Baron. I think the words "with all convenient speed," not in substance distinguishable from the directions given in this will.]

Martin having replied,

The Lord Chief Baron stated that (without intending at present to give a final opinion on the question) he considered this case to be within the rule of *Sitwell v. Bernard* ; and that it is the duty of Courts to carry into execution, as far as they can, the directions of the testator, according to what may be collected from the language of the will. The words (said his Lordship) in this devise, directing the estates to be sold "at such time or times after the testator's decease, as to the trustees should seem most advisable," I consider as equivalent to, "with all convenient speed," and [252] the immediately subsequent words, do not alter the sense ; they only give authority to sell either by public auction or private contract. I admit that the direction that they should stand possessed of the rents and profits until sale is strong ; but the question is, whether it is strong enough to get rid of the rule as laid down in *Sitwell v. Bernard* ! The Court in that case put a construction on similar words, and I hold myself bound to defer to the authority of that decision ; for there should prevail an uniformity in legal determinations. The convenient rule is there laid down to be, that the beneficial enjoyment should commence at the end of the year from the death of the testator ; and the Court in that case avowedly overlooked such words as those which follow here, where they were inconsistent with the testator's apparent general intention. In the case of *Gaskell v. Harman* (6 Ves. 159), Sir William Grant took great pains to shew that the particular words of the will necessarily excluded the operation of the rule in that instance. The case of *Sitwell v. Bernard* was extremely well considered, and established—upon a review of the several authorities of *Hutcheon v. Mannington*, *Entwistle v. Markland*, and *Stuart v. Bruere*, (and indeed all the cases were there brought under consideration)—that the rule of convenience must prevail in directing the proper period for the payment of legacies ; and that that is generally the end of the year. Lord Eldon, in that case observes, that the decisions of both Lord Thurlow and Lord Rosslyn as to time im-[253]pose difficulties upon him ; but he agrees as to the principle : and I entirely concur with every word of Lord Eldon's judgment in that determination. At present therefore I am strongly inclined to be of opinion that the tenant for life is entitled to the rents and profits which he claims ; but I will reserve my final determination till Friday.

Wednesday, January 13.—Martin, Benyon, Newland, West, and Longley, now submitted, that the 3000*l.* given to Noel was a legacy, and that the bequest of the residue of the produce of the sale of the Rowney estate was also a legacy, and that the duty on them being directed by the testator to be paid, it ought to be paid out of the personal estate, which is always to be considered the primary fund for that purpose.

Dauncey, Wingfield, Shadwell, and Lovat, for the heirs at law, who were also of the next of kin, and others of the next of kin, who were not heirs at law, contended that the personal estate was not liable, but that the duty should be paid out of the real estate.

[The Lord Chief Baron. The legacy duty is a charge upon the legacy, not upon the estate ; but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund.]

It was then contended, on the part of the [254] plaintiffs, that the principal and

interest due on the mortgage of 20,000l. (which was originally a debt due from Lord Wentworth) and on that of 2000l. (by which the personal estate of Lord Wentworth had been benefited to that extent) ought to be paid out of the personal estate, and also the legacy to Mr. Noel of 3000l.: and that the bequest to Lady Wentworth having lapsed by her death, it should go to the persons entitled to the fund out of which it was to have been paid, and not to the next of kin as personal estate undisposed of by the will.

On the first point it was urged, that no exoneration of the personal estate was intended by the testator; or if there was, it was only a partial and particular exoneration for the benefit of the widow, the residuary legatee: and she having died before the testator, the intended exemption of the personal estate failed, which therefore would again become liable to the burthens to which by law it was subject; and the testator must be taken to have died intestate as to that: and in that respect this case was said to come within the principle of the decisions in *Pickering v. Stamford* (3 Ves. 332), *Waring v. Ward* (5 Ves. 670), *Hale v. Car* (3 Bro. C. C. 322), and *McLeland v. Shaw* (2 Sch. & Lef. 538): for in this will there are no words shewing any intention to throw these particular burthens on the real estate, or to make that the primary fund for the payment of the specific debts.

[255] On the other hand it was insisted for the heirs at law and next of kin, that the testator intended the Rowney estate to be applied in all events in discharge of the 2000l. and the 20,000l., and interest, and also of the 5000l. and the 3000l., which are directed expressly to be paid "thereout"—that it was the residue only, minus all those sums, that was intended to go to the devisees—that the personal estate was, for the benefit of the next of kin, exonerated to the extent of those debts and legacies, and that it was plain from the declaration of the testator, that the residue of the personal estate of Thomas Rowney should be considered as his (the testator's) personal estate, and not as land:—that he intended, by the disposal of it, to augment his personal estate, and to such an intention the Courts have always given effect; for which they cited the authorities of *Williams v. The Bishop of Landaff* (1 Cox, 245), *Hawcor v. Abbey* (11 Ves. 179), *Gray v. Minnethorpe* (3 Ves. 103), *Burton v. Knowlton* (3 Ves. 107), and *Brummel v. Prothero* (7 *ibid.* 121), all which cases were submitted much more nearly to resemble the present than either *Waring v. Ward*, or *Hale v. Car*; for in the former of those cases there was no exemption, and in the latter the question was not raised.

[Those cases however his Lordship distinguished as turning on the intention; whereas the present was a case of intestacy as far as regarded the question before the Court.]

[256] As to the 5000l., said to be lapsed, they contended (if not also as to the other sums charged on the real estate), that if it should be held that there was a failure of those gifts altogether, it would be a resulting trust for the benefit of the heir at law; citing *Arnold v. Chapman* (1 Ves. sen. 108), *Cambridge v. Rous* (8 Ves. 25), *Hutchison v. Hammond* (3 Bro. C. C. 128), *Ackroyd v. Smithson* (Bro. C. C. 503), and *St. Barbe Tregonwell v. Sydenham* (3 Dow, Rep. D. P. 194).

It was besides contended that, if the Rowney estate should not produce money enough to pay the mortgages, the legacies given out of that fund could not have been demanded out of the personalty: and, on the other hand, the gift of 5000l. having lapsed, the residuary devisee could not take that as part of the residue: and therefore that proportion, at least, of the whole of the real fund, if it might be so called, must go to the heir at law, as being an undivided part of the real estate.

It was also much urged, that it appeared on the face of the will that the testator meant not only a benefit to his widow by increasing his personal residue out of the Rowney estate, but also to the takers of the Leicestershire estate, and whomsoever should be entitled to the residue of his personalty.

[257] Martin, in reply, denied that any supposed intention of the testator could be used in aid of the heirs at law and next of kin, who, if they had any claim at all, could only derive it from an intestacy: and therefore he submitted that the cases cited for the defendants did not apply, as they all turned on questions of intention: and it would be absurd to say that any testamentary disposition could be designed by the testator to meet the event of an intestacy. He contended, besides, that the Rowney estate was meant by the testator to form a subsidiary fund in aid of the personalty, and that the Leicestershire estate might be exonerated, and the general

residue augmented, for the benefit wholly of the residuary legatees—that the takers of the produce of the sale of the Rowney estate were to be regarded as the *haeredes facti* of the testator—that the debts and legacies directed to be paid out of it were not to be considered as to be raised absolutely, and at all events; but that they should be held to be a charge upon the estates for the benefit of the creditors and legatees: and he cited *Stapleton v. Colville* (Ca. Temp. Talb. 202), *Lord Inchiquin v. French* (Amb. 38), and *M'Leland v. Shaw* (2 Sch. & Lef. 538)—submitting that that difference would distinguish this case from that of *Ackroyd v. Smithson*, and that class of cases where the direction was absolute and positive to sell the estate at all events, in which case there would (he admitted) be a resulting trust for the benefit of [258] the heir at law. Here it is not imperative on the trustees to convert the real estate into money, as long as they have a fund out of which the debts and legacies may be readily satisfied; and they are in this case the executors also. Lady Wentworth being dead, it stands as if the bequest to her had been intended to discharge a debt at his death which he afterwards paid in his life-time; and the reason for raising the 5000l., and for augmenting the residue by exemption of the personalty then ceased: and nothing but the most manifest intention or express direction can exonerate personal estate from payment of debts. He therefore submitted, that the plaintiffs were entitled to the declaration prayed by the bill.

The Lord Chief Baron, at the close of the argument, said he should take time to look into the cases, and he spoke in high terms of approbation of the case of *Ackroyd v. Smithson*, as argued by the present Lord Chancellor; but he distinguished the present case by considering the debts and legacies directed by the will to be paid out of the Rowney estate as a mere charge on that part of the testator's real property in aid of the personalty. Were it otherwise (said his Lordship), all debts which a testator should think proper to cast on any part of his real estate, which his personalty might not be sufficient to pay, would create so many trusts for the benefit of the heir at law.

On the other point, his Lordship stated his then impression to be that, as there could be no doubt [259] that the primary fund for the payment of debts and legacies was the personalty; if a testator should give his residuary personal estate to a legatee discharged by means of his real estate of debts, and that bequest should lapse, the bounty intended would be taken away, and the testator must be considered as dying intestate as to that: not that the residuary clause is expunged; for it still forms part of the will and the probate, and may be resorted to, to explain the intention of the testator; but the estate is, according to the determination in *Waring v. Ward*, discharged from the exemption. Here (said his Lordship) the estate is not given to be sold absolutely, for the express purpose of paying a debt, which is not to be paid by any other means. It is given to create a fund by sale for certain purposes, and the costs of the sale are to be paid, which of course would be saved if the estate were not sold. There can be no doubt, from reading the will, that the testator meant that some of his debts should be paid out of his personal estate, though it is difficult to say what or why. The words are, the debts not therein otherwise provided for; now they are all in fact previously provided for: or if it should be said that that expression alludes to the provision for payment of the 2000l. and 20,000l. out of the Rowney estate, that would go to make him admit, that if he had not so far exonerated his personal estate, they were debts which would have been chargeable on the personal estate.

Adv. vult.

[260] The Lord Chief Baron now delivered judgment. The questions on the points remaining in this cause to be decided are, whether the personal estate is exonerated from the payment of debts and legacies, or of any of the debts or legacies; and particularly, whether the sums directed to be raised out of the estate, in certain events, and for certain purposes, are to be considered as descending, if I may use the expression, to the heir at law,—or whether, speaking in the language of Equity, they become a part of the residue of the real estate devised to the plaintiffs? These questions must depend upon a strict attention to the language of the will. (His Lordship then stated very particularly the various property disposed of by the will, and the manner and terms of the disposition, observing that the testator had emphatically expressed his intention to be, that all the Rowney property, whether real or personal, was to be treated as personal estate, and he observed also, that the 2000l.

mortgage could not be considered in strictness as the testator's own proper debt, whatever liability in equity to pay it he might have subjected himself to by his covenant.)

As to the devise of the Rowney estate, his Lordship observed, that the testator appeared to have intended it to be applied in aid of his personal estate, if the personal estate should not be sufficient to pay all the charges created by the will.

[261] Now, there is certainly here, continued his Lordship, no general exoneration. Beyond all question, it is a bequest of the residue of the personal estate and effects, after payment of such debts as are not by the will otherwise provided for, legacies, funeral and testamentary expences. There might have been a bequest to the residuary legatee, of the residue of the personal estate, without any such reference to the debts not provided for; but certainly it was not a general exoneration: and it is besides quite clear, that it was a bequest intended wholly for her benefit. The personal estate must be considered as liable in the first instance, and that not because a testator intends that it should be liable, for it is liable by law though there were no such intention, as much as if he had said I wish it to be so first applied. No expression of intention is necessary, any more than in the case of an heir at law, whom it is not necessary to shew was intended to take the inheritance. The personal estate is liable to the payment of debts and legacies, unless there is a clear intention expressed by the testator to discharge it from that liability. Here there is no such intention expressed. Then the wife being dead, the person for whose benefit the bequest was intended is gone, and there is no legatee to take it. In the construction therefore of this will, her name must be expunged, and then it comes within the principle of the case of *Waring v. Ward*. There was not in that case an intention to exonerate the personal estate generally, [262] and the legatee intended to be favoured having died, it was held that the fund otherwise exonerated was to be applied exactly as if nothing had been said respecting the application of it. If so, then, whatever the real intention of the testator was, judging as I must from the effect of the words of the will, and looking through it from one end to the other, I see no general exemption even intended. I see none but a personal exemption, and that is gone, there being no person to take advantage of it, and therefore the testator must be considered as having died without having given his personal estate in any particular manner. Debts and legacies stand upon a very different footing, because debts are to be paid *prima facie* out of the personal estate. Legacies may be paid out of the personal estate, or out of the real estate, according to the intention of the testator; therefore such legacies as are not thrown upon the real estate, are to be paid out of the personal estate; but as to those which are thrown upon the personal estate, an account must be taken to ascertain if that fund is sufficient for their discharge, an account being first taken of the debts which were due, that is, of such as are to be considered as due, from Lord Wentworth himself, and the personal estate must be applied to the discharge of those debts.

With respect to those legacies which are thrown upon the real estate only, he declares that the Rowney estate shall be applied to the discharge of the legacies after mentioned, so that [263] the legacies before mentioned do not therefore seem to have been thrown upon the personal estate, but are confined to the real estate.

On the words, "after payment of debts, legacies, and funeral expences," I must observe, that the legacies here are general, and would have been thrown upon the personal estate beyond doubt, but that, on referring back to the passage where the testator speaks of "the legacies thereafter given and bequeathed," it is obvious that they must be thrown upon the real estate. If we could ascertain that the 20,000*l.* was Lord Wentworth's own debt, of course the personal estate must go to pay it; but I think, upon looking into my notes, that it can hardly be considered as a debt which was to have been paid out of his personal estate, that is, in the arrangement to be made between the personal and real estate.

With respect to the legacy of 5000*l.* given to Lady Wentworth, that cannot be raised for her, and it has therefore become a question how far that legacy is to be thrown into the lap of the heir at law. Now, allow for a moment that the 20,000*l.* must be considered as forming a debt of Lord Wentworth in the way we are considering it, distinguishing the two estates, it does seem to me that this is nothing more than a charge upon the real estate. If I once establish this proposition, that the personal estate is first to be applied for the payment of that debt of 20,000*l.* then the

whole of that is provided for, and the real estate is given, [264] as it appears to me, for the benefit of the devisee, subject to the payment of such debts as the personal estate may be insufficient to pay. If the personal estate is not sufficient to pay debts, or any part of them, they must be satisfied out of the real estate. It is the ordinary case of personal estate given to A. and real estate to B. subject to the payment of such debts as the personal estate is not sufficient to satisfy. So much as is not wanted to pay the debts not satisfied aliunde, must go to the devisee, and whether you enumerate particular debts, or whether the charge is general, it seems to me to be the same thing in effect.

I am of opinion, therefore, that the arrangement which should be made must be an application of the personal estate to pay the debts of Lord Wentworth, and then the real estate must be sold; and what remains, after what is necessary to go in aid of the personal estate, must go to the devisee. I cannot draw any distinction between a direction to sell, to pay particular debts, and a charge, and whether it is to be sold out and out for the payment of the debts or in aid, it seems to be the same thing.

With respect to the 5000*l.* legacy to Lady Wentworth, if it can be called a legacy, which I much doubt, that, whatever it was, is excluded out of the personal estate; that therefore must be considered as directed to be raised out of the real estate, and payable out of it, supposing she had lived. With respect to the legacy to Mr. [265] Noel of 3000*l.* that seems to stand under the same circumstances, for though he is living, and ready to receive it, it is given out of the real estate, upon which it is thrown, and is not to be taken out of the personal estate.

I acknowledge that I have had very considerable doubts and difficulties in this case. I have looked through all the authorities, but find that none immediately apply to this case. If there is any doubt upon the state of facts, it can be referred to the Master, but I am very desirous to avoid delay, if possible.

THE DECREE.

Let the Deputy Remembrancer's report be varied &c. and absolutely confirmed.

Declare, that the net amount of the rents and profits of the testator's devised real estate, which accrued due between the day of his death (17th April, 1815), and the 17th April, 1816 (making all usual allowances thereout), shall be made principal money, and be added to and form an aggregate fund, with the principal monies produced by sale of the said estate. Declare the plaintiff, Noel, to be entitled for his life to one moiety of the clear rents and profits of said devised estates, accruing between said 17th April, 1816, and the letting the purchasers into possession, and also to one moiety of the interest and divi-[266]-dends of the stock bought with purchase-money; and Mr. Biscoe to the other moiety: the trustees to pay the balance in their hands of the rents and profits of the devised estates to plaintiffs, in equal moieties, first retaining the legacy duty thereon:—Declare the sum of 2000*l.* (the mortgaged debt to Haworth), directed to be paid out of the monies to arise by the sale of the said real (the Rowney) estates, and all interest due at the time of the testator's death (but not the interest accruing during the first year after the testator's death, which was decreed to be paid out of the rents and profits of the estates accruing during that period), and also the legacy of 3000*l.* to Noel, with interest from time of testator's death, and the legacy duty of 10*l.* per cent., to be raised and paid out of any of the monies produced by the sale of the said testator's said real estate:—the principal sum of 20,000*l.*, mortgage debt, to Lady R. Manners, and all interest, to be paid out of the testator's personal estate not specifically bequeathed: if insufficient, the deficiency to be supplied out of the produce of the sale of the said devised estates:—declare that the 5000*l.* given to Lady Wentworth is not a resulting trust for the heirs at law of the testator, and ought not to be raised and paid to them, but that the same ought to sink for the benefit of the several persons entitled to the said devised estates:—and, the testator having declared that the surplus and residue of the personal estate of his uncle Thomas Rowney, should, from the time of his (testator's) decease, be considered as part of his personal [267] estate, and not as land, nor to be laid out in land, be it so declared and applied by his executors in payment of his debts and legacies:—the legacy duty on the clear residue of the money to arise from the sale of the devised estates, to be paid out of such residue.

SCOTT v. LAWSON AND OTHERS. ——— v. SOWERBY AND OTHERS. ——— v. WOOD AND OTHERS. Thursday, 13th May 1819. —An old grant from the Crown, “of grain, hay, and herbage,” not shewn to have been acted upon, and under which no enjoyment or perception of the specific tithe claimed (agistment) was proved —held not to be sufficient proof of a title, in persons claiming under the grantee, to the tithe of agistment. —Wood, B. dissentiente. —“Herbage,” held not to mean agistment. —If a vicar claiming an account of tithes throughout a whole parish, by bill in equity, prove his right in part of the parish only, the objection that the claim is too largely laid, is not a ground for dismissing the bill. —Wood, B. dissentiente.

The above causes having been heard, now came on for judgment. —Their discussion was in effect nothing more than a rehearing of the cause of *Byam v. Booth and Others*, reported in vol. ii. of these Reports, p. 231. The plaintiff in that cause, Dr. Byam, having died at Brussels the day before the judgment of the Court was pronounced, the decree remained registered only in the Minute Book. The present plaintiff was soon afterwards inducted into the vicarage of Catterick: and he filed this bill in Easter Term 1817 against the defendants, owners and occupiers of lands in the parish, praying an account and description of the sheep not producing wool and lambs, and of the horses and other dry, barren, and unprofitable cattle, which had been agisted on their lands in the parish.

[268] The evidence being the same as on the former occasion, and there being nothing new advanced in argument, every instructive purpose of this case will be answered by giving such parts only of the several judgments which were pronounced by the Court, as add to the authority, or the reasons of that decision. The Barons delivered their opinions *seriatim*, as before.

GARROW, Baron, expressed himself as so entirely concurring in the opinion of the majority of the Court as pronounced by them on the former occasion, and for the same reasons, that it would be sufficient if he should read the judgment delivered by the then Lord Chief Baron, whose patience and learning he highly eulogized, as affording a lucid exposition of the opinion which he had himself formed on the question in this cause. His Lordship having then stated in substance the reasons which are to be found in that judgment, concluded by declaring that opinion to be, that the plaintiff had clearly made out his title to the tithe of agistment, of which he now claimed an account, and which was the only matter now in dispute; and that the defendants had not offered any good defence either in fact or in law: and that therefore the vicar was entitled to a decree.

WOOD, Baron, again declared himself to be of the same opinion as before, on all the points in the case; and his Lordship entered into the reasons on which that opinion was founded, as fully as he has done on the former occasion, and which [269] were in substance the same; and he also cited the same authorities. The only new matter which his Lordship introduced was in speaking of the manner of laying the claim on the part of the vicar, which, as before, he condemned, as having been laid too largely and extensively; for (said he, in allusion perhaps to what fell from Lord Chief Baron Thomson on the former determination) it is not sufficient in a case where a plaintiff, by the fraud and artifice of laying his claim more extendedly than his right, for the purpose of excluding adverse testimony, that he may have to pay costs for the excess, because it would in all cases be well worth while for a party, at the expence of some addition to his costs, to establish a right which he would but for that device not have been successful in setting up; and the establishment of such claims in courts of Law and Equity, observed his Lordship, go down to after times as indisputable memorial of title, and therefore should be regarded with jealousy on every occasion, without reference to the immediate consequences of so minor an inconvenience. That he denied to be the doctrine of any Court of law, whatever might be the practice which had obtained in the Court of Chancery; and he would reject the admissions at the bar which should be made as to the propriety of such a mode of pleading, for the rules of pleading should be uniformly founded on the same principles in every Court in the kingdom.

GRAHAM, Baron, adhered to the judgment delivered by him on the hearing of the

cause of [270] *Burn v. Booth*, and, in support of his reasoning, his Lordship investigated very minutely, and commented fully on the various and numerous documents adduced in evidence in the cause. Amongst other observations, he disclaimed the authority of the ancient grants produced on the part of one of the defendants, and which were not shewn to have been acted upon, or followed up in any instance; for, in cases of this sort, he had always considered that non-exercise of his rights by a grantee, made his grant as a matter of evidence mere waste parchment. Without proof of enjoyment, of what avail would these deeds be on an issue? There would be nothing to try if an issue should be granted, and it would be dangerous to mislead a jury by sending an issue to them, which might induce them to think that we had considered these dormant grants, which have never been followed up by perception, as being sufficient ground for their finding a verdict in their favor.

On the other points, his Lordship held, as before—that a grant of the tithe of herbage would not convey the tithe of agistment—and that the vicar, having claimed tithe of a larger proportion of district than that to the tithe of which he had proved his title, (although in this case the learned Baron declared it to be his opinion that here the plaintiff had proved his whole case) was no ground for the dismissal of his bill.

RICHARDS, Lord Chief Baron, commenced by observing, that the present suit was, in the result, [271] a clear re-hearing of the former cause, as there was nothing new in the evidence, or any of the circumstances, although the defence, as he was sorry to see, was in some respects different, in having resisted the plaintiff's claim to some of the tithes, which had before been properly admitted: and therefore he should also take the same judicious course as had been pursued by Mr. Baron Garrow, in merely saying that he concurred with the majority of the Court in the opinions delivered by them on the former decision.

His Lordship, however, stated that, in consideration of the habits of his professional course of life, he felt it incumbent on him to make a few remarks on the objection which had been taken to the manner in which this claim had been laid, and the extent to which it had been set up: although, said his Lordship, it may not be necessary, on the present occasion, where the majority of the Court are of opinion that the plaintiff has completely established his general title to agistment throughout the parish, whatever he might have done upon the former occasion. That right is the foundation of the present claim, and such is the right demanded upon this record. If the defendant Crowe has not made out the case on which he and those claiming under him have affected to rely—is that a reason why this bill should be dismissed altogether as to the other defendants and him? But suppose he had succeeded in his defence, is the vicar to be therefore beaten by all the rest? It is quite clear, that in Courts of Equity [272] the principle of the objection is not recognized in their rules of pleading, and therefore the Counsel who have admitted the objection to be untenable, would have acted improperly if they had hesitated to do so; for such an objection, I venture to assert, was never made in a Court of Equity, till the case of *Burn v. Booth*. The reason is quite obvious. The whole of the cause in a Court of Equity is in the breast of the Judge, and the entire controul of the Court. A vicar, the moment he establishes his right, is quatenus rector; and if Crowe had pleaded that he was exempt from the tithe demanded for one-half of his lands, and liable for the other, could a Court of Equity have dismissed the vicar's bill in toto, notwithstanding it reached that proportion of the claim which the defendant was in conscience clearly bound to pay?

As to the ground of objection, that such a manner of laying the claim might be made to operate to defeat a defendant's case upon the trial of an issue, Equity provides for that also by requiring the Judge to indorse the postea agreeably to the facts proved in the case, and the Court will then take care that no injury or injustice shall be done. There is, therefore, no foundation for saying that any injury or injustice may be done by the exclusion of evidence. In a Court of Equity nothing is ever suffered to come upon a party by surprise, and on this part of the case, the inhabitants of the parish would be good witnesses, because they are not interested between the rector and vicar.

[273] I have stated thus much upon the objection which has been taken; because, from the course of my professional experience, I feel myself called on to give my opinion in an especial manner, and that I am bound to justify the very proper

admissions of counsel, that the mode of pleading, which has been adopted by the plaintiff, is conformable with the law and practice of Courts of Equity.

The Court, therefore, decreed, in each of the causes,

An account of the tithe of agistment, with costs*.

[274] OTLEY, Widow, Administratrix, &c. v. LINES AND OTHERS. Demurrer. Friday, 21st May 1819.—General demurrer to a bill filed by a judgment creditor against his debtor (who had been discharged under the Insolvent Act (53 Geo. III.)) and the executrix of a will, by which he (the debtor) was entitled to a share of the residue of the testator's personal property, praying an injunction against the executrix to restrain her from paying it over to the legatee, and that the plaintiff might be paid his debt thereout—allowed.

The plaintiff filed this bill for a discovery and for relief; praying an injunction to restrain the defendant, an executrix, from paying over to John Bindley, the other defendant, his share of the residue of her testator's personal estate bequeathed to him; and that she might be ordered to pay thereout the debt due to the plaintiff from the legatee.

The bill (having shewn the defendant Bindley entitled under the will of the testator, who died in October, 1818, in which month the will was proved) stated that in the year 1816 Bindley was discharged under the then existing Insolvent Act, being at that time indebted to the plaintiff's deceased husband, on a judgment recovered a considerable time before, and in other sums—that the plaintiff, as administratrix of her husband, had taken all such means as were furnished by law to obtain payment of the debt out of the effects of which the insolvent had become possessed since his discharge; and insisted that she was entitled to the prayer of her bill.

The defendants demurred (generally) to the bill; for that any discovery would be of no avail, and that the plaintiff was not entitled to any relief.

[275] Wakefield, in support of the demurrer, submitted, that if the plaintiff had shewn any equity to entitle her to the interposition of the Court, in granting the prayer of the bill, it should have been filed on behalf of herself and all the other creditors of Bindley; but he contended, that it was altogether a case in which a Court of Equity could not act; and that whatever right a creditor might have against the future effects of his debtor, discharged by virtue of the Insolvent Act, it must, according to the 10th and 14th sections of the Act, on which alone this bill could be founded, be pursued in the Insolvent Debtors' Court.

Martin and Cooper for the plaintiff, relied upon the doctrine in Mitford's Treatise on Equity Pleading, p. 90 to 93, that Courts of Equity may interfere where Courts of Law cannot, from accident or fraud, give a party a complete remedy, or where their remedies may be defeated, or the effect of them fails. The words of the learned author of that Treatise are, "Where an act of parliament has expressly given a right, the Courts of ordinary jurisdiction have been found incompetent to give in all cases a full and complete remedy, and the Courts of Equity have therefore interposed." Thus in the case of a person, who had been discharged under an act for relief of insolvent debtors, by which his future effects were made liable to the demand of his creditors, but his person was protected, the Court of Chancery, exercising its extraordinary jurisdiction, enforced a judgment of a Court of Common Law [276] against his effects, which were so circumstanced as not to be liable to execution at common law.

They also cited the case of *Edgell v. Hayward and Dove* (3 Atk. 352), as establishing that such a bill as the present might be maintained: and that it might be filed by a single creditor on his own behalf, and upon that authority they submitted that this demurrer ought to be over-ruled.

RICHARDS, Chief Baron. The act of parliament has been brought into discussion by this bill very unnecessarily and improperly; as nothing is stated on this record to ground any application to the Court, or to assimilate the plaintiff's case to that of *Edgell v. Hayward*. That was a case of very particular circumstances; whereas this is simply a bill filed by a creditor against his debtor. Lord Hardwicke considered that

* On the 18th of June following, the defendants presented petitions of appeal against the above decree to the House of Lords; but they afterwards abandoned their appeal, and paid the plaintiff his costs.

a case of the first impression, and he relieved on the ground that the plaintiff there was precluded by the statute from proceeding to outlawry, and could do nothing without the assistance of the Court: and I do not find that that case has ever since been acted upon. Nothing of that sort is made to appear by this bill, and we cannot act upon any thing which is not put upon the record. This is a bill filed by the plaintiff against his debtor and his debtor's trustee, the executrix of the will: but the plaintiff sets up no sort of claim or lien to entitle her to the interposition of the Court, [277] and we should be doing very wrong if we were to suffer such an experiment to succeed in such a case.

Whatever therefore might be the result of another bill making out a stronger case, the present bill must fail, and this demurrer be allowed.

GRAHAM, Baron. This is certainly a case of the first impression. I own the determination of the case of *Edgell v. Hayward* very much surprized me, and I consider it as at least a very strong measure. I never recollect an instance of that decision having been followed as an authority in a Court of Equity in point of practice by the adoption of a proceeding so exceedingly strong. The authority of Lord Hardwicke is nevertheless very great, and any case founded upon it requires some answer. Now that which arises upon the present bill is, that a sufficient case is not stated to bring the plaintiff within the equity of that decision. To entitle a party to the interference of the Court, it should appear distinctly on the face of the bill, that he was precluded from all possible legal remedy. Now, looking at this act of parliament, it is clear the plaintiff had a very obvious remedy aliunde.

WOOD and GARROW, Barons, were of the same opinion.
Demurrer allowed.

[278] KING v. TEALE AND ANOTHER. Saturday, 22d May 1819.—An instrument in possession of a defendant, which is material to both the plaintiff's and the defendant's case, and is inquired of, in certain respects, by the plaintiff's bill filed to restrain proceedings at law on it, must not be set out more at length in the defendant's answer than is sufficient fairly to satisfy the plaintiff's interrogatory, or it will be subject to be referred for impertinence.

The plaintiff had obtained an order for referring the defendant's answer to the Deputy Remembrancer for impertinence in having set out at too full length, though it was not set out to nearly its extent, a warrant of attorney to confess judgment and the defeasance, as to which the plaintiff had interrogated him by the bill which was filed for a reference to the Master to take an account of what was due upon the warrant of attorney: and for an injunction from proceeding at law upon it in the mean time. The officer having certified that the answer contained nothing impertinent, his certificate was now excepted to, in respect of the objection taken.

Wakefield, in support of the exception, cited a MS. case from the Court of Chancery of *Slack v. Evans* * (M. T. 1819); and he submitted, that [279] if the defendant had

* *Slack v. Evans*. In Chancery, M. T. 1819.

In that case the Lord Chancellor, on occasion of a motion for a special reference to the Master, to tax the costs of a prolix schedule, which had been reported to be pertinent, said,

The true question is, whether a case can exist in which a Master can report the answer to be pertinent: but that he cannot do justice without a special reference being made to him to inquire into some prolixity not impertinent. For this, no authority is cited: and if I decide with the Master, I must decide that this prolixity is not impertinent, which I should be very reluctant to do. If in an examination, the examinant sets forth tradesmens' bills at length, it is impertinent. If pertinence and impertinence be so mixed that they cannot be separated, the whole is impertinent. So a prolix setting forth of pertinent matter is impertinent *.

Counsel do not see the schedules in one instance in an hundred; although frequently more important for them to see than the body of the answer itself.

Needless prolixity is itself impertinence, although the matter should be relevant.

* See Beames' Orders in Chancery, p. 70, where causeless multiplication of words is classed amongst other impertinences: and so in p. 165.

admitted by his answer that the warrant of attorney in question was to the purport and effect charged by the bill, it would have been sufficient; or that he might have pointed out shortly in what respects it was different.

Martin and Duckworth, on the other hand, contended, that in a defendant's answer, put in on oath, it was only consistent with due caution that he should not take upon himself to set out the tenor and effect of a material document, and particularly where, as in the present case, the instrument differed very essentially in its date, in the number of instalments by which the money was to be paid, and other important matters; and they asserted, that although the instrument appeared to run to some length in the answer, yet not one tenth part of the whole was set out, and [280] its contents were material, not only to the case of the plaintiff, but to that of the defendant.

Per Curiam. All that is required in an answer is, that the defendant should fairly and pertinently set forth as much of what instrument or other document he may be asked respecting, as is sufficient to satisfy the object and inquiry of the plaintiff's charge and interrogatory; and he must not wantonly incur the record beyond that, so as unnecessarily to harass and increase the expence and difficulties of the plaintiff. He is bound to set out the full purport and effect so far; but it is not proper that he should do more. If he does, it must be at the risk of a reference for impertinence. We are of opinion that the defendant has transgressed that rule in this respect, and therefore the exception must be.

Allowed.

[281] IN THE EXCHEQUER CHAMBER. IN ERROR.

DOE, ON THE DEMISE OF THE EARL OF JERSEY AND OTHERS v. SMITH AND OTHERS.

Saturday, 22d May 1819.—Lease—by tenant for life, under a deed of settlement on marriage, giving him a power to demise the lands &c. for lives, or years determinable on lives, upon certain conditions, one of which was in these words, "And so as there be contained in every such lease a power of re entry for non-payment of the rent thereby to be reserved:" immediately after the covenant by the lessees for payment of the rent, was inserted the following proviso, "Provided always, that, if it shall happen (&c.) that the said yearly rent (duties &c.) hereby reserved, or any part thereof, shall be behind, unpaid or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done or performed as aforesaid: and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all arrearages thereof (if any be) may be fully raised, levied, and paid (&c.) it shall and may be lawful to and for (the tenant for life) his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised (&c.) wholly to re enter &c.:"

—held, in an action of ejectment by the reversioner against the lessees, to be valid on the ground that the above proviso, contained in the lease for re entry, was conformable with the power to demise contained in the deed of settlement; and satisfied the particular condition in question, on which it was to be exercised: and that the lease was therefore a good execution of the power to demise, which was held to be general, and such as authorized the lessor to annex in the fair and bona fide exercise of a due discretion, reasonable and legal qualifications to the power of re entry for non payment of the rent reserved: and did not require the tenant for life to exact an absolute unqualified right to have an immediate power to re enter on the expiration of the day on which the rent reserved should be made payable. Both of the above qualifications are legal and reasonable, and may be annexed to a power of re-entry for non-payment of rent required by an indefinite leasing power to be contained in leases to be made under it, to temper the rigor of such a right, where the requisition in such leasing power is general in its terms, or does not expressly prohibit their introduction without being a departure from the exigency of the power. —If a power to demise refer to "such ancient and accustomed, or as great and beneficial rents, duties, and services, as had formerly been reserved" (&c.): or if from its general tenor it

may be collected that the creator of the power intended that the maker of the leases should have regard to the state of the property during former occupations, the form and covenants of such previous leases may be taken as a guide by the lessor in framing new leases, and the contents of the former may be received in evidence on a question, as to whether the power were well executed, affecting the validity of such new leases, to shew that they were framed in the same terms as those of the old leases.—Long established forms and precedents of common assurances adopted in general and approved practice by conveyancers of acknowledged professional skill, are of great authority, in the absence of decided cases, in the determination of questions which regard the validity of the various legal instruments by means of which the disposition of real property is usually effected.

[S. C. 3 Bligh, 290; 1 Br. & B. 97. Reversed, nom. *Smith v. Doe*, 1821, 2 Br. & B. 473. Referred to, *Boys v. Williams*, 1831, 2 Russ. & M. 694, reversing 3 Sim. 563. Approved, *Colpoys v. Colpoys*, 1822, Jacob, 465. Dictum applied, *Heelis v. Blam*, 1864, 18 C. B. (N. S.) 108. Applied, *In re Grainger*, *Dawson v. Higgins*, [1900] 2 Ch. 773, C. A.]

On the trial of this action of ejectment at the Summer Assizes for Hereford, in 1815, before [282] Mr. Baron Wood, the jury found the facts stated in the special verdict, the substance and material parts of which are set out below. The Court of King's Bench (Ld. Ellenborough, C. J., and Bayley J. only giving any opinion, Holroyd and Abbott J.J. having been of counsel with the parties), on that statement of facts, gave judgment for the defendant*: thereby deciding, that the lease granted to the defendant, on the validity of which he relied, was warranted by the terms of the settlement giving a power to the defendants' lessor (the tenant for life) to make such leases—or (in other words) that the lessor had complied with the requisition of the settlor, that there should be contained in all such leases a power of re-entry for non-payment of the rent reserved, by the terms of the proviso for re-entry introduced therein immediately after the covenant on the part of the lessees for the payment of the rent &c. post, p. 291: and upon that determination the lessors of the plaintiff brought the present writ of error.

The special verdict found (as far as is materially applicable to the questions raised upon the facts of this case), that Lady Louisa Barbara Mansel, [283] only child and heir at law of Lord Mansel at the time of his death (29th of November, 1750), became seised in her demesne as of freehold, for the term of her natural life, of the demised premises, part of certain freehold estates in the counties of Brecon and Glamorgan, which had been devised to her by his will for her life with divers remainders over—that the will contained a power enabling her, in consideration of marriage, to revoke all the uses and devises therein, and to make a new appointment of the fee-simple thereof unto such uses, and with such powers and provisoes, and in such manner as was by her afterwards done by her marriage settlement of the 2d of July, 1757—that on the 20th of the same month she intermarried with George Venables Vernon the younger, afterwards Lord Vernon—that, while she was so seised (for life, with such power of appointment over in fee), before and in consideration of her marriage, she duly executed, according to the power given her by the will, a deed of settlement of the said lands &c. whereby, after revoking and annulling the uses of the will, she appointed, settled, and limited the devised estates to trustees: To hold (after the solemnization of the intended marriage) to the use of the said George Venables Vernon the younger, and his assigns, for and during the term of his life, without impeachment of, or for any manner of waste: and after his decease to the use of herself for life sans waste: and after the determination of those estates by forfeiture or otherwise in their life-time, or the life-time of the survivor of them, to the use of the same trustees and their heirs during &c. [284] in trust to preserve &c. (permitting the said tenant for life to take the rents and profits); and after the decease of the survivor to divers other uses for the benefit of the issue of the marriage, and also of the issue of Lady Mansel: and in default of such issue to the use of such person, and for such estates, as she should, whether sole or covert, and notwithstanding her

* That judgment is inserted in a note, post, p. 296.

coverture, by her will direct, limit, or appoint: and in default of and until such appointment &c. &c. (in the usual form and words), and subject thereto to the use of herself, her heirs and assigns, for ever.

The verdict then found that by the same deed it was provided, declared and agreed, between the said parties to the deed of settlement, in the words following:

"Provided (&c.) that it shall and may be lawful to and for the said George Venables Vernon and Louisa Barbara Mansel his intended wife, from time to time, during their respective lives, when, and as they shall respectively be in possession of or entitled to the perception of the rents and profits of the manors, messuages, lands, hereditaments and premises, so limited to them for their respective lives as aforesaid, by indenture or indentures under their respective hands and seals, attested &c., to demise, lease or grant, such part or parts of the said manors, messuages, lands, tenements and hereditaments, or parts or shares of manors, messuages, lands, tenements, hereditaments and premises whereof [285] they shall be so respectively in possession or entitled to the perception of the rents and profits as aforesaid, as are now leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons *in possession or reversion* for one, two, or three lives, or for any number of years, determinable on the dropping of one, two, or three lives; so as there be not on any part or parcel of the same premises to be demised, leased, or granted respectively for a life or lives or for years, determinable on the dropping of a life or lives, as before mentioned, any greater estate or interest subsisting at any one time than what will wear out or be determinable on the dropping of three lives: and *so as* on every respective lease, demise or grant for a life or lives, or for years determinable on the dropping of a life or lives *there be reserved* and made payable during the continuance of the estates and interests thereby to be demised, leased, or granted respectively *the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties, and services, or more, as now are or at the time of demising or granting* the premises so to be demised, leased or granted respectively, *were reserved or made payable* for or in respect of the same premises respectively, or a just proportion of such ancient, or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased or granted respectively (except [286] heriots, which shall or may be varied, altered, or compounded for, according to the will and pleasure of the said George Venables Vernon and Louisa Barbara Mansel) *all such rents, duties, and services* respectively, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the said respective demises, leases, and grants thereof; and *so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved*: and so as the respective lessees, to whom such lease or leases shall be made as aforesaid, be not by any express clause to be contained in any such leases respectively freed from impeachment of waste, and so as the said respective lessee or lessees, to whom any such lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively:

"*And also* by indenture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease or grant all or any of the said manors, messuages, lands, tenements, hereditaments and premises, so limited to them George Venables Vernon and Louisa Barbara Mansel for their respective lives, for any term or number of years absolute, not exceeding twenty-one years, *to take effect in possession, and not in reversion* or by way of future interest: so as upon every such lease for an absolute [287] term not exceeding twenty-one years, *there were reserved* and made payable during the continuance of such lease or leases *so much or as great and beneficial yearly and other rent and rents, and other services proportionably, as now is and are therefore paid and yielded, or the best or most improved yearly rent and rents* that can be reasonably had or obtained for the same, *without taking any fine premium, or fore-gift, or any thing in the nature of or in lieu thereof*, to be incident to and go along with the reversion and remainder of the same premises, expectant on the determination of the said respective leases; and so as the respective lessees to whom any such lease or leases shall be made respectively as aforesaid, be not expressly freed from waste, and do seal and deliver counterparts of such leases respectively; and *so as in every such lease for any term of years absolute* respectively, *there be contained a clause of re-entry, in case the rent or rents thereupon to be*

reserved *to be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof :*

"*And also by indenture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease, and grant all or any part of the lands, hereditaments and premises so limited to them, the said George Venables Vernon and Louisa Barbara Mansel, for their respective lives as aforesaid, wherein or where- [288]—upon any mine or mines now is or are open : or wherein or whereon any person or persons shall be willing to open any mine or mines, sough or soughs, or other thing or things whatsoever which may be requisite and necessary for the digging and getting of lead or copper ore or any metal or mineral whatsoever, unto any person or persons for any term or number of years, not exceeding thirty-one years, to take effect in possession and not in reversion or by way of future interest : and so as upon every such lease for an absolute term not exceeding thirty-one years there be reserved and made payable during the continuance of such lease or leases such part or share of the lead, copper ore, coal and other produce, to be gotten from the said mines, or such yearly rent or income in respect thereof, as can reasonably be had or obtained for the same, without taking any fine, premium, or fore gift, or any thing in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder of the said premises, expectant on the determination of the said respective leases ; and so as "* (&c. as before) ; "*and so as there be also inserted such proper and usual covenants for the effectually winning and working the said mines, and smelting the ore, and doing all other proper and necessary acts as are usually inserted in leases of the like nature."*

The special verdict then finds the following facts : that by force of the last mentioned deed, [289] G. V. Vernon after the marriage became seised for life of the last-mentioned lands, and entitled to and in the receipt of the rents and profits thereof—that at the date of that settlement, and after until the surrender made at the time of making the indenture next mentioned and therein referred to, the lands in the declaration mentioned, had been and were leased and were under and subject to a lease to certain persons for a term of years determinable on the lives of three persons who died before the day of the demise laid in the declaration—that after the date of the settlement and the solemnization of the marriage, viz. on the 5th of September, 1803, the said G. V. Vernon being so seised, &c. executed, by his then name and title of Lord Vernon, an indenture of that date, between himself of the one part, and Charles Smith (since deceased) and the defendant in error of the other part : whereby it was witnessed, that in consideration of the surrender of the former lease, and of 105*l.* paid to Lord Vernon by Charles Smith, and the defendant and of the yearly rents, duties, payments, services, articles, covenants, provisoes, and agreements thereafter specified and reserved, and by and on the part of the lessees to be paid, done, performed and kept, the said Lord Vernon demised, granted &c. to Charles Smith and the defendant, the messuage, tenement, and lands, with the appurtenances : (the premises in question sought to be recovered by the ejectment) To hold from the day of the date, for ninety-nine years, if the lessees and John Smith [290] (a son of Charles Smith), or either of them, should so long live : yielding therefore yearly during the said term unto the said Lord Vernon, his heirs and assigns, or the person or persons to whom the freehold and inheritance of the premises should for the time being belong, the yearly rent of 2*l.* at Michaelmas and Lady-day, by equal portions, together with one couple of fat capons on the 1st day of January yearly during the term, or the sum of 1*s.* 6*d.* in lieu thereof, at the election and choice of the said Lord Vernon, his heirs or assigns, or the owner of the inheritance : and also an heriot of the best beast, or 40*s.* in lieu thereof at the like election &c. upon the death of every tenant dying in possession : and the like upon every assignment, sale, forfeiture, or alienation : and also the lessees yielding and doing constant suit of mill.

The verdict then found that the lease contained a covenant in the following words :—"*And the lessees for themselves, their heirs, executors, administrators, and assigns, and for every of them, do covenant, promise, and agree to and with the said George Lord Vernon, his heirs, executors, administrators, and assigns, and to and with such person or persons to whom the immediate freehold or inheritance of the premises shall as aforesaid belong, and to and with every of them in manner and form following, that is to say, that they (the lessees), their executors, administrators, and assigns, some or one of them, shall and will well and duly during [291] the said term, pay, do, and perform, or cause to be paid, done, and performed, unto the said George Lord*

Vernon, his heirs or assigns, or such person or persons to whom the freehold or inheritance of the premises shall, as aforesaid, belong and every of them, the said yearly rent or sum of two pounds and the said duties, heriots, suits, services, and other the reservations aforesaid and every of them, at the times and in the manner above limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof: Provided always, that if it shall happen at any time during the estate hereby granted, that the said yearly rent or sum of two pounds and every or any of the duties, services, reservations, and payments hereby reserved, or any part thereof, shall be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed, as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all arrearages thereof (if any be) may be fully raised, levied and paid ;" (or if the lessees do not repair within six months after notice ; or do commit waste, or grind their corn at any other mill, or assign without licence :) " or if any default shall be by them the lessees, their executors, administrators, or assigns, made in the payment or performance of all or any of [292] the (omitting the word rents) reservations, covenants, and agreements hereinbefore on their parts contained, that then and from thenceforth in all, or any, or either of the said cases it shall and may be lawful to and for the said George Lord Vernon, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised, and into every part and parcel thereof, wholly to re-enter ; and the same to have, hold, retain, possess, and enjoy, as in his and their former and proper estate, against (the lessees) their executors, administrators, or assigns : these presents or any thing herein contained to the contrary thereof in anywise notwithstanding."

The verdict then found, that no other than the above recited power of re-entry for non-payment of the rent reserved by the same indenture was contained therein—that the lessees executed and delivered a counterpart—that the several rents, duties, reservations, and payments reserved by the indenture of the 5th September, 1803, and secured by such render, covenants, and power of re-entry therein contained, were, at the time of making the last-mentioned indenture, the ancient and accustomed yearly rents, duties, and services and then were as great and beneficial rents, duties, and services as the yearly rents, duties, and services, which at the time of making the deed of the 2d July, 1757 or at any [293] time thereafter, previous to or at the making of the indenture of the 5th September, 1803, were or had been reserved or made payable or secured for or in respect of the lands and tenements by the same indenture mentioned to be demised—that the lands and tenements, with the appurtenances in the declaration mentioned, were the same lands and tenements, and that the usual and accustomed form of leases of the estate contained in the marriage settlement of 2d July, 1757, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in the indenture of 5th September, 1803—that all the rents, duties, and services reserved by the last-mentioned indenture, and which accrued in the life time of Lord Vernon, had been discharged and performed ; and that Henry Smith had been ready to pay and perform all sums, matters, and things that would have accrued to this time, supposing the last-mentioned indenture to have continued in force and undetermined—that Charles Smith was since deceased, but that Henry Smith and John Smith were still living—that after the making of the last-mentioned indenture, and before the day of the plaintiff's demise, L. B. Mansell, by virtue of the powers to her given by the deed of the 2d July, 1757, made her last will and testament in writing, dated the 5th August, 1783, which was duly published &c. &c., and thereby devised the said lands and tenements devised by the will of Lord Mansell to her, subject to the estate for [294] life of her husband therein ; and that the devisees afterwards bargained and sold the said estate to George Earl of Jersey, Edward Ellice, and Alexander Murray (the lessors of the plaintiff), who thereupon became seised in remainder, and on the death of Lord Vernon, on the day of the demise laid in the declaration, became seised thereof in their demesne as of fee. Lease, entry, and ouster.

Easter Term, 58 Geo. III. 1818. The case now came on for argument on the errors assigned, when

Littledale was heard on the part of the plaintiff in error, and

Gifford, then Solicitor-General, on behalf of the defendants.

The Court having required to have the points discussed a second time, the case stood over for that purpose, and it was now argued again by

Hilary Term, 59 Geo. III. 1819. Jervis for the plaintiff, and

Moysey (F.), for the defendant.

Of the ability, learning, and research displayed by the several Counsel who argued in support of either side of the question upon each occasion, many of the learned Judges will be found in the following pages to have borne approving testimony in delivering their opinions : but as every [295] single principle or proposition stated and reasoned upon arguendo in the progress of the various discussions at the bar, have been repeated with great force by some or other of their Lordships on the bench, in detailing the reasons on which their different conclusions, on the points in the case, were founded : and as nearly every authority which was cited in argument has also been mentioned and commented on by the Judges in delivering their judgments, the Reporter has taken the liberty of omitting, in a case necessarily of so great length, the arguments of Counsel altogether, for which, perhaps, the desire to avoid the unprofitable prolixity of needless repetition, will be considered a satisfactory motive.

Easter Term, 59 Geo. III. Saturday, 22d May 1819.—The Court this day pronounced judgment, stating the various reasons and the authorities on which their several opinions had been formed, *seriatim*.

RICHARDSON, J. (who was present) having been, while at the bar, one of the Counsel for the lessors of the plaintiff, declined taking any part in the judgment.

GARROW, Baron. The question in this case arises on the construction of a power, to make leases, which was given to the lessor by the deed of marriage settlement, of which the terms are set out fully in the special verdict : and it is—whether the lease, the validity of which is the point now before us, granted by Lord Vernon, (who became possessed of the estate, under the [296] settlement, as tenant for life) to the defendant and another person (since dead) for 99 years, if the lessees and a son of one of them should so long live—was made in due execution of the leasing power or not : in other words—whether the terms of the lease are, or are not in conformity with the power so given to the lessor by the settlement. If they are not, the lease is void : if they are, it is valid, as being a good execution of the leasing power. In the former case, the judgment * which has been pronounced below by [297] the Court of King's Bench, ought to be reversed ; in the latter it must be affirmed.

* As that judgment has not hitherto been reported, and perhaps will not now be published, it may be of use to introduce it here.

Doe on the Demise of Jersey v. Smith. 23d December 1816. K. B.

Lord Ellenborough, Chief Justice, this day delivered the judgment of the Court of King's Bench, (having stated the terms of the leasing powers in the settlement, and of the proviso in the lease, and the facts found by the special verdict) in the following words :—

The first part of the power, therefore, relates to leases determinable upon lives, upon which it would be sufficient to reserve the ancient rents. The second part applies to leases for years, upon which the best and most improved yearly rents that could be reasonably had or obtained, were to be reserved. Upon the former part (the leases determinable upon lives) there was to be a proviso of re-entry for non-payment of the rent thereby to be reserved : upon the latter (the leases for years) there was to be a clause of re-entry in case the rent were behind or unpaid by the space of twenty-eight days after the time appointed for the payment thereof : it being in the one case left undefined what was to be the tenor of the clause of re-entry : in the other it being provided, that such clause should fix the right of re-entry at the period of twenty-eight days after the rent should have become due. The same Lord Vernon who is mentioned in the marriage settlement and leasing power therein contained (and who was tenant for life with a power for leasing under that settlement), on the 5th of September, 1803, executed a lease, upon which the question arises, to Charles Smith and Henry Smith for years determinable on lives : and that lease is now sought to be set aside, by this ejectment, by the lessors of the plaintiff, who have since, by devise, and by lease and release, become entitled to the premises in question in fee : and it is sought to be set aside on the ground of its not being conformable to the terms of the power, on the

[298] His Lordship then stated the limitations contained in the deed of settlement on the terms of [299] which the question was founded; observing, that it applied to different estates, which were directed [300] to be let upon different sorts of leases—some being to be granted for long terms determinable upon lives, and for lives, and others for short terms of years absolute; that the leasing power given by the deed of settlement requires different conditions of holding to be contained, and restrictions to be inserted in the leases executed under the power, of which the terms are various as applicable to the different species of property, and the different periods of duration of the several leases; for that in leases to be granted for terms of less than twenty-one years absolute, a rent is required to be reserved, as nearly equal as possible to the annual value of the lands let; and all such leases must contain a power to re-enter in case the rent reserved shall be in arrear for the space of twenty-eight days after it shall become due. Then (continued his Lordship) [301] with respect to the leases allowed to be made for long terms determinable upon lives, under which sort of lease the lands sought to be recovered by the present ejectment were let, and which had been formerly demised in the same manner; it is provided by the terms of the power,

subject of re-entry, which such a lease (a lease for years determinable upon lives) is required (as it is said) to contain. The power directs that there be contained in every such lease a power of re-entry for non-payment of the rent: it does not say what power, but a power only. The lease executed under this power does contain a power of re-entry for non-payment of rent; for it contains the following proviso:—(his Lordship read the words of the proviso). The lease (continued he) likewise contains provisions for re-entry upon other defaults and breaches of covenant: but as the power in question relates only to re-entry for non-payment of rent, the statement of the others is immaterial.

It is contended, that the leasing power requires that a provision for re-entry for non-payment of rent perfectly general and unqualified in its terms, should be expressed in the leases to be made under it; inasmuch as the power itself contains no qualification, and only requires a power of re-entry for non-payment of rent. Under a power of re-entry thus general and unqualified, the effect would be, that the tenant for years determinable on lives might be instantly ejected the moment his two pounds annual rent was in arrear: although upon the rack-rent being in arrear on leases for years absolute, and where the rent might be of some value in amount, the power does not allow of re-entry till after it should be in arrear twenty-eight days, thus making the rigour of the rule extreme when there is the least reason for enforcing it. Where the construction of a power leads to such unreasonable and inconvenient consequences, it naturally produces a disposition to examine with some exactness, the terms in which the power is contained, and to see whether the letter of the provision does absolutely require such construction. The leasing power says, that the lease must contain a power of re-entry for non-payment of rent, not on non-payment of rent, nor to be exercised immediately upon the occurring of that default; it is silent as to the time when it should be carried into effect, and being so silent, why should it not, in virtue of such silence, be intended that the creator of the power thought it enough to require that there should be some reasonable power of re-entry for non-payment of rent upon every lease; leaving it to the discretion of the person by whom it should be granted, to prescribe when and under what circumstances that power of re-entry should in each particular case be enforced. By requiring that the leases should always contain a power of re-entry, he calls the attention of the successive lessors from time to time to the subject, whenever the occasion of leasing should recur, and when the attention of the lessor is called to it, it is hardly likely that he should in any case, in the exercise of a proper discretion, introduce into his lease so harsh and rigorous a clause as the letter of this provision would, upon the construction now contended for, introduce universally; and in all cases whatsoever, in the exercise of a proper discretion, he would probably adopt the usual clause for re-entry which he should find inserted in the former leases of the same property, or would, in some other mode, qualify it by reference to the time during which the rent had been in arrear, or to the want of adequate means of enforcing the payment of it by distress, or to both: but in no case under the guidance of a sound discretion, would he give a power of re-entry which may be exercised summarily, immediately, and universally, without an hour's respite to be allowed in favour of the tenant. Besides, what eligible tenant would accept a

that wherever a lease shall be made for such a term, there shall be contained therein a power of re-entry for non-payment of rent: so that in this leasing power there is certainly no time specified, by way of indulgence to the tenant, as to the payment of the rent reserved; nor is any thing further required of the tenant for life who should be in possession of the estate, than merely that he shall insert in the lease a power to re-enter upon the premises for non-payment of rent. Now it has been strongly insisted, in argument, that it was obviously the object of the creator of the power to take care of the interest of the reversioner. I agree that it was one of the objects of the settlor to take care of the interest of the reversioner: but at the same time I say, that it was equally his object to take care of the interest of the tenant for life; and to make the estate, whilst in his hands, whoever he might be, a beneficial estate: and to that end it was fit to entitle him to impose such terms as to the holding, as would be most beneficial to the property itself: and in that view, certainly, whatever would be beneficial to the tenant for life, must also necessarily be for the benefit of the reversioner, and the converse would be equally true.

[302] Now, in point of fact, the lease in question, as granted by Lord Vernon to the defendant and his deceased co-lessee, does contain a clause for re-entry, not

lease containing a provision so inconvenient and degrading, under which he might be thus instantly dispossessed for the default of a single moment. By construing the words "a power of re-entry," as meaning any or some, the provision, it will be said, on one side contains too little of restraint upon the person who is to exercise the power: but, on the other hand, it may be answered, that by the other construction, by which it is made to mean a general and absolute power of re-entry, unqualified by any consideration of time or circumstance, it is made to import too much. Of the two constructions of which the indefinite words in question are susceptible, it is certainly the safest course to understand the power as bearing that sense which best accommodates itself to the convenience of the parties who are to be governed by them. In a case like this—where the framer of the restraint had it in his power to have prescribed the rule in such terms as he pleased, and to have obviated all doubt, which he might reasonably have been expected to have done, had he thought the power of re-entry in the then subsisting leases open to objection—we do not conceive ourselves as contravening any legitimate rule of construction, when we hold, that the restraint of leasing should not, in this instance, be carried in construction to an extent which is to leave no discretion in the person executing the power; and supposing we are right in so holding, we further think that the discretion which, upon such construction, is necessarily left to the person who is the object of the power, has been well exercised in the present instance.

An objection also has been taken to the admission in evidence of other leases of the same premises, in order to prove, as stated in the special verdict, that the usual and accustomed form of leases of the estate contained in the marriage settlement or deed of the 2d July, 1757, for lives, or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the indenture in question of the 5th of September, 1803. But this objection cannot, upon the view we have already taken of the case, arise in the present instance: for if we are right in holding that the person who had to exercise the leasing power, had any discretion as to the terms of that proviso of re-entry, which he is generally required to insert in this lease for years determinable on lives, he might certainly, with great propriety, refer to those former leases as a guide to the discretion which he should exercise on the subject: and the Court, in judging of the manner in which such discretion had been exercised, might as fitly look to the former leases on the subject. Upon this ground it is unnecessary to discuss the cases of *Cook v. Booth* (Cowp. 809) and *Iggulden v. May* (7 East, 237, & 9 Ves. 325), which do not apply to a case of a lessor who has a discretion to exercise as to the terms of his leases.

There are other grounds, also, upon which the admissibility of this evidence might be maintained, which were in part discussed on the argument, but which are not necessary to be adverted to upon this occasion.

The result of our opinion upon the whole is, that the lease in question is not at variance with the power: that the former leases were properly admissible in evidence; and that therefore the defendant is entitled to the judgment of this Court.

Judgment for the defendant.

generally, certainly, nor in case the rent shall be in arrear for twenty-eight days: but by a proviso, that if the rent shall be in arrear for the space of fifteen days, and if there shall be no sufficient distress upon the premises to satisfy that rent, it shall then be lawful for the lessor or the reversioner to re-enter.

The present question turns entirely upon that proviso: and it is simply whether this lease, so containing such a clause, is a good execution of the leasing power; or in other words, whether that proviso is a reservation of such a power of re-entry as will satisfy what has been required by the creator of the power, to entitle the tenant for life to make leases, as given by the deed of settlement. It is obvious that the creator of the power, as the expression is in a Court of Law, but in fact, his legal adviser, knew how to make distinctions as to the power of re-entry: for in the instance of those leases which were to be for years absolute, wherein the rent to be reserved is to be of the most valuable description, he only requires of those who shall successively come into possession of this estate, as tenants for life under the deed of settlement, that they shall, for the preservation of this estate, most beneficially for those who shall be from time to time entitled as reversioners, insert a condition, that in case the valuable rent so reserved on such leases shall be unpaid for the space of twenty-[303]-eight days, the lessor or reversioner shall then have a right to re-enter at the expiration of those twenty-eight days. It has been insisted, however, in argument, that, where the render is 2l. a year, and a couple of fat capons, or eighteen pence, at the option of the lessor, in that case the power of re-entry is to be altogether absolute and unconditional; and that at the first moment after the day has expired on which the money is demandable, the power of re-entry is peremptorily to attach and enable the reversioner on the instant abruptly to turn out the person who, holding under a valuable lease for a long term of years, determinable upon lives, should have supinely permitted the clock to make its round, so as to complete that day, without paying the small sum of 2l. If the power had required in terms that the lessor should reserve such an unconditional right to re-enter the moment after the rent had become due and had not been paid or tendered, I should admit that the argument which was so strongly pressed upon the Court, would have had much weight, and perhaps we could not alter it; for we must take the power as we find it: and if the creator of the power had inserted that special condition, I should have thought perhaps that we could not depart from it, and make another power. We are, however, only to see whether in fact the power in question, such as it is, so presented to our consideration, has been complied with or not; and where we find a general power required, and see that in fair reason it has been conformed with, we ought not to be more strict in the interpretation to be put on it, than the creator of the power [304] himself has been. The terms of the requisition in the settlement are, that there shall be contained in the leases a power of re-entry for non-payment of rent. Is there not in the lease granted to the defendant a power of re-entry for non-payment of rent? Undoubtedly there is. But it is stated, and I admit with very considerable force, that this is not such a compliance with the requisition of the power as the reversioner has a right to expect the lessor to have observed; because he has clogged the clause for re-entry, not only with a delay of fifteen days, but also with a further qualification which imposes on him the necessity of previously ascertaining that there be no sufficient distress upon the premises. Now, with the utmost respect and deference for the great authorities who differ from me, I conceive the obvious answer to the first objection to be, that there is nothing unreasonable in the interposition of that convenient delay: and as to the second objection, we cannot but consider (for in looking at these questions we must use the experience of all mankind upon such subjects) that the event of there not being a sufficient distress upon the premises in a case of this sort, on a valuable farm paying a nominal rent of 2l. a year, is not to be contemplated in the common course of things, and most probably was never thought of by the maker of the settlement. Without therefore taking up more of the time of the Court, it appears to me that there being in fact to be found in this lease a clause of re-entry for the non-payment of rent reserved to the per-[305]son to whom the rent is to be paid, giving him a power to re-enter if fifteen days shall elapse without payment of it, and there shall be no means of satisfying it by distress upon the premises: and I cannot but consider that such a power is a substantial satisfaction of the condition in the settlement, which requires generally only that there shall be inserted a power of re-entry for non-payment of rent.

His Lordship (having observed that he so entirely concurred with the judgment delivered on this question by Lord Ellenborough, that he might have adopted his words) concluded by adding, that he had not noticed the second question, whether the prior and subsequent leases were properly admitted as evidence of the facts introduced into the case which were founded upon reference to them : because (said he) if I am right in the opinion that the leasing power has been complied with by the insertion in the demise of the proviso for re-entry which has been introduced, it necessarily follows that the person who, whilst in possession of the estate, should make leases under the power, would be warranted in taking the then subsisting leases of the same property as a criterion for the rent and the covenants to be inserted in the new leases ; and that therefore they were properly submitted to the jury on the question, whether the lease in dispute was a good execution of the power of leasing given by the deed ! because if it should appear that the terms and conditions of former [306] leases had been adopted by the lessor, it would go far to direct them as to the verdict they should find.

BURROUGH, J. (having shortly stated the question, and observed, that in order to give an intelligible opinion, it would be necessary to state the words of the power, as many of his observations would apply to the import of those words, and which in themselves he considered to be decisive of the question) read at length the clause in the settlement by which the leasing power was given to the tenant for life, as set out verbatim in the statement of the case—the principal and other restrictive clauses—the other two leasing powers—and the general clause for re-entry at the conclusion (ante, p. 284 to 288, the material parts of which are distinguished by italic letters) ; and stated the short substance of the case as found by the special verdict. He then proceeded to give the following reasons for the judgment he was about to deliver : The first point which arises upon this special verdict is, whether on the question to be submitted to the jury—the sufficiency of the proviso of re-entry in the lease in question—the fact of the insertion of a similar proviso in prior and subsequent leases could be made use of in construing the power contained in the deed of settlement, and upon that point I am of opinion that they could not. Parts of each of these powers refer to a pre-existing state of the property, and to cases of former leases ; for instance, the first power authorises leases to be made of lands then [307] let, requiring only the reservation of the ancient and accustomed rents. The other powers require the reservation of as great and beneficial rents, &c. as were then paid, or the best and most improved rent that could be had. I mention those parts of these powers for the purpose of contrasting them with the clause on which the question immediately depends. There are cases wherein evidence of former leases, and even parol evidence must of necessity be received, as where the parties to a deed refer to matters of fact, and make the knowledge of them necessary to explain the nature, and supply the terms of the instrument to be founded on them—they then become a part of the particular transaction, and there the matters which might result from such a reference being necessarily found by the jury, would be proper for our consideration. But there is nothing in the words of the clause in question which admits of a reference to leases made prior and subsequent to the settlement. The only words in the clause are, “and so as there be contained in every such lease, a power of re-entry for non-payment of rent.”

The clause itself, then we see, contains nothing which refers us to any former particular state of this property : I am therefore of opinion that the prior leases were not admissible in evidence, because they could not be legally used in any way in the construction of this power.

I now come to the consideration of what should [308] be the construction of the power itself upon which arises the question, whether the settlement requires only such a power of re-entry as is contained in the lease, which is made to depend on two preceding conditions : viz. if the rent be behind and unpaid by the space of fifteen days, and no sufficient distress can be had or taken upon the premises. I am of opinion that neither of these restrictions, so imposed upon the right of re-entry, is authorised by the leasing power. First, because the words of the power convey to my apprehension a plain and specific meaning : for “a power of re-entry being required to be given, if rent shall be behind and unpaid,” is a perfect idea, wanting no explanation ; but a clause giving power of re-entry only in case the rent shall be behind for fifteen days, is a very different thing ; and the difference is still greater if you superadd,

"in case no sufficient distress can be had or taken on the premises." It must be borne in mind throughout, that this is a power for a lease to be granted by a tenant for life, and that he, without such a power, could make no lease which would endure beyond his death. It is moreover a power created by deed, and it is quite new to the law, for Courts to put any construction upon such a power beyond the plain and literal meaning to be collected from the words upon the face of the deed. If any lawyer's attention had been drawn to these words in the leasing power, with a view to the execution of a lease, he would not, I think, have signed his approbation of the draft of this lease. Other men, [309] indeed, are too often apt to treat the authority on which their title rests too lightly, until they feel the consequences, when the thing is done.

Secondly, it is contended that the power of re-entry, required to be inserted, is not so specifically described as to be considered insufficient if the power reserved be a reasonable one; but who is to judge whether it be reasonable or not? the parties to the deed, or a Court or Jury? By what definite rule are we to be guided in judging of its being reasonable? That is a difficulty which I know not how to combat. I am of opinion at all events, that such an indefinite criterion cannot be admitted to govern our construction of a power, and which might vary the meaning of the parties, and, more especially, where the construction is to be collected clearly and completely from the words of the deed itself.

Thirdly, the plain meaning of the words of parties to a deed I hold to be binding. Now, I cannot bring myself to read this deed, without a conviction that the parties meant that the leases should contain a pure and simple clause of re-entry. The second power enables the successive tenants for life to make leases for terms not exceeding twenty-one years: and for that the party expressly provides in words, that "there shall be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment there-[310]of." This affords to my mind an irresistible argument for excluding any such qualification from the former power. The parties have used none but general terms in the formation of the first power, and have adopted special terms in the formation of the second.

The lease in question cannot be maintained, unless we can consider that the lessor, by the terms of the first power, had a right to bind the inheritance with both these restrictions—1st, that the right to re-enter shall not arise unless the rent shall be behind for the space of fifteen days; and, 2dly, not even then, if a sufficient distress can or may be had or taken on the premises: and I consider myself bound to hold both those restrictions to be not in conformity with the leasing power: for that they make the power more prejudicial to the inheritance than if the plain terms of it had been pursued in framing this lease by the tenant for life.

As to the prejudicial effect of introducing the condition, that there must be no sufficient distress on the premises, it appears to me that the case of *Coke v. Day* is precisely in point; and I agree with the learned Judges who signed the certificate in that case. Such a clause imposes the greatest inconveniences on the remainder man; and we have not only the authority of *Coke v. Day* for that, but we have it also practically exhibited in the case of *Hers, on dem. of Powell v. King* (Forrest, Exch. Rep. 19).

[311] This question was very ably argued at the bar, and a great number of cases were cited; but the two which I have mentioned, and the plain intention of the parties expressed in the deed, are sufficient to govern my judgment. I wish to add a word only with respect to the general clause of re-entry, towards the end of the lease, because it was noticed at the bar that the word "rents" is omitted in that clause, and an argument was founded upon it, which has much weight with me. I think that word was designedly omitted: for it cannot be taken that the parties meant that clause to apply to a case which was before fully provided for, according to the requisitions in the powers. The omission of the word "rents" in that clause, was adverted to in the Court below; but it appears to have been treated upon that occasion as not worthy of much notice.

I have considered this case, with an anxious wish to find myself justified in concurring in affirming the judgment which has been pronounced by the Court below; but finding that I cannot do so without sacrificing the opinion that I have formed on the question after great attention to the case, I am bound to pronounce that opinion to be, that the judgment of the Court of King's Bench ought to be reversed.

PARK, J. In giving my opinion that the judgment of the Court of King's Bench ought to be reversed, I should much distrust my own view of the questions in this case, opposed as it is, to the [312] great learning and ability of those by whom that judgment has been pronounced, and of those from whom I have now the misfortune to differ in thinking that it was not well founded in point of law; but that in so deciding I do not stand alone, nor am without the support of much greater learning and ability than my own.

This case has been argued very elaborately, and with very considerable ability at the bar, and much research has been bestowed upon it. The main question is, however, a very short one (having stated the question and the words of the power in the deed, and of the proviso in the lease, and of the restrictions therein imposed on the right of re-entry). These (continued his Lordship) are the only words which are material to the present inquiry, and they do not present any difficulty to my mind: for if a plain man were asked, how he would execute such a power? he would say, insert a clause, that if the rent be not paid as reserved, the lessor shall have power to re-enter. How much then must he be surprised to find two conditions superadded, materially altering the right of the remainder-man, which he can no where find in the power.

[Here his Lordship read the words of the proviso for re-entry.]

I admit, that in construing powers the intention of the creator of the power is to be attended to, wherever it can be collected from the instrument; [313] but that intention is to be construed strictly and impartially, and without favouring one party more than the other, that is, without leaning either to the side of the tenant for life, or to that of the remainder-man, as was said by Lord Mansfield in the case of *Goodtitle, dem. Clarges and Another v. Fenucan* (Doug. 573): and the same doctrine is to be found in the case of *Pomery v. Partington* (3 T. R. 674). The reason is obvious, because a power given to make leases is intended to operate beneficially for both parties. By enabling the tenant for life to grant a permanent interest, the farmer is induced to cultivate and improve the soil of the estate by which the remainder-man is ultimately equally benefited: the one during his life having advantage of a well cultivated estate; and the remainder-man on his death finding the estate has not been suffered to become impoverished. Still, however, I admit by the execution of the leasing power by the tenant for life, the remainder-man is certainly not to be prejudiced: but can any one, who reads this lease, and compares it with the power, avoid seeing that the former is not all conformable to the latter; and that by the proviso for re-entry in the terms of this lease, the remainder-man is placed in a situation far less beneficial and advantageous than the maker of the power intended that he should and than he would have been in, if the right of re-entry had been reserved according to the terms of the power? or it must be considered by those who think otherwise, that a clause of [314] re-entry, limited and clogged with conditions, is as beneficial as one which is unlimited, unclogged, and absolute, without any condition. It appears to me, that if this case turned entirely upon the insertion of the first condition alone, that which restrains the right to re-enter unless the rent be in arrear for fifteen days, the leasing power authorising no such restriction, would of itself be sufficient to avoid this lease. It has been argued, that the delay of the right of re-entry for fifteen days is nothing more than a reasonable time. The objection to that is, if fifteen days be reasonable, why may not thirty or forty be so: but in point of fact the maker of this power never contemplated the insertion of any such condition. On the contrary, we find that immediately after in the next power, and when she meant to give the tenant time, she has said so expressly; and therefore she well knew that if she intended any such thing it was necessary to express it: now nothing to my mind can be a stronger argument, grounded on intention in this case, against the validity of this lease than that circumstance: for the requiring the restriction to be introduced in the one case amounts clearly to an exclusion of it in the other, and that with me is quite decisive. But it is not necessary to rely entirely upon this part of the case: because it is clear, that if the power be badly executed by not being pursued in any one respect, the lease is void altogether. Then, as to the second objection, with all deference to the very learned Judges who have differed, as well as those who may differ from me, I have [315] never been able to entertain a doubt upon that point. In a condition that the reversioner shall not be entitled to re-enter except "there shall be no sufficient distress upon the premises," is there no clog or impediment to a right of re-entry? Is so limiting such a right no

injury to the remainder-man in the enjoyment of his estate that he cannot enter for the condition broken till he has searched every corner of the premises for a sufficient distress! That he must do so has been decided by the Court of Exchequer, by a decision on a case in which they confirmed the opinion of a very learned Judge (Mr. Justice Heath), who had so ruled the point at *Nisi Prius*. That was determined upon the principle that a clause of forfeiture in a lease, in case no sufficient distress be found on the premises, must be strictly pursued; and therefore it was held, that where a distress is to be made, every part of the premises must be searched, or the plaintiff must be nonsuited in an action of ejectment. The case in which that has been determined, is that of *Ries on the dem. of Powell v. King* (Forrest, 19) (his Lordship stated the facts of that case, and the result).

But the very point now before us has been already distinctly decided in the case of *Cove v. Day* (13 East, 118) (having also particularly adverted to that case, and the incidental dicta of Lord Ellenborough in course of the argument). On these grounds therefore, said his Lordship, I think this lease cannot be supported.

[316] It was contended at the bar, that the general clause for re-entry, which is afterwards inserted in the lease in question, is sufficient to satisfy the requisition of the power; but I cannot assent to that proposition, because it is a maxim of law that a subsequent general clause cannot affect a preceding special clause. To hold that proposition to be law would be to overturn all the doctrine in the books from the time of Lord Coke to the present day. In Sheppard's Touchstone, p. 85, s. 1, we find it laid down, that "if there be two clauses or parts of a deed repugnant, the one to the other, the first part shall be received, and the latter rejected, unless there be some special reason to the contrary." In the case of *Colther v. Meyrick* (Hardr. 94), Baron Nicholas, in answer to one of the objections, says "when there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand;" and in the case of *Thomas v. Howell* (4 Mod. 69) we find it said by the Court—"But in deeds it was admitted, that subsequent clauses, which are general, shall be governed by precedent clauses, which are more particular. In *Altham's case* (8 Co. Rep. 151 (b)) it is recognized, as a rule or principle in law, that *generalis clausula non porrigitur ad ea que antea specialiter sunt comprehensa*; and further on it is observed to have been well said in 35 Hen. VIII. Dyer, 56, that "subsequent words may qualify and abridge, but not destroy, the generality of the words precedent." And it was admitted, when this case was last ar-[317]gued by the counsel for the defendant, that Lord Ellenborough had intimated a strong opinion against the efficiency of that argument; and I am of opinion also, that that point affords no ground for supporting the lease, because the general clause cannot be considered as having the effect of completely nullifying the previous special power of re-entry.

Another question raised in this case was, whether the former leases of the same property given in evidence were admissible in support of the validity of the lease in question, by shewing that it was conformable to them in respect of this clause. Upon that point I say, it is enough to shew that the power in the deed requires no such extrinsic means of explanation, because it is clear and precise, and has nothing ambiguous in it; and every man who reads it, with or without a legal mind, will find it clear and satisfactory in its tenor. It contains no reference to former leases, at least as to terms; and according to the authority of the Master of the Rolls, in the case of *Bonyham v. Guy's Hospital* (3 Ves. 298), they could not be used to explain the deed of settlement, by shewing, from the acts of the parties, what was their probable understanding upon it. In a subsequent case of *Eaton v. Lyon* (ibid. 694) too, the same learned person held distinctly, that "a legal instrument is not to be construed by the acts of the parties." The same doctrine was acted upon in [318] this Court in the case of *Iggulden v. May* (2 N. R. 449); and it was also so decided in effect in the case of *Doe, on the dem. of Allan v. Calvert* (2 East, 376), in which I was myself of counsel. In that case it was held that the lease was void, because it was not conformable to the leasing power; notwithstanding it accorded with the custom of the country and with former leases which had been granted by the creator of the power. There was certainly no question raised in that case as to the admissibility of the evidence, but if the Court, where it had been admitted, refused to give it any effect, it was substantially the same thing as if they had refused to receive it. Without at all adverting to decided cases, however, I am of opinion, that on principle, no evidence can be admitted to explain

a deed in any case, more particularly where the instrument is so plain and perspicuous as to exclude all ambiguity.

Upon the whole, therefore, I am of opinion, for the reasons which I have stated, that the judgment of the Court of King's Bench ought to be reversed.

WOOD, Baron—having stated the question and read the terms of the three powers, and noticed the distinctions in each, and the words of the proviso in the lease for re-entry, in case of non-payment of the rent for fifteen days, and no sufficient distress, thereby (as his Lordship observed) [319] engrafting upon the power the terms required by the statute of the 4th Geo. the II. c. 28—proceeded as follows:

It is contended on the part of the plaintiff, that the proviso for re-entry in the lease is not such an one as is required by the settlement, both inasmuch as it has limited a time for re-entry, which the settlement has not, and has thereby postponed the right of re-entry beyond the day on which the rent becomes due: and inasmuch as it is clogged with a condition that there be no sufficient distress on the premises, which the leasing power in the settlement does not mention; and that therefore the lease is void.

The clause in the settlement, however, requires no more than that the lease should contain a power of re-entry for non payment of rent, giving that power no qualification or modification at all. There is in the lease a clause of re-entry; so that in terms the maker of lease has complied literally with the power given by the settlement. I admit, however, that the power, although it is general, must be executed not in an illusory manner, but in a reasonable manner, that is, in such a manner as the law will deem reasonable; for I apprehend that the law will judge what is a reasonable execution of a power where no specific terms are expressed, as it will judge of the operation of the power itself. In the power of re-entry required to be inserted in the leases for the lands to be let at rack-rents, a time is limited [320] for the payment of the rent, and that time is twenty-eight days. That power, I admit, cannot be departed from. Why then, I ask, was no time for payment limited also in this power? unless it was because the settlor meant to leave it, as I conceive she has done, to the discretion of the tenant for life to insert such a reasonable power of re-entry as should secure the payment of the rent to the reversioner. Where the power dictates no precise terms, it is an inference of law that it must be executed in a reasonable manner; and the law will take notice whether it is executed in an illusory or in a reasonable manner. For instance, where one gives to another the power to appoint such portions of a bequest among his children as he shall think proper—if he should give the whole to one child, that would be an illusory manner of executing the will of the donor, and one which the law will not permit. So if in this case the power of re-entry were clogged with unreasonable qualifications, I admit it would not be well executed. The object of a clause of re-entry is merely to secure the rent; and it has always been considered as the only object of it, both at law and in equity; and when I see such a clause inserted here as is reasonable and fair, and which reasonably and fairly secures that object, under a power in an instrument where we are not tied down by any specific terms, I think the power well executed; for we are not to look out for what I conceive to be a mere apex juris to defeat the intention of the parties; we ought so to construe deeds and acts ut res magis [321] valeat quam pereat. In one of the cases cited on the part of the lessors of the plaintiff, the true principle on which these powers are to be construed is, I think, rightly laid down. That is, the case of *Cotter v. Merrick* (Hardr. 89), which has also been referred to by my Brother Park, and was particularly relied upon in the argument. There the question—which was, whether a lease that had been executed by a tenant in tail was conformable to the powers of making leases by tenants in tail, which were granted by the statute of Henry VIII., which was passed to enable tenants in tail to make leases to bind as if they were tenants in fee simple—also arose upon a special verdict, which found that Robert Earl of Essex was seised in tail to him and the heirs male of the body of his grandfather, of the manor of Pembroke, and that he died seised; that his son entered, and made a lease by deed for twenty-one years to Sir John Merrick, rendering rent to the lessor, his heirs and assigns, and died; and after his death the estate tail descended upon one who was not heir at law to the lessor; and the question was, whether that was a good lease within the statute of 32 Hen. VIII. c. 28, to bind the issue in tail. By that statute, if a tenant in tail make a lease of the estate tail, provided such leases be not for more than twenty one years, and provided that upon every such lease there

be reserved yearly, and made payable to the lessors, their heirs and successors to whom the said lands should have come after the death of the lessors, [322] if no such lease had been made, and to whom the reversion thereof shall appertain according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomedly yielded or paid," such leases shall be good in law. In the case referred to, as the estate tail descended on a person who was not the heir at law of the lessor, and the rent was reserved to his heirs and assigns, so that there was not a rent reserved in terms to the persons who were to succeed to the estate after the death of the lessor, which certainly was departing from the power contained in the act of parliament; yet it was held a good lease. In that case Baron Hill says, "In the exposition of statutes, the Judges must make such a construction as to advance, and not to frustrate the intention of the makers. Now their intent was, that the rent should go along with the reversion, and the lease be good, if by any reasonable construction in law it might be so." So I say also, that in cases of powers reserved by settlement, we ought to do the same, if by any reasonable construction in law we can do so. Baron Parker also says, "It is the office of a Judge to preserve, and not to destroy an estate, if the exposition be not contrary to the words." Those, I conceive, are the true principles upon which we should construe all deeds. In that case the Judges gave a rational construction to the lease, and that operation to the act of the parties, which, in all probability, corresponded with their intention; although, in words, it was not according to the proviso contained in the act of parliament. Then taking the true interpretation of the power to be, [323] to leave the mode of re-entry to the discretion of the lessor, the question will be, has that discretion not been in this instance fairly and *bonâ fide* and reasonably executed?

The two points in this case arise on the time given for payment of the rent: and the absence of a sufficient distress upon the premises. As to the first, I consider, that by the operation of the first leasing power in the settlement, it is left to the lessor to insert, in his discretion, a reasonable proviso for re-entry, as in the other case he is tied down to twenty-eight days. Then is this a reasonable power in point of time, giving the tenant a period of fifteen days. In the next power, the period prescribed by the settlor is eight and twenty days, which is almost double the time; and if the parties thought that a reasonable time, then surely fifteen days must have been considered by them to be a reasonable time to be given to pay the rent. I lay no great stress on the finding of the jury (but I mention it, because I think it ought not to be entirely laid out of the question) that in the other leases of this property which had been executed, both before and after the deed of settlement, such has uniformly been the usual time given. It has been said, that we cannot look at those leases for the purpose of obtaining evidence of that fact; because it is contrary to the rules of evidence to explain a written instrument by extrinsic parol testimony. But it is not for that purpose that the leases have been made use of here: they have been used only for the purpose of shewing the manner in which these lands were [324] usually let, and to ascertain the state of the property at the time when the new lease was made, with a view to accommodate to it the terms of the lease about to be prepared: and for that purpose and to shew that the lessor was acting *bonâ fide*, the former leases were, I think, properly used and admitted in evidence: and these same terms having been found there, I think that a fair criterion from which we may judge of the reasonableness of the proviso in that respect. In Coke upon Littleton (of Estates upon Condition) instances are put of conditions which were considered reasonable—one of them is, "if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year" (Co. Litt. s. 325, p. 201 a.), I only use this to shew what at that time was considered to be a reasonable proviso, and that the law will judge what is a reasonable time.

Then supposing this power to be reasonable in point of time, the consideration of the last objection arises: and that was the objection mainly, if not entirely relied upon. It is, that the right of re-entry has been clogged with the condition of there being no sufficient distress upon the premises. Upon that the question will be, is that also a reasonable condition to be inserted; and with reference to the law, as it stood when the lease was made, I am clearly of opinion, that it was perfectly reasonable. The statute of the 4th of Geo. the II. had, before the making of this settlement [325] considered it to be reasonable, that lessors, where they had a power of re-entry for obtaining payment of the rent, should not enter whilst there was a sufficient distress

on the premises. Where is the difficulty which that condition imposes? The rent reserved is 40s. : and can it be supposed that there would be any difficulty in finding a sufficient distress for 40s. upon this estate? They might not only take a sheep or a horse, but if they should go into the house, they would there find a table or chairs, or any article amounting to that value : it is therefore mere idle fancy to suggest that there would be any difficulty in finding a sufficient distress. I will now advert to the statute of the 4th of Geo. the II., on which I wish that there had been more argument and consideration, as well in the case of *Core v. Day* as in the case before us. The date of this deed of settlement was in the year 1757, which was after the passing of that statute (for it passed in the year 1731) to regulate the powers of re-entry for non-payment of rent. Before that statute, the carrying into execution a power of re-entry, was attended with great difficulty and nicety. There must have been a demand of the rent upon the land. If there were a house upon premises demised, the rent must have been demanded at the fore door, and it must have been demanded at a convenient time, before the sun-setting of the last day of payment, so that the money might be numbered and received. Then when the lessor had done all that, the law still required him to make an actual entry and bring an ejectment : and if all these things were not [326] critically and exactly performed, the lessor lost the right of re-entry for that time, and he must have waited till other rent accrued, and then he must have made a fresh demand and re-entry for the subsequent rent. If the landlord, having complied with these formalities, had brought his ejectment, it was the uniform practice of the Courts of Equity to relieve the tenant against the forfeiture, upon payment of the rent and costs ; for they considered the clause of re-entry as a mere security for the payment of rent. Landlords therefore being laid under such great difficulty, it was thought right to remedy that inconvenience : and therefore the legislature interfered : but at the same time that the legislature did remedy that inconvenience, it took care also to provide for the ease of the tenant : and therefore it said, that the landlord, in such a case, shall not avail himself of his power of re-entry, which was considered to be merely for the purpose of securing the rent, if he can be paid by distress upon the premises. Now this condition having been thought reasonable by the legislature, why should it not be thought reasonable by individuals, who are about to make a settlement in which the consideration of the subject arises. I think there can be no better test of the reason of the thing than what the legislature has provided in the very case. Then we have authority to shew, that it has always been considered that a power of re-entry is merely for securing the rent. In the case of *Wadman v. Culcraft* (10 Ves. 68) a forfeiture [327] had been incurred by the non-payment of rent, and breach of other covenants. The Master of the Rolls, in giving judgment, made these observations, "The plaintiff seeks to be relieved against a forfeiture of the lease, which he states to have been incurred solely by the non-payment of rent : and if that is the ground of this ejectment, there is no doubt Equity will relieve against the forfeiture, considering the purpose of the clause of re-entry to be only to secure the payment of rent : and that when the rent is paid, the end is obtained : and therefore the landlord shall not be permitted to take advantage of the forfeiture." Before the statute of Geo. II. it was the same, and the only alteration which has been made by the statute is, in dispensing with the old formalities attending re-entries at the common law ; and it has enacted, that the landlord having a right to re-enter, and when half a year's rent is in arrear, shall and may at once bring his ejectment and recover possession, provided there is no sufficient distress to be found on the premises, to countervail the arrears then due : and these are the very terms engrafted upon this proviso. The same statute has also provided, on behalf of the tenant, that he, in case of proceedings against him for rent by the landlord, he may pay or tender the rent and costs to the landlord or his attorney, or he may pay them into Court before trial, and that thereupon all the proceedings shall cease. The policy of this law, therefore, we see, was at once to prevent forfeiture for non-payment of rent on the one hand ; and on the other, to facilitate the [328] landlord's remedy for the recovery of it : and, at the same time, the legislature also thought it right to impose the same condition on the landlord as this lessor has done, that the tenant shall not be ejected if there be a sufficient distress to secure the rent. In this case there is secured to the landlord ample means for the recovery of his rent ; he may bring his action or distrain the moment it becomes due, without waiting any time ; and if, after the expiration of fifteen days, there be no sufficient distress upon the premises, then his right of re-entry

attaches. It has been said, that the statute still leaves it open to the landlord, if he will comply with the formalities of demand at the last hour of the day, and make re-entry, in that case the necessity of distress is not imposed on him. The answer to that is, that the tenant would instantly be relieved in a Court of Equity against the forfeiture. I have hitherto made use of this statute to shew the reasonableness of engrafting such conditions upon the power of re-entry required by the settlement; but it does not seem clear to me, that the statute has not shut the door against the proceeding by re-entry at the common law: and that is a point which I hope will be well considered if this case should come before parliament. If that be so *cadit questio*; because then the penners of this lease will have introduced nothing more into this clause than the law had in effect introduced; and I can have no doubt that they did consider that it was incumbent upon them to insert the same conditions as the statute had provided. I will now consider the ques-[329]-tion, whether the landlord's right of re-entry at common law is not entirely shut out by the statute, which I think a fit question for the consideration of parliament. The act begins by reciting, that great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties which attend re-entries at common law; and forasmuch as when a legal re-entry is made, the landlord or lessor must be at the expence, charge, and delay of recovering in ejectment, before he can obtain the actual possession of the demised premises; and it often happens, that, after such a re-entry is made, the lessee or his assignee, upon one or more bills filed in a Court of Equity, not only holds out the lessor or landlord by an injunction for recovering the possession, but likewise pending the said suit do run much more in arrear, without giving any security for the rents due when the said re-entry was made, or which shall or do afterwards incur; for remedy whereof, be it enacted by the authority aforesaid, that in all cases (and I lay some stress upon this expression) between landlord and tenant, from and after the 24th day of June, 1731, as often as it shall happen that one half year's rent shall be in arrear (and here the rent is reserved half yearly) and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord and lessor shall and may (the words are not merely may, yet if it were may, I should still consider it imperative by analogy to a decision on another statute, which I [330] shall presently advert to) "shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises," in the usual way, and that (it enacts) shall be equivalent to the formalities of a re-entry. Upon those words it is imperative, as it appears to me, that he shall not proceed as at common law, because the statute dispenses with that proceeding and abrogates it, and directs that instead he shall proceed in the usual manner by ejectment. The act then thus continues, "And in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the Court, where the said suit is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then and in every such case the lessor or lessors in ejectment shall recover judgment and execution in the same manner as if the rent had been legally demanded, and a re-entry made! But the lessor cannot re-enter in any case, unless there be an insufficiency of distress; and here the condition imposed upon him is only, that he shall not avail himself of the power of re-entry if there be sufficient distress. Then the statute also provides, on behalf of the tenant, that if he shall tender the rent due to the landlord, or pay it into Court with costs before the trial, the proceedings in the ejectment shall cease. I think, [331] therefore, that by the statute the power of re-entry at common law is taken away. Why should it be left? It is quite nonsense to suppose that it can be left for any thing, but as a security for the payment of the rent; because if the lessor would make a re-entry at the common law, while he might find goods to distrain, the defendant might have filed a bill in Equity to restrain him. And now neither Law nor Equity will permit the lessor, since the statute of 4th Geo. II., to take any proceedings on non-payment of rent for any other purpose save the recovery of the rent, and the right of re-entry is regarded merely as a security for the rent. Now it appears to me, that that is the reasonable, fair, and liberal construction of the statute; for why should there be left a loop hole for the landlord to make an entry at common law, in order to

avoid the remedial enactments of this statute? The intention of the act was, that the lessor should have the same relief in a Court of Law as he might before have had in a Court of Equity. It strikes me therefore that it is imperative upon the party to proceed in the way which shall enable him to avail himself of this act, and in that way only; and I apprehend that it always has been so considered: for there will not be found, since this statute, an instance of a re-entry at common law. I, at least, have never heard nor read of such an instance: and I think the construction which the Courts have put upon the statute of the 8th and 9th of Wm. III. c. 11, confirms me in the opinion, that this statute is also imperative. That statute is entitled "An act for [332] the better preventing frivolous and vexatious suits." The 8th section of that statute, which relates to actions for penalties for not performing covenants and agreements, runs in these terms, "And be it enacted, that in all actions which from and after the 25th day of March, 1697, shall be commenced or prosecuted in any of His Majesty's Courts of Record, upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may (not shall and may, as it is in the 4th Geo. II.) assign as many breaches as he or they shall think fit; and the jury upon the trial of such action shall and may (now using both words) assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken; and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions." It is provided also, that if judgment shall be given for the plaintiff on a demurrer, or by confession or nihil dicit, he may (again) suggest as many breaches of the covenants as he shall think fit; upon which there shall be a writ of enquiry: and if the defendant after such judgment and before execution executed shall pay into Court to the use of the plaintiff the damages assessed, by reason of the breaches of covenant, with costs, a stay of execution shall be entered upon record, or if damages shall have been levied under the execution, the defendant shall be discharged from [333] the execution, the judgment to remain as a security to answer any further breaches, and the plaintiff may have a scire facias on the judgment suggesting other breaches. Now I well remember the first case where the construction of the word "may," in that statute, was brought into consideration. That was the case of *Drage v. Brand* (2 Wils. 377). Until that time it had always been considered to be, in the option of the plaintiff, whether he would proceed according to the course of the common law, or under this statute; and therefore in general he assigned only one breach. In *Drage v. Brand*, however, that came to be considered. It was there contended, that it was not compulsory on the plaintiff to assign breaches, and that he had right to elect to proceed at the common law, and not upon this statute: and it was argued very much, upon the ground, that the statute was made for the benefit of plaintiffs, and that, as it says the plaintiff may assign as many breaches as he should think fit, he might waive it, and leave the defendant to his remedy in Equity, having an election either to proceed upon the statute, or according to the course of the common law. The Court, however, in its construction of that statute, in the case I have referred to, held, and all the Courts in Westminster Hall now hold, that the statute is compulsory on the plaintiff to assign breaches and assess damages, and that the defendant shall not be put to seek relief in Equity. And that, I think, is the fair and liberal and proper construction to be put upon that [334] remedial statute, or the result would be, that a plaintiff would be entitled on a verdict to take out execution for the whole penalty and costs, and the defendant would be driven into a Court of Equity for relief, when an issue must necessarily be directed. To prevent that circuity it is, that the statute has been considered in legal construction to be compulsory, and as enacting virtually that the plaintiff shall assign breaches and assess damages. The same question was so determined also in the case of *Roles v. Rosewell* (5 T. R. 538), some time afterwards. I say, therefore, that by analogy to this statute, the true and real construction of the statute of the 4th Geo. the II. also is, that it is compulsory, and upon the same principle, (indeed the words are much stronger in this latter act) and that the power of re-entry at common law is abolished, and the landlord must proceed in the way thereby prescribed, by serving an ejectment at the end of half a year, and cannot proceed in any other way. If I am right in the construction of that statute, and there is certainly no decision to the contrary, there is an end of this question; for the penmen of this lease have by introducing these conditions inserted

nothing as a qualification of the power of re-entry, which is not conformable to that statute. But I will suppose it to be still left open to the landlord to proceed as he might have done before the statute: in that case I would use it to shew that a reasonable clause of re-entry being all that the power required, the adoption of the same condition, [335] which the legislature has adopted in similar cases, cannot be considered as unreasonable. It might not perhaps be necessary to express the condition, because the law imposes it; but being expressed superflua non nocent.

The case of *Coke v. Day* has been cited as an authority of the Court of King's Bench establishing, that the inserting in a condition of re-entry in a lease made under a power, the words, "in case no sufficient distress can be taken upon the premises," (those words not being in the power) was not a good execution of the power. I doubt very much the propriety of that decision. I think the operation and effect of the statute of the 4th of Geo. the II. c. 28, was not sufficiently brought before and considered by the Court in that case; but, be that as it may, it is different in one very material feature from the present. The re-entry required there was for non-payment of the rent reserved by the space of twenty-one days: so that there was there a specification of a particular mode; and therefore it might perhaps be inferred, that no other qualification would be warranted; but here there is no condition specified nor time limited. "A power of re-entry," generally, is all which is required; and therefore I consider that reasonable qualifications may be added. In the case of *Doe, dem. Forster v. Wandlass* (7 T. R. 117) it was determined that a landlord could not recover in ejectment, where there was a sufficient distress, and he had not complied [336] with the requisitions of the common law. In this present case, which was only a few years ago, the same Court of King's Bench also must have considered it as distinguishable from that of *Coke v. Day*; or that upon re-consideration their former decision was wrong; for it cannot be supposed that they had forgotten their own decision of a few years before, when the same Chief Justice and one of the present Judges sat on the bench in both cases. They held that this power has been reasonably and properly executed, and they have accordingly given judgment for the defendant: and I am of opinion that it was a right judgment, and that it ought therefore to be affirmed.

GRAHAM, Baron—having stated the nature of the question, and observed that it depended on the first of the three leasing powers contained in the settlement, applicable to three distinct dispositions of the property, the terms of which, as well as of the proviso for re-entry and other material parts of the lease, he read at the commencement, remarking the distinctions occurring in the terms of the three powers, in each of which (he observed) the creator of them had been more or less minute in her care of providing for the preservation of the interest of the remainder-man, in proportion to the amount of rent to be reserved—delivered his judgment to the following effect:

With regard to those demises of the property which the tenant for life was empowered to grant [337] for lives or long terms depending on lives, and on which fines were permitted to be taken, the settlor is manifestly more indifferent in her provisions; for she expresses less anxiety about the precise terms by which the rents reserved under the first power, where the lessor is entitled to take premiums, are to be secured: and that is probably because those fines, which are a species of anticipated rent, constitute the substantial enjoyment and income of the tenant for life; and the reserved rent is merely nominal and intended only to establish a recognition of the relation of landlord and tenant; for as to any beneficial enjoyment a rent of two pounds may be treated in the present discussion as a rent of two shillings. As to that she only requires that the leases shall contain a power of re-entry, in general terms, so general that nothing definite can be extracted from them, nor can the very words be followed on that account; and it must therefore necessarily refer to something extrinsic. It cannot be executed without such reference to something that had before been done with respect to the property on similar occasions; or she has left it altogether to the judgment and the discretion of the person who might have to execute the power. There is a very important fact found among the circumstances of this special case, which, although I do not mean to rest my judgment on it, I cannot but consider most material for our consideration. At the time of making this settlement, and so long afterwards as till the year 1803, the then subsisting leases contained a similar proviso, [338] couched in the terms of that which is contained in this lease. Now what could be more natural than that any person, who should have to pen a lease by which he was to reduce into practice this general power, should have recourse

to such subsisting leases to serve him as a guide in ascertaining the customary and usual mode of leasing, to direct him in his endeavour to execute the power as conformably to the requisition of the settlor as might be? All that she has required is, that there is to be a power of re-entry for non-payment of rent. But what power? Such an one as should be reasonable and proper. Would it be reasonable or proper so to bind down the tenant, that, upon his failure to pay this rent before the last moment of the day on which it is reserved, the landlord might instantly re-enter? Those are terms which any man taking a lease would revolt from and reject, as being terms which must drive him into a Court of Equity for relief on every occasion; and they would also subject the landlord to all the inconveniences attending a re-entry at common law. It has been objected that, if it should be admitted that some time may be given, a difficulty would arise in ascertaining what time; and it has been asked (for that difficulty has occurred to very intelligent minds) who is to judge of the reasonableness of such time? A Judge or Jury? I answer neither, certainly. It must be in the discretion of the person who is to execute the power. It is he, who necessarily is, in the first instance, to embody in a specific shape this general requisition of the creator of the power, [339] that the lease contain a power of re-entry; and the Court would in a case of dispute have ultimately to determine whether he has followed the intention of the settlor. I do not say that the insertion of every power of re-entry will satisfy the leasing power in the settlement; for it must be such a power of re-entry as would be reasonable either with regard to what had been formerly adopted in the earlier enjoyment of the property, or to what would be commensurate with any occasion that might arise for departing from the former usage. Here then we may apply the doctrine, now universally admitted, that clauses of re-entry are regarded both at Law and in Equity, as only having for their object to secure the payment of rent; and therefore a power of re-entry, modelled on the law, cannot but be considered reasonable and suitable to every occasion. That was the doctrine in Equity before the statute. It is however material for us to consider, that when this settlement was made, the statute of 4th of Geo. II. had passed; and therefore the maker of this lease, in executing the power, had then not only the principles of Equity, but the rule of this statute for his guide. I take it to be a clear proposition, after a very long experience in Courts of Equity, and I state it in the hearing of those who can correct me if I am wrong, that whatever may be the form of these clauses, whether they express that the lessor may re-enter for non-payment of rent, or that the lease shall be void in such case, or whatever other form they pursue; if the lessor had re-entered for breach [340] of that covenant, a Court of Equity would have at all times restrained him from proceeding further at law, on the lessees paying the arrears of rent and costs; for such clauses (which were originally founded on the old doctrine of estates upon condition) operate as a forfeiture, and it ever has been the peculiar province of Courts of Equity to relieve from the forfeiture, whenever the rent should be satisfied. The legislature however considering it hard that a tenant should be put to the expence of coming to a Court of Equity to be relieved from the consequence of non-payment of, perhaps, a mere nominal rent of two-pence (for I may for this purpose assume this 2l. to be no more), have therefore provided a more summary course. They however also considered, at the same time, the hardships under which landlords laboured, from the necessity of observing all the formalities of re-entry at common law which they were often liable to mistake, and, their observance being traversable, they frequently failed to recover; and therefore the legislature provides that the lessor shall be entitled to re-enter without observing any such formalities: but that is provided only in case there be no sufficient distress upon the premises: for if by looking over the next hedge he can see abundant means of satisfying himself the arrears of rent, the statute says he shall not turn the tenant out, nor drive him to a Court of Equity for relief. Looking then to the provisions of this statute and the established course of the law, could any man of sense take any better guide for the framing of the [341] clause of re-entry, required in general terms by this leasing power, than the conditions which this statute imposed on landlords, when it conferred on them the advantage of taking away the difficulties attending their common law remedy by re-entry. Can we conceive that the settlor meant, that for a sum of one pound, the amount of one half year's nominal rent, there might be an actual re-entry made, when, by merely looking over the hedge, the landlord would most probably see a hundred head of cattle on which he might distrain? Where

then is the difficulty or clog imposed by this qualification on the remainder-man? The very nature of this tenure, too, is a strong argument against the supposition that the creator of the power intended that there should be an absolute peremptory power to re-enter the instant the rent should be due and unpaid: because we know that under such leases as this the lessee is the owner for the duration of his term of the property: and he pays a great sum for it in the shape of a consideration for his lease. It surprised me, therefore, to hear it seriously argued in a case of a lessee who is, as it were, a purchaser for a valuable consideration, that great dangers and difficulties might attend a suit in replevin. Can it be really supposed that a tenant who buys the estate for three lives, and has so valuable an interest, would resist the payment of a rent of 20s., and replevy the goods distrained, at the great expence of such a proceeding? So, with respect to the supposed hardship of searching every part of the premises for a distress, can it be supposed that these estates can ever be in [342] that destitute condition, that the lessor must be obliged to search for distrainable goods every part of a farm, where he may be sure to find a dung-heap in any corner which would pay him his one pound. These are arguments which, in my judgment, ought not to have any weight with liberal and intelligent minds. Another argument was used, and with that I perfectly agree, that by no mode of executing this power ought the remainder-man to suffer any injury, or be put in a worse condition. That is very true; but we are also to bear in mind that these powers, which have been transferred from Equity into the Law, are therefore always to receive an equitable and liberal construction, so as neither to work an injury to the tenant, or to the person next entitled in remainder or reversion to the rent reserved. But let me ask, what possible injury can that person suffer under the power as it has been executed in this instance? Will it be said that it would better his condition to have reserved to him a power of re-entry at common law for this rent of one pound, such as the literal execution of this power, under which it has been said he ought to have had that right reserved, would give him, instead of this beneficial and easy power of re-entry which has been provided for him by analogy to the statute, enabling him upon the non-payment of the one pound rent, if he can wait for the space of half a year, to proceed to get possession by the easy remedy of ejectment (if indeed it could be supposed that there should be no sufficient distress on the premises) by which the old common law difficulties are at once obviated?

[343] Then we were pressed with authorities against the admissibility of such a condition to relax the right of re-entry, the principal of which was the case of *Care v. Day*. I, by no means, admit that that case has decided the point for which it has been cited in argument; for if it had, I might then concur with my Brother Wood, who shewed some little disposition to differ with that case. But it is not necessary for me to express any opinion on the propriety of that decision; because I think it distinguishable from this. That was not a case of an estate for lives at a nominal rent, and I know, from a note* of the case of *Holley v. Scot* (Lofft, 316), with which I have been fur-[344]-nished, that that case bears me out in this. The note I speak

* *Lord Tankerville v. Wingfield and Pritchard* †, transcribed from the MS. note in the possession of Mr. Butler. M. T. 13 Geo. 3, B. R.

[S. C. 3 Bligh, 332, n.; 2 Br. & B. 498, n.; 5 Moore, C. P. 346, n.]

Upon ejectment the case was as follows:—Upon the marriage of Sir John Astley, his lady's estate was settled upon Sir John for life, with several remainders over which never took effect; remainder to the lady's right heirs. A power of leasing was given to Sir John; such leases to be made for any number of years at the accustomed rent, to take effect immediately in possession, and not by way of future or reversionary interest; and on every such lease there was to be inserted a clause of re-entry if the rent should be behind for twenty-one days, the rent to be made payable, and the re-entry to be incident to, and to go along with the reversion or remainder. In the same settlement there was also a power of revoking all the uses thereby declared, and appointing new.

Some time after the marriage, Sir John Astley and his lady revoked all the uses

† This is the same case as is reported in Lofft, 316, under the name of *Holley v. Scot*.

of, although not very fully taken, [345] enables me to perceive what the ground of the decision was : and that case diametrically opposes [346] what was said at the bar to be the doctrine deducible from the case of *Care v. Jay* : so that we [347] may say, in this case, *magno se judice quisque tuetur*. I however am of opinion, that the

of the settlement that were subsequent to Sir John's life estate and the powers incident thereto, and declared new uses : there was also a fine levied to the same effect.

21st September, 1766, Sir John made two several leases of this date to the two defendants Wingfield and Pritchard for twenty-one years, conformable to the power he had by the said settlement and the other deeds, and the fine, except, that previous to the entry, distress was to be made : and it ran nearly in the following words :—That if the rent should be behind or unpaid by the space of twenty-one days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises (except as therein is excepted), then it should be lawful to Sir John Astley, his heirs and assigns, to enter.

Sir John Astley and his lady being both deceased, the estates are descended upon Lord Tankerville, the plaintiff, &c.

Dunning for the plaintiff. The Court always takes a difference between powers when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate, or which he holds in another's right. The first are always construed favorably to the persons making use of this power : the second are taken in a strict light. Here it was certainly the second. It was a power to be exercised on the wife's estate, and in some respect in prejudice of his wife, and therefore to be taken strictly.

1st objection. That the settlement declares that the power of re-entry should be reserved and made incident to the inheritance of the estate, and by the lease it is reserved to Sir John Astley, his heirs and assigns. 2d objection. The settlement directs the re-entry so to be reserved as above to be made immediately, if the rent should be behind by twenty-one days. By the lease it is to be preceded by demand and distress.

These are strong, plain, and conclusive objections.

Beareroff for the defendants. The remainder-man Lord Tankerville has substantially all the powers he ought to have, or can have. As to the 1st objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident : the heirs and assigns of Sir John Astley mean those who are heirs and assigns to the estate under the settlement by which Sir John Astley claims the estate so. *Cotter v. Merrick*, Hardr. 89. Tenant in tail died seised, his son entered and made a lease for twenty-one years, rendering rent during the term to the lessor, his heirs and assigns, and died. It was unanimously adjudged to be a good lease and within the 32 Hen. VIII., the opinion of the Court being, that the word "heirs" being a comprehensive word, it ought to be construed secundum subjectam materiam, and to have that which the nature of the deed requires. This is much the stronger in the present case, as Sir John Astley having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may in some respect be said to be the heirs and assigns of Sir John Astley. As to the 2d objection, that the re-entry which is directed by the power in the settlement to be reserved immediately on the rent being behind twenty-one days after it is due, is by the lease to be preceded by distress and by demand. The words on the settlement are short and loose, and seem to be no more than a general direction, that in every lease to be made under this power there should be a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry. It is a direction that the power of re-entry usually inserted in leases should be inserted in the leases to be made under this power in the usual manner. This, I apprehend, a sufficient answer to the objections raised against these leases, each is a verbal objection, and I have given each a verbal answer.

Mr. Dunning in reply. The distinction I set out with, and the consequences of that distinction that these leases are to be considered in a strict light is not denied, and besides this claim to the favor of the Court, Lord Tankerville has that of being the heir at law of the owner of the estate on which this power has been exercised. Lord Tankerville is neither the heir nor the assignee of Sir John Astley : he claims by a title paramount to Sir John. The rent is directed by the settlement to be incident

doctrine assumed in the argument to be established by the authority of *Care v. Day* would be contrary to law and (I had almost said) to common sense: and when I consider the great reputation of the Judges of whom the Court was composed, when the case of *Holley v. Scot* was determined (my Lord Mansfield and Mr. Justice Aston being then on the Bench), it is, in my estimation, of the highest authority; and it decided the very point in dispute. In the argument Mr. Dunning mainly relied on the objections of the introduction of qualifications similar to those now objected to, and Mr. Bearecroft treats them as verbal objections, contending that they are the usual qualifications, and such as are inserted in all leases, and [348] are productive of no injury to the lessee. The principles of the reasoning of Lord Mansfield I think I can collect from the report, although his precise expressions might have been mistaken by the gentleman who took the note, who was then a very young man: but the ultimate decision of Lord Mansfield could not have been mistaken. The ground of that decision was that the reason of inserting the clause of re-entry being merely to secure the payment of the rent, whatever was adequate to that purpose and occasion was sufficient; and that it would be contrary to the spirit of the statute, and contrary to reason, that the lessor should enter for the non-payment of the rent whilst there should be a sufficient distress. It should be observed, that the rent there was a beneficial rent and not merely nominal as this is. Even in that case Lord Mansfield held that the qualifications were no more than what was reasonable and proper; and therefore his Lordship and all the Court held the lease to be a valid execution of the power. Having expressed myself

to the inheritance, that is to say, to be to the several limitees of the settlement when respectively in possession. The reservation is to the heirs and assigns of Sir John Astley. They are not limitees. This is therefore not a proper execution of the power. The case quoted, and the act of parliament 32 Hen. VIII. only shew, that if a tenant in tail makes a lease according to the statute, and reserves rent to himself and his heirs, the word "heirs," or the words "heirs and assigns" may be construed to be such heirs as may succeed by force of the entail. This construction can never, in the present case, take in Lord Tankerville, who cannot in any sense or meaning whatever be deemed the heir of Sir John Astley or his assigns. It is sufficient to say, that in pleading he could never be described as such. As to the words being loose, and directing what should be done, and not describing how it is to be done, this seems a frivolous distinction. The settlement directs a clause of re entry to be inserted in the lease; the lease says it shall not be lawful for Sir John Astley to enter as long as there is a sufficient distress or distresses to be taken. Till then it is postponed. This is contrary to the words of the settlement, and is not certainly a proper execution of the power.

Lord Mansfield. - The two objections to these leases are, 1st, that by the settlement the re-entry is to be made incident to the rent, but by the lease it is reserved to Sir John Astley, his heirs and assigns. And in the event it has not followed the rent, but gone to the heirs of the lessor Sir John Astley, while Lord Tankerville is in the lawful possession and receipt of the rents. The 2d objection is, that the clause of re entry, which by the settlement ought to be immediate, is by the lease fettered, being on a previous demand and previous distress. As to the first, by the nature of the power it must go with the reversion and inheritance. The person who is in the reversion and inheritance, is he that is to enter on the forfeiture of the lease, and no one can enter but he to whom the rent is payable; for, as Littleton says, no stranger can enter for forfeiture; for a stranger cannot be in by his former estate. If the rent had been reserved for the term, as in the case cited from Hardres, still it goes with the inheritance. Heirs and assigns can only mean those who have the reversion and inheritance, otherwise, as is said 2 Saund. 370, they would be words of surplusage. The clause of re entry must go with the inheritance the same as the rent: for it cannot be reserved to any body but to him who is seised of the inheritance. It was said that ought to have been worded to the person next in reversion or remainder. The words "heirs and assigns" are general words, and are as good and quite tantamount to particular words. As to the second, the clause of re entry is short with words of course, and does not preclude the operation of law. A re entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress. Therefore, in both points, we agree to support the leases, so the verdict must be entered for the defendants.

so fully upon that case, I shall not enter into any depth of learning on the point, whether the extrinsic evidence was properly admitted in this case; because my opinion is grounded upon the conviction that this clause of re-entry is proper and fully adapted to the occasion, which was, that it should be a security for the payment of the rent. Without agreeing implicitly with the suggestion of my Brother Wood, that the statute of the 4th of Geo. II. c. 28, has precluded every other mode of proceeding, I consider that it is quite enough [349] for my purpose, that it affords a fit criterion of judging of the sufficiency of this power of re-entry. The lessor wisely and properly takes that statute as his guide; and in effect the proviso so qualified puts the remainder-man in a better situation; because the power to be strictly construed would have left him to his intricate remedy at common law; whereas the other and more reasonable execution of it gives him the beneficial remedy with which he had been furnished by the statute. Were it necessary however to decide the point I should not fear to say that the extrinsic evidence was well referred to; but I wish to stand upon the higher ground that there is here nothing of ambiguitas, either patens or latens; but inasmuch as in the language of the deed, which is sufficiently clear in sense, there is nothing definite or precise in the way of direction, it being general and indefinite in that respect, referring to judgment and discretion to be exercised in the execution of the power according to the requisition, I therefore think the existing leases were properly resorted to as a guide to that discretion and judgment by examining how the estates had been previously managed, and the prior practice as to the mode of demising which had obtained at the time of the making of the settlement. If therefore there be any ambiguity at all in the deed, it is an ambiguitas patens, which, it is said, cannot be helped by averment; but I am of opinion that there is no ambiguity here. I need not therefore advert to the doubt thrown on the doctrine in *Cooke v. Booth* by the [350] decisions, that where parties have used express language, the conduct of the same persons or other evidence aliunde cannot be admitted to explain their meaning: and I am relieved from that difficulty here; because, in the case of *Coke v. Booth* there were express covenants, which in their language imported an agreement for a perpetual renewal, and it is the generality of the power here which we are to supply. But covenants which, according to the plain sense of the words on the face of the deed itself express or may be construed to express an agreement for a perpetual renewal, certainly cannot receive explanation aliunde, as by the construction which the persons executing the successive leases, and their lessees had put upon it by more qualified covenants, so as to exclude the effect of that by which they had covenanted for a further renewal.

The cases which have been cited by my Brother Park are, I think, very distinguishable in their circumstances: and the doctrine which they establish, therefore cannot be applied to the present question so as to decide the point. On the whole I think the judgment of the King's Bench was right, and ought to be affirmed.

RICHARDS, Lord Chief Baron (having expressed a desire to give his opinion, independently of any feeling excited either way by the difference of opinion on the Bench) stated the question, and continued as follows:—

If we should hold the lease to be according to [351] the power, and a good execution of it, there would be at once an end of the question: for its validity would be thereby established: if not it is void. If it should be held to be void, we get rid of one of the strong arguments of a very learned person; because, in that case, the statute of the 4 Geo. II. would have no application as affecting this lease, inasmuch as the operation of that act only attaches on existing leases in force. So that notwithstanding that statute, and notwithstanding any relief which Courts of Equity would possibly afford in cases where equitable proceedings might be instituted for the purpose of obtaining the interference of such a Court, under these circumstances; (for with any such speculation we have here at present nothing to do, as no such proceedings have been resorted to) we must come back to the plain question on which this case depends—whether this demise has been made in due execution of the power to lease given by the settlement?

There cannot, I think, be said to be hitherto any complete uncontradicted decision on the subject. With respect to the qualification by the enlargement of the time, I know of no case: and with respect to the introduction of the other qualification requiring that there must be an insufficiency of distress on the premises, we find on that point the conflicting cases of *Holley v. Scot* and *Care v. Day*: and there is also the decision in this case now under consideration, in opposition to that of *Holley v. Scot*.

It therefore becomes [352] extremely important to consider this hitherto undecided question—as being, in the absence of authority, one of the first impression—with great care and circumspection.

Before I state the situation of the parties to this settlement and the various provisions of the deed, on which the whole turns; I must observe that it is now perfectly established, that the principal thing to be attended to, in construing powers of every description, is the intention of the creator of the power: for he is the legislator in every particular case, and may impose, arbitrarily, whatever terms he pleases, provided they are not inconsistent with the known rules of law. It is the duty of Judges not to speculate beyond that intention and its legality: and it is not their province to examine whether the terms, expressly required to be imposed by the creator of the power, are reasonable or unreasonable. Their only province is to see that they be not contrary to law, and if not, they must execute the intention of the parties. In this case, that intention is to be gathered wholly from the situation of the parties at the time of executing the settlement and a careful consideration of the terms of the instrument itself. The daughter of Lord Mansel may be considered as having the absolute dominion over this property, when her father, who had given it to her for life, with a power of appointment in fee, died. She afterwards executed that power by making this settlement on her marriage, and she thereby appointed these estates, which were then so entirely subject [353] to her disposition and control, in the following manner: limiting them to the use of her husband Lord Vernon for life; with remainder to herself for life; remainder to the children of the marriage: then to such persons as she should by will (not by deed) appoint; with remainder, or reversion rather, to herself and her heirs and assigns for ever. So that, with the exception of the intermediate estates limited to Lord Vernon for life, and to the issue, she reserves to herself the entire dominion over the property, and subjects it to her own sole disposition. The deed of settlement then creates three different powers of leasing adapted to give different interests to the lessees. Those powers were to be executed by Lord Vernon and herself respectively, as either of them should successively come into possession; and accordingly Lord Vernon, when he became tenant for life of the estate in question, made the lease now under consideration, by virtue of this power of leasing, which power moved wholly from Miss Mansel, and was given by her under the terms of her deed of appointment. I state this the more particularly because a distinction has been sometimes taken in the exposition of leasing powers, between those which are to be executed by persons having estates with such powers originally moving from themselves, and persons whose power over the property has been originally derived from others: and it has been thought that less latitude is to be allowed in the former case than in the latter; but it is not my intention now to consider whether that distinction is well or ill founded. Our most material [354] object is to examine minutely the nature and terms of each of these three powers: for by those alone can we be enabled to decide on the validity of the lease now under consideration: and I shall first take that which respects the mines, although that is not a subject of the present question. [His Lordship stated it in terms, observing that there no power of re-entry is required; he then stated the words of the second power of leasing for terms of years not exceeding twenty one, and the clause requiring the insertion of a power of re-entry.] Now the power to lease the mines does not require that a right of re-entry should be reserved for the non payment of the rent at any particular time; but in the second power there is a clause requiring a power of re-entry to be reserved, provided the rent be unpaid twenty-eight days after the time appointed for the payment of it. The creator of the powers, therefore, has expressly declared the law on the subject in the latter case, by declaring it to be her intention that there shall be contained in such leases a clause of re-entry if the rent be unpaid for twenty eight days: so that upon that event happening, the lessor or reversioner is to be absolutely entitled to enter. The tenant for life, therefore, is not at liberty to introduce into leases under that power, any other terms less favourable to the reversioner who is as much a purchaser of his reversion, as the lessee is of his interest, than those prescribed; and the reversioner is to be favoured, at least equally with the lessee who must be presumed to have knowledge of the title of the lessor under whom [355] he takes, and into which it is his duty to enquire; while the reversioner on the other hand—although (as I have observed) he is as much a purchaser as the lessee, yet as he acquires his interest in the estate by a deed of appointment to which he is

no party—must necessarily be taken to be a stranger to the title which he has no such opportunity or right to examine. In neither of those powers to lease at rack-rent is there to be any fine, premium, or foregift taken; so that the tenant for life is to have no greater advantage than the reversioner upon those leases. He has only been empowered thereby to grant leases for a number of years certain; and as they may endure beyond his own life, for which period he might have granted leases without any power; perhaps a lease for a given number of years may be thought more beneficial to him than a lease made to endure for the uncertain term of his own life. The other (the first) power, however, which is that, the construction of which is now brought under our consideration, is quite different in its terms. [Here his Lordship read that power, as in page 284, ante.] Under this power the tenant for life is given a right to take as great a fine, premium, or foregift as he can obtain; and that is a privilege which naturally must operate to the disadvantage of the reversioner; because, if the term be not out until after the death of the tenant for life, the reversioner has nothing but the ancient accustomed rent: and therefore it is not extraordinary that the creator of that power should be desirous of protecting the reversioner who might be her [356] child (though any appointee would probably be entitled to be considered, in such a case, an object of her greater care) by requiring more efficient restrictions to be inserted, in order to protect him from the effect of this sort of lease, than in the other cases; for this would raise a question of right as between the tenant for life and the reversioner; because the lessee has a right to cover himself from consequences by taking appropriate covenants from the lessor, on which he would be entitled to recover a compensation from his assets, in case of any breach of the covenant that he has power to demise. So that while the lessee may be really, in any event, protected, the reversioner may be injured if the terms of the power are not strictly pursued.

On the 5th of September, 1803, Lord Vernon granted this lease of the premises which are the subject of the present action for ninety-nine years, if three lives should so long endure, at the yearly rent of 2l. I do not think it necessary to dwell upon the quantum of the rent, for the principle of construction to be applied to it must be the same, whatever the amount may be. That rent which is found to be the ancient and accustomed rent, is reserved payable at Michaelmas and Ladyday in every year. Then after the covenant to pay the rent, it is provided in the lease that if the rent shall be unpaid by the space of fifteen days, and no sufficient distress be on the premises, it shall be lawful for the lessor to enter and possess the premises, free from the lease.

[357] Now the question is not merely whether this clause is conformable to the words of the first power, contained in the settlement, to demise the property of Lady Vernon for lives or years determinable on lives; for beyond all question it is not; but it is in effect whether any latitude of construction can be admitted in a case of this sort, so as to let in the whole of the terms of the proviso in the lease, as it stands, and render it constructively consistent, with the requisition of the leasing power. In looking into an instrument, with a view to learn the intention of the parties, the examination must be made with reference only to the instrument itself, and no cognizance can be taken of extrinsic matter not expressly referred to. It has been argued at the Bar that, as the settlement only requires a power of re-entry, it must be taken that the settlor meant to require only such a power as is reasonable; and that any power of re-entry might be inserted which should be qualified by reasonable conditions: and it is said that as there is, in fact, a power of re-entry reserved in the lease, the terms of the requisition in the power of leasing are satisfied, notwithstanding there are conditions added in restraint of that power; because those conditions are reasonable. The objection to that unsatisfactory and imperfect compliance is, that no one can be entitled to judge of the reasonableness of the qualifications which the tenant for life may choose to introduce. Who is to decide it? a Judge or a Jury! or is the tenant for life to be the arbiter of it? It surely can—[358]—not be supposed, that the author of this settlement, when she created this power to lease in the words which she has used, meant that the tenant for life might qualify the right of re-entry directed to be reserved, in any manner he pleased. That would be most absurd; for by introducing correspondent qualifications, he might, in effect, lease out the whole fee.

I am sorry to say that I do not feel the weight of the argument, which was founded upon the use of the indefinite article in this power; for I do not see in what respect the word “the” would have been more useful, significant, or conclusive than this word “a,” or in what respect the use of the indefinite article has altered the meaning,

at least so as to have given greater efficacy to the import of the terms of the power, in favor of the person who was to exercise it, than the definite article could have done. Passing that over, therefore, thus lightly, I return to the real subject-matter of contest—the conformity of the proviso with the power. [His Lordship then stated the words of the proviso in the lease, and of the power.] The objection to that proviso is two-fold—first, because by the covenant, the power of re-entry is not given on the non-payment of the rent, but at a certain period after, namely, fifteen days; and secondly, because the reversioner cannot even then enter, if there should be a sufficient distress on the premises. If either of these objections should prevail, it must be fatal to the title of the defendant in error. I shall [359] avoid saying any thing decisively either way, as to whether such an enlargement of time alone would be destructive of this lease. I have, certainly, very considerable doubt upon that point; for there may be something in the notion which appears to prevail, that that condition would be nothing more than what would be reasonable in so relaxing such a right; and as that notion, though perhaps erroneous, may be, notwithstanding, very general, I should not be disposed to hold this lease invalid on that ground alone, out of respect to the principle of the maxim *communis error facit jus*, which may be thought to apply to that; but I must say, on the other hand, that the words of the power being plain and specific, we are left without any discretion to go out of its terms, whatever inclination we might have to do so, on that or any other such ground. Where the ancient rent is required to be reserved and made payable at the usual times, which must necessarily be on given days, and that, on non-payment at the day, a power of re-entry must be reserved, that power must be followed, and the lease must be made pursuant to that power: now, certainly, a power to re-enter, if the rent be unpaid at Candlemas, is not consistent with a power to enter fifteen days after that time when the rent has become due. If, then, the terms of a power are to be taken as the criterion for construing it, as such a deviation would derogate from the remainder-man's right to re-enter so required to be reserved to him, such a qualification may, perhaps, seem to be in substance not within the power. I repeat, however, [360] that I do not mean to rely on the inadmissibility of that condition. As to the argument, that a hardship is thrown upon the lessee unless the right to re-enter be qualified with some reasonable condition, I must deprecate all consideration of any such suggestion; because Judges are bound to expound an instrument according to their best judgment, without advertent to hardship on one side or the other. The terms of the power are their only criterion; but whatever hardship there might be, it is convertible, and may affect either party equally; for the reversioner is as much entitled to complain, if he does not succeed to the property according to the intention of the donor, as the lessee has if he mistake the construction of the power under which he derives his title to his lease; and, indeed, much more so, for the lessee has his remedy against the assets of the lessor, whilst the reversioner has no remedy over. There is, however, in point of fact, no hardship on the tenant, whether he is obliged to pay his rent at Michaelmas or within fifteen days after. On some certain day it must be paid, and being aware of the time, he ought to be prepared for its payment, at whatever day it may be fixed. Whatever other difficulties I might feel, before I could aver that in my opinion the extension of the time alone would be fatal to this lease, on the second point, I cannot entertain any doubt (except that which I derive from the difference of opinion expressed by learned men) that the restraining this power of re-entry, not only, in case the rent should not be in arrear for fifteen [361] days; but also in case there should be a sufficient distress on the premises, is inconsistent with the terms prescribed by the leasing power; because that last condition certainly throws on the remainder man a serious difficulty not warranted by the power. If then the first objection be held to be good by so many learned persons, this second must be considered to be so by all. because that restriction of the power of re-entry is a further and much more important accumulation of the difficulties of the reversioner. Under the power to lease, there can be no doubt, that if the rent should be unpaid on the day on which it was made payable, or at most within fifteen days after, then the right of re-entry was given and intended to be given; and it would be the fault of the lessee if he should suffer his rent to run in arrear when he might pay it in due time; but if he neglect to do so, is he to be also allowed by a contract between himself and the tenant for life, whose interest in that respect is adverse to that of the reversioner, to throw upon the reversioner or his agents the charge of employing persons to examine the premises for

distrainable property, at the hazard of failing in ejection by reason of that search proving ineffectual? Many inconveniences were pointed out by the plaintiff's counsel as resulting from such a restriction; and we cannot but consider those difficulties to be very disadvantageous to his rights: and it seems to me to be a monstrous proposition to maintain, that a tenant for life, without any authority given him by the power which was necessary to enable [362] him to make such a lease, may operate the reversioner by imposing terms upon the right of re-entry, which may be extremely inconvenient to him, and very injurious to his interests. Then, if we look to the other part of the settlement, we shall find, that, with respect to a great part of the estate, the power of re-entry is prescribed in different terms from those of the leasing power now before us: and I am entitled to assume, that when Miss Mansel fixed the right of re-entry in one case at twenty-eight days after the rent became due, she meant that the rent should be paid at the time fixed where she had not given the indulgence of any time. She has herself made the distinction, and whether reasonable or not is not for us to judge; for she is the legislator, and her express directions must be conformed with, if the law will permit them to be carried into execution. Another observation which arises upon the different terms of the powers is, that the leases of the mines (and, under the second power, of the manors, messuages and lands also) must be made to take effect in possession, and not in reversion; whereas leases under the power before us may be made to take effect in possession or in reversion; and the distinction which I take on that is, that the fact of the sufficiency or insufficiency of distress could not be contemplated with a view to a lease to take effect in reversion; for the provision for re-entry in default of sufficient distress, as applied to leases in reversion when the lessee might not be in possession for twenty years to come, would be absurd. Then [363] it was said that the question here is not, whether the words of those qualifications are noticed in the power; but, whether it be not a reasonable construction of the power, that the lessor should agree not to put an end to the interest of the lessee for non-payment of rent, unless in the case of there being no sufficient distress. But the question continually recurs, does not the insertion of that qualification break in upon the clear express intention of the parties to the deed of settlement? In this particular case the lease was in possession, but that does not at all alter the construction of the power. I merely throw this out as to the leases in reversion, as a circumstance, amongst others, which guides us to the intent of the creator of the power, and shews it to be impossible that the settlor could have intended, that the tenant for life was to deal with the lessees whose leases were to take effect in reversion, on the contemplation that there would be a sufficiency of distress as a remedy for securing the rent; or indeed any other remedy than the power of re-entry, during all such time as the leases should continue in reversion. In the way in which it is proposed to construe this power, the parties must be supposed to have intended to enlarge the right of the lessee. It is admitted, on all sides, that a right of re-entry, if the rent was not paid, was intended; but then it has been urged, that if there be a sufficient distress, that right may be suspended during the whole residue of the term. The effect of that would be, that the tenant for life, who has received in advance a large fine, [364] premium, or foregift (to the amount of 2000*l.*, for instance), is to have all the benefit of the demise against the reversioner, and he is to be excluded for the whole term, because the Judges may be of opinion that this clause inserted on the behalf of the lessee is a reasonable clause. It cannot be denied that it would certainly be a reasonable clause in a general point of view; but in this particular case it is in direct contravention of the intention of the settlor of the estate in favor of the reversioner; because it would suspend that right of re-entry which, beyond all doubt, was intended to be given at some certain time, if the rent should then be unpaid.

For these reasons it seems to me that, as the settlor could not have intended that any other power of re-entry should be reserved than one which should enable the reversioner to enter on the non-payment of the rent, unconditionally, the lessor has not had due regard to that intention in making the lease in question; and therefore I think that the judgment of the Court below in holding that lease to be a good execution of the power is erroneous.

As to the other question, whether the prior leases were properly received in evidence, I shall content myself with merely referring to the case of *Bynham v. Guy's Hospital*, and the other cases cited by my Brother Park, with all of which my Brother

Graham and myself have been long acquainted, as being quite decisive on that point. [365] They have been always considered good law: and I take it that they have settled that former leases cannot be read in evidence to shew the intention of the parties with respect to others made subsequently.

Then on the subject of authority we have the decision of the King's Bench in the case of *Care v. Day*, which appears to me to be conclusive on the second point: and (I think it material to observe) that case was sent for the opinion of the Court of Law by a most able Judge (Sir William Grant) and it is very singular, if *Holley v. Scot* was to be considered as a decision by which Courts should abide, that so learned a Judge should direct a case to be sent with precisely the same question to the same Court—the King's Bench. In the estimation of that learned person, therefore, the case of *Holley v. Scot* could not have been considered as an authority: and he must have concluded that there was no decision extant upon the question. When we find that in that case (*Care v. Day*) the Judges of the Court, stopping the plaintiff's counsel in reply, unanimously concurred in the opinion stated in the certificate, that the lease there was void, as not being conformable to the power, it is a decision (and it is the only one upon the subject) from which we cannot, I think, depart. I therefore cannot but concur in the opinion which has been delivered by my learned Brothers, Mr. Justice Burrough and Mr. Justice Park.

[366] DALLAS, C. J. This case has been repeatedly argued at the bar, and most ably certainly upon each occasion, and the subject has been exhausted of observation and authority. It now appears that not only the two Courts differ in opinion, but there is a difference also between the learned Judges this day present. The question, therefore, whatever the result may be, must be considered as one of considerable doubt and difficulty.

The principles which apply to cases of this description are not in dispute, and the leading rule has been already stated in the course of this day. No intent can be implied against that which is plainly expressed: but if there be a doubt upon the words, the construction must be reasonable, and according to the intent of the parties, as it is to be collected from the whole instrument, comparing the different parts with each other—and I say from the instrument; because if from that a clear intent can be collected, a Court is not at liberty to go out of it; or to engraft upon it what may appear to itself to be reasonable: for this would be not to construe but to make a deed for the party: and the question is not what the power ought to have been: but what it is. The power in question relates to leases of different descriptions—to leases determinable on lives, on which the ancient rents are to be reserved: and to leases for years at the best or most improved rent. The former were to contain a proviso for re-entry generally, for non-payment of rent: the latter were to contain a proviso for re-entry [367] twenty eight days after the rent should be in arrear and unpaid. The present case is of the first description.

It is objected that the clause of re-entry varies from that directed by the power in two respects—first, by making the right of re-entry to arise, not upon non payment of the rent, generally: but fifteen days after such non payment—and, secondly, by giving it only in case there shall be no sufficient distress to be had or taken on the premises or any part thereof. I shall examine each of these objections separately: and first as to the fifteen days. The power is silent in this respect, directing a right of re-entry on non-payment of rent, and saying nothing more. It has not been contended that, if the lease had followed the power, and there had been no mention of time, the clause for re-entry would have been uncertain: or, taking it to be sufficiently certain, that the right would not have accrued on the rent becoming in arrear: nor has it been argued that such would not have been a good execution of the power. It is clear, therefore, that the words added produce an effect different from that which would have followed, if the words of the power had been pursued: and that that effect is to convert a present into a future right. In case, therefore, of the death of the tenant for life, the right of the remainder man to re-enter for non-payment of rent would be postponed by the proviso for fifteen days beyond the time when it would have arisen if the words of the power had been followed. [368] The doctrine in *Coke*, *Littleton* (sec. 325), has been this day referred to in support of the lease: but I understand that section differently: for a distinction is there taken between a right to re-enter generally, on non-payment of rent, and a right to re-enter after a specified time, which, in the latter case, it is said must depend on the time specified in the condition, and is

therefore various, being matter of agreement in each case between the parties; thus excluding the notion that there is any such thing as reasonable time abstractedly considered. It is to be considered then on what grounds the proviso in this case can be said to be a due execution of the power: and the first ground I take is this. It is said, that as the power directed a proviso for re-entry on non-payment of rent generally, and without specification as to time, it must be intended that a reasonable right of re-entry was intended, and that the time given is a reasonable time. But to this I cannot agree: because it is an intendment against express words, and words of clear and definite meaning: for the right of re-entry is to accrue on non-payment of rent; and the time, when a right is to attach, is as well specified by the occurrence of an event, as if time itself were expressly mentioned: and here the event is specified, namely, the non-payment of rent. It is, however, said, that the intention of the party is to be considered, and that it is unreasonable to suppose that she could have meant a provision of so much harsh-[369]-ness, as that a tenant should be ejected the very moment his rent was in arrear. But the intention of the party is only to be considered as it is to be collected from the instrument itself; and on the instrument, so considered, I can entertain no doubt of what the settlor meant: because she has, to my understanding, made use of plain and clearly intelligible words. But supposing it to be a provision of harshness, which it would be fair to urge if the words of the power were doubtful, and I agree, therefore, that it is fairly urged by those who so consider them; yet if the words be sufficiently clear, we are not at liberty to enter into the consideration of harshness: and still less, to set up what our notions of harshness may be, to justify a departure from the power. What the power orders to be done must be done: for this one reason is of itself sufficient, that it does so order. It is next urged, that looking to other provisions in the same deed, and applying them to the question of intention, the power must be taken to intend what the party executing it has, in effect, done, and when twenty-eight days are expressly ordered to be given in the case of leases for years, in which the rent would be of the real value, can it be supposed (it is asked) that in the case of a rent merely nominal, a right of immediate entry would be intentionally prescribed? Comparing, therefore, the two cases, it is said the proviso was intended to give time in each instance: and that the reason would be stronger for postponing the right of re-entry in the former, and making it immediate in the latter instance. [370] But here—again protesting against departing from plain words, and supposing myself at liberty to consider what the intention was—on what ground am I to infer that it was intended to give fifteen days for payment of rent in a case in which the power says nothing of the kind? Is it because in another case, and of a different description, time is given, when it is said there was less reason for giving it? On all legitimate grounds of construction, I feel myself bound to reason differently. If the party distinguish for himself, I am not at liberty to destroy the distinction. Nothing being said as to time in the one case, and time being given in another, proves, at least, that time was under consideration: and even, if in the case of a single proviso, a reasonable time could be implied from the generality of the power, I should say emphatically that in this case, it cannot be implied; because the second provision, if to operate at all, throws light upon the first, and shews, that when time was intended to be given, it is so expressed. Thus the case appears to me on principle. The case of *Jones, d. Cooper v. Ferry* has been cited, as shewing, that where the power directs generally a clause for re-entry, a reasonable time may be implied, although the power is silent in that respect. All, however, which that case proves is, that it was done in the particular instance without objection: but what the decision would have been if the objection had been made then as it is made now, we can only conjecture one way or the other, as we think that it ought now to succeed or fail. It leaves the question, therefore, as a ques-[371]-tion altogether new, this being the only case referred to: and on principle I am at a loss to understand how it can be taken as universally true, that when a power prescribes a proviso for re-entry for non-payment of rent, but is silent as to time, the power, because it is silent, must be taken to speak. And what is reasonable time? Is it to be treated as matter of fact or matter of law? Is it for the Jury in the first instance, or for the Judge? How is it to be ascertained what time is reasonable? On looking through the reported cases, in which it occurs as matter of express condition, we shall find it different in almost every different case. It is so here. As to one set of leases fifteen days are given: in the other twenty-eight. Shall I say it is reasonable in the former, and unreasonable

in the latter? Or what measure am I to take? In the cases in the books, it is sometimes fifteen days, sometimes twenty, sometimes forty two, sometimes sixty: in short, it is mere matter of convention, and therefore peculiar to each. Will any of these cases furnish the rule? If not, what other cases are we to look to, or where is the line to be drawn? These are difficulties which press forcibly on my mind. It is said, however, that the party to execute the power, is to be the judge of what is reasonable: and so he may be, in the first instance, if directed so to do: but if otherwise, I should scarcely think it ought to be so left. But be it so, the difficulty remains the same; for on a question arising between him and the remainder-man, who is to decide but a Jury or a Court? The same [372] difficulty occurs as to amount. Is it to apply to two pounds, five pounds, or any, and if any, to what sum? The same difficulty in drawing a line as to time, applies also to the reservation of rent. These are objections to which I cannot easily find an answer. On the other hand, the line seems plain and direct. When parties have spoken for themselves, let Courts abide by what they have said; but, when words are clear, to seek in a doubtful construction for an uncertain intent, in order to get rid of what may appear harsh, will only lead to litigation, conjecture, vexation, and ruinous expence; in a word, to all which this case has already manifested, and will more fully display before it shall have attained its close. We are told, however, that, if this objection were now to prevail, it would invalidate a great number of leases in this Kingdom granted under similar powers. The fact may possibly be so, and this consideration demands caution: I wish, therefore, to avoid deciding expressly on this ground, whatever may be my view of the subject, as there is another which, taken singly, is decisive to found the opinion which I form. And this brings me to the remaining objection, viz. that part of the proviso for re-entry which relates to there being no sufficient distress on the premises. And here, again, the ground taken is only an extension of the former ground, it is a wider stride of the same exceptionable sort. All the former observations apply, therefore, with increased force, and I shall content myself with referring to them. It will scarcely be said, after the case to which we [373] have been referred, of *Ross, d. Powell v. King*—in which there was such a proviso in the lease, and the party was nonsuited for not proving that he had searched every part of the premises, a single cottage remaining unsearched—that such a clause is of indifferent or immaterial operation. On what ground then is it now sought to be justified? First, it is said, that it does no more than the law would do without it, and that therefore, by analogy, it is reasonable. But to this I answer—then leave it to the law. If by law the party will be on the same footing, in effect, without these words as with them, why introduce them? It is said, however, that a clause of re-entry for rent in arrear is considered as in the nature of a mere security for rent: that supposing entry to have been made, still, if not submitted to, an ejectment must be brought: and then that by the statute, on payment of the arrears of rent and all the costs, the proceedings would be stayed, and thus the right to re-enter be destroyed. To this it is added, that by the same statute the landlord must prove that there was no sufficient distress on the premises: so that the law itself subjects him to the necessity of searching for a distress before his right to re-enter can avail. Now this is true, applied to a proceeding under the statute, and if a party shall elect not to re-enter under his right, but shall avail himself of the statute in obtaining the benefit, he must take upon himself the burthen and prove, because the law upon which he proceeds says he must prove, that there was not a sufficient distress. But if he choose to stand upon [374] his stipulated right, and take the chance of all the difficulties which may attend demand and re-entry at Common Law, as applied to such right, he is not bound to distrain, and in this respect he may choose for himself. On the other hand, the tenant may get rid of the right to re-enter, by paying up the arrears of rent with costs; but he may not do this, or he may not be able to do it: and in either case the landlord succeeds without having been bound to search for a distress: and where he stipulates not to be so bound, it is competent to him so to do. So it would be under the statute in the case of a valid lease: but here the question is upon the validity of the lease itself, which depends on a due execution of the power, though I admit the argument is only urged to shew, from a supposed analogy, that the proviso in question is not inconsistent with a due execution of the power. But this doctrine was equally resorted to in the case of *Care v. Day*. It was there said that, as the tenant coming in and paying the arrears and costs would be relieved, such a clause was now merely used in *terrorem*; but Lord Ellenborough, interrupting the counsel, observed, “Surely

the direct power of re-entry is more beneficial to the landlord :” and “the very provision of the Legislature shews there is a difference in this respect.” But the case of *Holley v. Scot* was referred to as an authority in favor of this part of the case : and obscurely as we have it reported, the particular point not being at all adverted to in the decision, still, as the decision must have been different if the objection now [375] made had been deemed valid, I think it in fairness may be taken to be, as far as we can trace what it was, a decision in favor of a power similar to the present. But, giving all the weight that can belong to this case in point of authority, still, as a single case, and a case so imperfectly imported, and so militating as it seems to me (and I speak it with deference) against first principles, I should not feel disposed to subscribe to it if it were not opposed by any other decision, which however I conceive it to be by *Cove v. Day*, on which so much has been already observed, that I do not feel it necessary to dwell longer on it. It is in point, unless the present case can be distinguished from it on the grounds on which a distinction has been endeavoured to be raised. I shall therefore examine whether those grounds are sufficient so to distinguish it. And first, it is said, that in the case of *Cove v. Day* the Court had only to construe a power prescribing a right of re-entry as applicable to a particular lease ; but that in this case it is a question of intention to be determined on a comparison of distinct provisions : and that from such comparison the conclusion results, that the creator of the power must have intended the proviso in question to be such as is found in the lease. I will not repeat what I have already said in this respect. I deny that there is any such ambiguity or generality in the terms of this power as to give discretion, or call for implication or intendment, and even comparing the separate provisions with a view to get at intention, if intention were doubtful on the pre-[376]-cise words, the reasons become stronger in my view of them against adding the words in question.

The next ground resorted to is that of the former leases, which, it is contended, are admissible evidence ; and which leases contain a proviso precisely similar to the present as applied to the property in question. It seems scarcely necessary to say, for it follows as a consequence from all I have hitherto observed, that in my opinion these leases are not admissible. Where no uncertainty results from generality, where nothing is left deficient in point of expression, and where there is no reference to any matter dehors the instrument itself, recourse cannot be had to foreign matter ; and I think no uncertainty or ambiguity belongs to the instrument in question : nor are there any words of reference to connect it with any other whatever in this respect. But not so in other respects : for as to the rent, when former leases are intended to govern, they are expressly referred to : and it is said “the ancient rent” (that is the rent then reserved by subsisting leases) “shall be the rent under this present power. So as to the power given to let leases of mines, they are directed to have the proper and usual covenants, such as are usually inserted in similar leases : but as to the proviso for re-entry on non-payment of rent, there is no reference to any other lease, nor any words making it necessary to refer to any matter extrinsic of the instrument. But, for the purpose of argument, if we take the leases [377] as admitted, how do they remove the difficulty ? Because, in former leases not referred to, or even pointed at, there is a provision of a particular description, shewing, that when a right of re-entry was intended to be subjected to the want of a sufficient distress, it is so expressed,—does it follow, that in a subsequent lease the same thing is therefore to be implied when not expressed ? Even supposing the former leases to have been made under a similar power, still it would only shift the question from this lease to those ; or, taking it that the parties, by acquiescing in such leases, have put by their own acts a construction on their words, it will fall within the rule, that what is matter of legal construction cannot receive explanation from the conduct of the parties. The leases, if let in, would with me leave the difficulty where it was, proceeding on what I deem grounds of legitimate reasoning : but it is enough to say, that for the reasons already given, I hold them to be inadmissible. Even if looking out of the instrument I could conjecture that the maker of the power did so intend, and would have so said if his attention had been drawn to the subject, it would not be a conjecture on which I should feel myself at liberty to act. But to this case, as to many that have gone before, and many that in all probability will follow, the important principle must be applied, that the intent is to be the rule of construction if the words will bear it out ; but if the force of the words be such that the intent cannot

be com [378]-plied with, the rule of law must take place, and the words prevail. A single observation on the case of *Care v. Dan*. I admit it must be taken that in the opinion of the Court below that case and the present are dissimilar: but as I cannot distinguish them on the grounds on which the decision proceeded there, or the argument has been rested here, the distinction to my judgment fails altogether: and *Care v. Dan* itself being considered by me as properly decided, becomes with me an authority in point.

On the only remaining ground—the general clause for re entry in the concluding part of the lease—having delivered my opinion so fully on the other points, and deeming this less material and more particularly so, as no reliance has been placed upon it in the course of the several opinions delivered this day: I shall content myself with referring to what has already been said. The result is, that the judgment of the Court of King's Bench must be reversed

Judgment reversed.

[379] IN THE HOUSE OF LORDS.

SMITH v. DOE [Lessee of George Earl of Jersey and Others].

The majority of the Court of Error in the Exchequer Chamber, having been of opinion, that the judgment of the Court of King's Bench ought to be reversed, the defendant brought a writ of error, returnable in parliament, to reverse that judgment of the Exchequer Chamber.

The case was appointed to be heard at the bar of the House of Lords, when

The Attorney General (Sir R. Gifford) and Puller argued on the part of the present plaintiff in error: and

Jervis and Maule, for the defendant.

On the conclusion of the argument the House adjourned to deliberate of their judgment: and in the mean time, finding that they required the assistance and advice of the Judges, they propounded the following question to each of them:

“Whether—having due regard to the true intent and meaning of the indenture of the 2d day of July, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict: and having [380] also due regard to the legal effect of all the facts and circumstances found by the special verdict—the demise of the 5th of September, 1803, as the same is stated in the special verdict, is for any and what reasons, invalid?”

Wednesday, 16th May. —The twelve Judges having been in consequence summoned to attend the House of Lords for the purpose of answering the question proposed to them, on this day delivered their opinions seriatim.

RICHARDSON, J.—having very shortly stated the case, and the question—proceeded as follows:

I am of opinion that the lease of 1803 is invalid: because I think it is not made in conformity with the leasing power contained in the indenture of 1757. The leasing power for that class of leases of which the lease in question is one, requires “that there be contained in every such lease a power of re entry for non payment of the rent thereby to be reserved;” and the question resolves itself into this, what is the true construction of these words?

In order to decide this, I must first consider, whether the words themselves import and convey any distinct meaning; and I think they do: I think they mean, that the lessor should have power to re-enter if the rent reserved should not be paid according to the reservation.

[381] One test, and I think a fair one, whether such meaning is conveyed by the words of this power, would be, to insert in a lease a proviso for re entry, expressed as nearly as possible in the very words of the power itself: and then to consider what construction a proviso so expressed would require: and whether the meaning would be sufficiently distinct to be capable of being enforced by a Court of Justice.

Suppose then, that in the lease of 1803 it had been provided, that it should be lawful for the lessor or person entitled to the rent “to re enter for non payment of the rent hereby reserved.” In that case would the person entitled to the rent have been empowered to re enter if the rent had not been paid on the day of reservation?

It seems to me that he would have been so empowered: and that without any delay or condition other than the previous demand required by the common law: for all that he would be bound to prove, in order to justify and enforce his re-entry, would be that there was a non-payment, on demand, of the rent reserved by the lease. If this be so, it seems to me to prove, that the necessity of waiting fifteen days, and the necessity of proving a deficiency of distress on the premises, imposed by the proviso actually contained in the lease of 1803, are conditions not warranted by the leasing power.

It has been said, that the leasing power requires only "a power of re-entry," much stress having [382] been laid on the indefinite effect of the article "a": and it has been further said, that though such power of re-entry is to be "for non-payment of the rent:" yet that the words "for non-payment" are not equivalent to "on non-payment," but only point at the purpose or object of the power of re-entry, namely, that of securing the payment of the rent.

It appears to my mind, however, that although the article "a" be indefinite; yet it cannot in just construction extend an indefinite meaning to the subsequent words, if they sufficiently import (as I think I have shewn they do) a distinct and definite meaning. In this sentence the word "a" seems to me neither to add to, nor to qualify the meaning; but that the meaning would have been the same if that word had been wholly omitted, and the sentence had stood thus—"So as there be contained in every such lease power of re-entry for non-payment of the rent thereby to be reserved." And as to the observations made on the meaning of the words "for non-payment of the rent:" although it is true that the word "for" does often import the purpose or object, and so it might here, if the words had been "a power of re-entry for payment of the rent:" yet the same word "for" as often imports the cause or occasion of that which is predicated: and such I think is its import here, where the words are "a power of re-entry for non-payment of the rent," meaning on occasion of the non-payment.

[383] If the words of this leasing power import, as I conceive they do, by themselves, a distinct and definite meaning, I think it follows, that the fact, stated in the special verdict, respecting the usual and accustomed form of leases of the estate mentioned in the marriage settlement, can have no legal effect on the construction to be put on these words. Such evidence, I conceive, is never admissible in the construction of a written instrument, unless the words of the instrument itself import a reference to something extrinsic, or unless the words involve some latent ambiguity, that is, an ambiguity not appearing on perusal of the instrument itself, but which becomes apparent on applying its provisions to the subject-matter. The words of this leasing power in that part which respects the clause of re-entry seem to me to involve no latent ambiguity, nor to import any reference to any thing extrinsic: although some former parts of the same leasing power do import such reference, namely, where it is required that the lands to be leased for lives should be such lands as were in lease for lives at the time of making the settlement, and that the rents to be reserved should be the ancient rents or rents as great and beneficial.

I admit that a Court is bound to look at every part of a written instrument in order to ascertain the meaning of the parties in a particular part. But I think it by no means follows because this settlement, in respect of the rack rent leases, expresses that the tenant is to be allowed twenty-[384]-eight days for payment, that, therefore, it was intended in respect of the leases for lives to give a similar or any allowance of time which is not only not expressed, but which appears to me to be at variance with what is expressed. Supposing however it were possible on this ground to get rid of the objection, made against the lease of 1803, in respect of the allowance of fifteen days: another and still more decisive objection remains, namely, that this lease fetters and confines the power of re-entry to such cases only where there is a want of sufficient distress—a condition which appears to me to be equally inconsistent with the power applicable to leases for rack rents, and to that which is applicable to leases for lives.

The case of *Care v. Day* (13 East, 118), which I think was rightly decided, appears to me to be in point; and I cannot draw any distinction which is satisfactory to my own mind, from the circumstance, that the leasing power there allowed a period of twenty-one days for payment: whereas the leasing power now under consideration, as to the leases for lives expresses no such allowance. It is true that in *Care v. Day*

the case of *Hodley v. Scot* (*b*)¹ does not appear to have been cited: and it seems that in the last mentioned case a similar objection, taken to a lease granted under a power, was overruled by the Court of King's Bench. On what ground the Court proceeded we are not apprised, and being obliged now to make our election be [385] tween the two authorities, I must express my concurrence with that of *Coxe v. Day*.

It has been suggested that the statute of 4th Geo. II. c. 28, though professedly made for the benefit of landlords, does in effect take away their right of re-entry at common law, and confine them in all cases to the statutable remedy thereby given, which remedy can never be exercised without proof that no sufficient distress was to be found on the demised premises countervailing the arrears then due. And I think it must be admitted that this construction of the statute, if it be the true construction, furnishes a sufficient answer to the second objection made to the lease of 1803: for in that case the lease has only expressed that, which, whether expressed in the lease or not, the statute law has provided.

But I cannot think that this is the true construction of the statute.

The object of the statute, as appears to me, both from the recital and the enactments, was to relieve landlords from certain inconveniences to which they were subject by the law as it then stood, and to give them certain remedies to which they were not before entitled; but not to deprive them of any remedies or rights to which they were already entitled by law. It contains no negative or prohibitory words, which I think would obviously have been inserted, if the intention had been to deny to the landlord the future exercise [386] of any ancient right. And it would, as it strikes me, be a strange construction to hold, that the words apparently intended for the landlord's benefit do, from their generality, operate to extinguish any of his ancient rights, when, if such had been the intention, it would have been so easy and so obvious to express it. That such however was not the intention I think manifestly appears from this, that wherever the new mode of proceeding in ejectment given by the statute is pursued, the statute declares that "then and in every such case the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made." It refers to the legal demand and re-entry as a still subsisting mode of proceeding, not repealed or affected by the statute, and thereby shews that the old mode of proceeding was intended to be left as it was; although the new one, if adopted, is declared to be equivalent for the purpose of obtaining a valid judgment and execution. This, I believe, has always been considered as the intent and effect of the statute. And although I am not able to point out any case where it has been expressly decided that the statute does not take away the landlord's remedy at common law, several cases have occurred where landlords have so proceeded without objection on that ground, and it has been taken for granted that they were entitled to do so. *Doe, d. Forster v. Wandlass* (7 T. R. 117), and *Doe, d. [387] West v. Davis* (7 East, 363), are cases to this effect: and so is 1 W. Sand. 286, n. 16 (*b*)².

It has been said, that if the lease of 1803 be invalidated, the decision will shake many titles. I have no means of knowing whether this observation is well founded, or to what extent. If such should be the consequence I shall regret it; but I cannot feel that such an apprehension can afford a legitimate ground for deciding the present case otherwise than as the words and legal effect of the instruments now under consideration seem to me to require.

Upon the whole therefore I am bound, for the reasons before given, to answer the question proposed by your Lordships, in the affirmative.

BEST, J. —having adverted to the words of the power, observing, that they were wholly general and indefinite,—delivered his opinion nearly as follows:—

I consider the law to be now settled, beyond all contradiction, by a variety of cases, none of which are touched by the determination in *Coxe v. Day*, or any other conflicting authority, that, under a general power, such as this is, given in a deed enabling a tenant for life to let the property upon leases, requiring that he shall reserve a [388] power of re-entry for non payment of rent, an absolute unconditional power to re-enter, the instant the rent is due is not thereby necessarily required. I admit that any conditions with which the tenant for life may qualify the power to be reserved must be reasonable and legal: but I consider that the intention of the settlor is satisfied, in

(*b*)¹ Lofft, 316. See also Mr. Butler's MSS. note, ante, p. 313.

(*b*)² And see *Doe, d. Vaughan v. Menier*, 2 M. & S. 276.

this case, by the power of re-entry which has been reserved in the proviso, containing, as it does, these usual and reasonable qualifications. They are qualifications from which no injurious consequences can result to the reversioner, either by lessening his security for the payment of the rent, or in any other respect; whilst they protect the tenant from the danger of being entrapped into an immediate forfeiture, if indeed a forfeiture could be exacted from him so long as the rent due to the reversioner should be sufficiently secured. It has been settled that these qualifications cannot be excluded from such a condition as this is, the object of which is entirely the security of the rent, but by express words; and here there are none to be found. Nor is this a new doctrine in law, or confined in its application to subjects of this nature; it applies to every part of the law as far it affects human conditions. If one contract generally to deliver goods, it is not imperatively necessary that they should be delivered on the instant: all that can be required is, that they be delivered within a reasonable time. If any stipulated service be engaged to be performed, the performance of it must be intended to be undertaken within a reasonable pe-[389]riod: and that reasonable period again does not, in construction, exact the condition that the contracting party shall occupy every moment of the intermediate time in the service to be performed, to the exclusion of all relaxation, and to the neglect of his own affairs. All cases of this nature must be decided with reference to that common principle. If cases were necessary to support that principle, I say this very point has been decided, and these very conditions have been sanctioned as reasonable and usual, valid and subsisting under such a power as this. The practice of Westminster Hall, and the understanding of all lawyers in all time have uniformly recognized this principle as well as those which I shall have occasion to state hereafter. The cases are certainly very few. I consider that that of *Coxe v. Day* has nothing to do with this question; so far from it that if I had had the honor of a seat on the Bench when that was so determined as it is reported to have been, I should have coincided in that decision. Of the cases I have alluded to, the first which I shall mention, is that of *Jones, on the demise of Corper and Another, v. Ferney and Others* (Willes, Rep. 169). I am aware that this is only a negative authority, founded on the question not having been raised there, although the opportunity was afforded. It proves, however, when the industry and learning of the bar at that period be considered (and we find from a note to the report, that the case was argued by Prime and Wright King's Serjeants, for the plain [390]-tiff, and by Skinner King's Serjeant, and Burnett Serjeant for the defendant, on two different days), that the objection not having been taken, it was in their opinion, and in that of the Bench, not tenable. In that case a tenant for life was empowered to grant building leases; so as in every such lease there be contained a condition of re-entry for non-payment of rent, and the usual and reasonable covenants. It is stated that there was a clause of re-entry in the lease for non-payment of the rent in forty two days after the days of payment; (so that the qualification there was much more extensive in point of time than in the present case) yet notwithstanding that obvious occurrence of this objection there, it was not insisted on, or alluded to. Then I consider that the next case which I shall mention (that of *Hotley v. Scot*) has expressly decided this point. I take it from Mr. Butler's note of that case, which (however young he might have been at that time) I consider to be perfectly accurate, as it bears every appearance of that care and correctness for which he has since been distinguished. The note is short, but it furnishes the distinct ground of Lord Mansfield's judgment, and on that I think this case also ought to be decided. The power was to lease for years, and in the leases a clause for re-entry was to be inserted if the rent were unpaid for twenty-one days: the lease in question had such a clause; but it added "and no sufficient distress could be had." Lord Mansfield says, what I consider to be an able epitome of the law upon the subject, "The clause of re-entry is short with words of course, [391] (his Lordship, referring to the settled form used in practice) and does not preclude the operation of law. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute it cannot be without want of distress." Judgment was accordingly given for the defendants. Lord Mansfield therefore held, that the clause was a good execution of the power, although the power authorized no such stipulation in words. So should we hold in this case. I use the decision of *Hotley v. Scot* for a double purpose; not only for the sake of the authority of the Judge; but for the sanction by the Court of the doctrine afforded by the form being recognized as agreeable to the general practice of conveyancers which was there considered as in itself an authority for the Court, and

of which the counsel who argued the case of *Jones, Dec. Courper v. Torney* must, in those days, have been fully aware; and therefore it was that the point was not on that occasion raised in argument. The object of the clause of re-entry has uniformly been considered to be, security for payment of the rent merely: and upon that ground it is that Equity always relieves against the forfeiture. In the case of *Wadman v. Calcraft* (10 Ves. 68), the late Master of the Rolls states that to be the principle on which the Court relieves against forfeiture for non-payment of rent: and therefore it is that Equity will not suffer a lessor to take any other advantage of the clause.

[392] [His Lordship stated the language of the judgment, to that effect.]

That being the only recognized available object of the clause of re-entry, and as it is impossible to shew that the introduction of the conditions inserted in this proviso at all tends to abridge or diminish the security for the rent, I hold that it is therefore not an insufficient execution of the power given by the deed, that such qualifications should be introduced.

But I rely mainly on the position, that if the creator of a power would exclude the effects of the otherwise necessary operation of law upon powers of a similar nature; and if he requires a deviation from the established forms of practice in the particular instance, it can only be effected by express words: and if there be no such words of exclusion used, all the known, the usual, the legal qualifications may be introduced in executing the power. To alter the regular course of law, there must be the consent of parties. In *Dormer's case* (5 Co. 40 b.), it was resolved (long before the statute of the 4th of Geo. II. when the law required a demand of the rent before a forfeiture should attach) that "re-entry for default of payment of rent without demand of it may be by special consent of parties. At that time the party meaning to re-enter must have demanded the rent at the last period of the day on which [393] it was due, or he could not avail himself of the right of re-entry. However general, therefore, the power might be, still the law qualified it by a necessity of making a demand of the rent; and if it should be intended that the common course of law was not to take effect, the special consent of the parties was necessary to be expressed in terms to that effect, or the operation of law upon the general contract would not have been excluded. If that were so before the statute, why, when the statute has taken away that necessity, and created another, should not that other be regarded as a legal qualification, and as necessarily implied by law, as the former had been? The words of the report in Coke are, "And divers other cases were put, where consent of the parties shall alter the form and course of the law." The use I make of that case is to shew, that where a legal qualification is not expressly excluded by the parties in terms, the law attaches and has the effect of controlling and moulding their general contracts. In this power, as created by the deed, there is nothing expressed to exclude the operation of law and the established practice of Westminster-Hall; and the Courts have always held these qualifications, adopted in the common forms of assurances in use with conveyancers, to be reasonable and proper. Then the case of *Holley v. Scot* is a positive authority in favor of the introduction of such conditions, and is not in any degree negatived by the case of *Care v. Day*. The Court did not give such a judgment in that case as has been assumed [394] in argument. Two of the Judges (Lord Ellenborough and Mr. J. Bayley) who delivered their opinions in the case of *Care v. Day*, have since supported the determination in *Holley v. Scot*, by the judgment which they have pronounced on this case in the same Court, and which I consider is not affected by the decision in *Care v. Day*. Lord Ellenborough, indeed, while the case was arguing, certainly threw out incidental observations, apparently militating with the doctrine of the case in *Holley v. Scot*—but it is not fair to hold a Judge bound by the occasional remarks which proceed from him in the course of the discussion, and which are often mentioned merely for the sake of fixing the attention of counsel, or giving a new direction to the course of the argument. It is only from the ultimate decision of the case that any principle of law can be fairly and properly deduced. The case of *Care v. Day* is, however, very distinguishable from the present and from *Holley v. Scot*, and in this very material respect. There is a qualification introduced into the power of re-entry in the lease which was the subject matter of argument in the former case, by the creator of it, by which the landlord would have been deprived of the benefit of the statute of the 4th of Geo. II. and the tenant would have had all the undue advantage of the difficulty, attending the old necessity of making a demand of the rent with all formalities which that statute was meant to extinguish.

The words of the condition of the power in that case are, "So as in every such leases there be contained a [395] condition of re-entry for non-payment of the rent reserved by the space of twenty-one days." So far the proviso for re-entry pursues the words of the power, and if it had stopped there, it would, perhaps, have been held sufficient, as it might then have been said, that it was a specific power, it prescribed all the terms which the creator of it meant should qualify the right of re-entry, according to the rule, that *Expressio unius est exclusio alterius*. But the distinction on which I rely, is the introduction of the words, "being lawfully demanded" between those words and the other member of the condition, that no sufficient distress can be found upon the premises. In that case, unquestionably, the proviso in the lease was not, in that particular respect, in conformity with the power in the deed: because, by inserting the words "being lawfully demanded," such a condition was not only not warranted by the law, but it was contrary to law, casting on the landlord a burthen and difficulty, from which an express statute had been passed for the purpose of relieving him. He would be, by such a condition, thrown back into the difficulties from which the statute had extricated him: he must, in that case, have watched for the particular day on which the rent should become due, and have made the demand, as formerly, at sun-set, with all the formalities which had been dispensed with by the new law. The rejection of such a condition, indeed, is fully consistent with the principle that the landlord's right shall not be clogged with difficulties beyond the law. That case, therefore, I consider [396] as very distinguishable from the decision in *Hotley v. Scot* in that respect; and that, for that reason, it is not a conflicting determination; and I think the latter, confirmed as I have shewn it to have been, abundant authority for the decision of this question in the negative.

Another principle to be considered in forming an opinion in this case, furnished by the case of *Oppey v. Thomasius* (Sir T. Raym. 132), is that powers are to be expounded according to the intent of the parties, as was said by Mr. Justice Twisden—a rule recognized more fully in *Goodtitle v. Funnican* (Dougl. 565), (stating Lord Mansfield's judgment). If then the sole legitimate object of the power to re-enter, which is now only a common modification of the enjoyment of real property, be to secure the payment of rent, and if the intention of the party exacting the introduction of such a power, is to be regarded in construing the terms of it—can any man doubt that the intention of the creator of this leasing power has been fully satisfied by the clause for re-entry inserted in the proviso for that purpose in this lease? It has merely for object, I repeat, to secure the rent, and that is the only legitimate purpose of it. If an absolute forfeiture of leases was to be the immediate inevitable consequence of non-payment of the rent reserved on the day it became due, it would be a consequence most prejudicial to the tenant, to the landlord, to the remainder-man, and to the public: for it [397] would tend to discourage the cultivators of land, and create a neglect of property injurious to all parties, and to the community at large, if forfeitures were to be rigidly exacted without regard to circumstances. But would the conditions attached to this power of re-entry defeat, in any respect, those or any fair views of either party to whom it related, and for whose interest it was intended? It certainly would not, and therefore I say, that if the intention of the parties is to be attended to, I consider that this lease was a sufficient execution of the power.

But whether I am right or not in the view which I have taken of this question, I have done enough to establish the validity of this lease, if I have brought the case into doubt and difficulty: and that it has been brought into doubt is apparent from the various and protracted discussion which it has occasioned both in the Courts below and in this House. I should be one of the last to advise your Lordships, as a Judge, that established rules of law should in any case be materially broken in upon, out of regard to any considerations resting upon equitable grounds; because I am aware that great iniquity is always the consequence of every such deviation from those rules. But when the equity of a case consists with the law arising upon the circumstances of it, as far as any settled principles of law can be found to apply, rigid strictness should not be insisted upon. Equity is naturally engraven on the hearts of all men learned and unlearned. Every one [398] may see the palpable equity and the justice of this case. In doubtful matters, consequences may be weighed: and I have frequently heard the most eminent Judges say of particular cases pending before them, in which they have felt themselves fettered by the ancient usage and course of practice, that if they were new they would decide them according to the reason and equity of the

circumstances, where not inconsistent with the rules of law: and I consider it to be sound legal reasoning that established principles are not to be shaken. But in this case the established practice and the weight of authorities are decisively in favor of the obvious reason and justice of it: and if this case were not now to be decided agreeably with that established course, the determination would shake the titles of every person in the kingdom who is in possession of valuable estates held upon leases under such powers as this. An immense proportion of the landed property of this country is granted out by tenants for life upon leases of this sort for valuable consideration, and this lamentable consequence would follow, that claims for indemnity to an enormous amount would be set up against funds which may have been long ago raised by the provident care of prudent fathers, to secure provisions for younger branches: and the grantees of valuable leases fairly purchased might, on a sudden, be turned out of possession of their estates for a mere error in the framing of the instrument: although the form should be consistent with the long established precedents which have been followed in all [399] practice. These leases are granted to a very great extent, all over the West of England, where this practice of settling estates particularly prevails. The estate of many a family, therefore, in that part of the country, depends on the validity of such demises: and I have reason to know, from means afforded by my situation as Judge upon that Circuit, that similar attempts have been already made to take advantage of similar objections. Therefore, I should be disposed to hold, that it would be sufficient to support such leases against such objections, that there should be any doubt upon the question: and that there are doubts of very considerable magnitude, the experience of this case abundantly shews.

My opinion being, that the lease in question is valid, makes it unnecessary for me to say any thing upon the point which has been raised as to the admissibility in evidence of the former leases.

This power being general, and the proviso for re-entry contained in the lease having in it nothing unreasonable or inconsistent with the terms of the condition upon which it was to be exercised; I therefore feel myself bound to answer the question which has been proposed to us by your Lordships, in the negative.

GARROW, Baron, stated that he concurred in opinion with Mr. Justice Best, supported as he was by the very high authority of the late Lord [400] Ellenborough: and that his answer to the question must therefore be, that the lease in question was not invalid.

[His Lordship then proceeded to give his reasons so nearly, in substance, to the same effect as he had expressed himself in the Exchequer Chamber, as to make it unnecessary to repeat them here.]

BURROUGH, J.—Since the judgment was given in this case, in the Court of Exchequer Chamber, I have paid the closest attention to the subject. I have over and over again weighed in my mind the various facts and circumstances contained in the special verdict—and I have earnestly endeavoured to discover whether I had formed an erroneous opinion, when I concurred in that judgment.

After the fullest deliberation, I am of opinion that the demise of the 5th September, 1803, is invalid—that it was valid only during the life of the lessor: and that his death determined the estate of the lessee.

The statute of the 4 Geo. II. c. 28, was relied on in the Exchequer Chamber, and in argument before your Lordships, as bearing on the subject. In my view of this case, it has no application to the subject before the House. That statute (as I conceive) applies only to leases which, before the statute, might and must have been avoided by entry—to cases where the cause of avoidance [401] might have been waived. Such leases were valid till a strict legal entry was made, and before such entry, they were capable of confirmation by suitable acts done by him in whom the right of re-entry was: but a lease by a tenant for life, having a special power to demise, if not made conformable to the power, is the lease of a mere tenant for life: and has validity only during his life, and not a moment longer.

I cannot see that any well grounded argument, from a provision made by an act of Parliament, in the case of demises of a description wholly different from the demises in question, can be urged in support of that demise. In forming our judgments on the question submitted to us by your Lordships, we must consider that we are required to give our opinions on the construction of a deed.

There are certain rules of the common law which must govern us on such an occasion.

One rule is—that the construction must be made on the whole deed. The principle of the common law is, *Ex antecedentibus & consequentibus est optima interpretatio**.

There is another rule which also strongly applies to the case in question—and that is, *Quoties in verbis est nulla ambiguitas, ibi nulla expositio contra verba fienda est*.

[402] Acting on these rules, I contend that there is no ambiguity in the words of the power, and that it is manifest from the various parts of the deed of the 2d July, 1757, that it was the intention of the parties to have those words understood as they are written, and without addition.

The clause of re-entry in the demise ought, I contend, to have corresponded with the *reddendum*, which is to this effect, “Yielding and paying the yearly rent of 2l. at Michaelmas and Lady-day, by equal portions,”—and not so corresponding, I am of opinion the lease is invalid.

1st. Because there can be no re-entry, unless this rent is behind and unpaid, for fifteen days from Michaelmas and Lady-day, which is an extension of the time beyond that in the *reddendum*.

2dly. Because the re-entry for non-payment of the rent cannot, by the express terms of the demise, be made, if there is sufficient distress to be had on the premises.

The general scope of the deed is too well known to require repetition.

It has heretofore been considered, that there are three distinct powers in this deed. I conceive that, correctly speaking, there is only one power, consisting of three distinct parts.

[403] I say this—because the enabling words—“that it shall and may be lawful &c.” are placed at the head of the whole, and are not afterwards repeated—and the other parts are introduced by the words “and also.” It appears to me, from this mode of looking at the deed, that it may be fairly collected, that the framers of it must have had their minds directed to the different parts of the power—and must have designedly and deliberately introduced an additional restriction in that part of the power which relates to leases for years, and references in other parts to extrinsic matters—and designedly and deliberately omitted any such additional restriction in the part of the power in question, and also all words of reference to extrinsic matters or former leases.

The first part of the power is that which relates immediately to the demise in question. By this—Mr. Vernon and his wife (who by the deed took successive estates for life), are enabled to grant leases for life, or years determinable on the death of a life or lives, of such lands as at the time of the deed were leased for life, or years determinable on the dropping of a life or lives. So as the ancient and accustomed yearly rents, dues, and services, or more or as great and beneficial rents, &c. be reserved or made payable, and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. Now, what is the rent thereby to be reserved, but the rent in the *reddendum*? The power of re-entry is to be for [404] the non-payment of that rent. If that rent was not paid at Michaelmas-day or Lady-day, I contend it is plain, by the very terms of the deed, that the right of re entry ought to be complete.

It is not to be doubted, that former leases were admissible in evidence—for two purposes.

1st. To shew what lands were at the time of the demise leased for life or years, as described in the deed.

2dly. To shew what the ancient and accustomed rents were. For former leases are for those purposes necessarily referred to. But it appears to me to be free from doubt, that as to the power of re-entry prescribed by the deed, there is no reference to former leases, or to prior circumstances, but to the *reddendum* only—ascertaining not only the rent itself, but also the mode and time of payment. This power of re-entry prescribed by the deed is framed in plain terms—it contains a clear proposition in itself—and therefore I contend, that the maxim that *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*, is precisely applicable to this

* *Shep. Touchst. C. 5, R. 4, p. 87.*

point. Thus to decide, is to avoid the vicious mode of interpretation which is reprobated by a maxim to be found in Lord Bacon's Tracts (fol. 17), *Divinatio non interpretatio est que omnino recedit a literâ*. If you stir beyond what the deed expressly pre-[405]scribes—then commences the divinatio—and the interpretatio is at an end.

Next follows in the deed what I say is more properly a second part of the same power, than a distinct and separate power—the general enabling words being at the beginning of the whole. This part is connected with the former part by the words “and also.”

“And also by indenture to demise any of the lands in the settlement, for any term not exceeding twenty-one years in possession. So as there be reserved as much, or as great and beneficial yearly and other rents as were then yielded, or the best and most improved yearly rent or rents as can be reasonably had or obtained; and so as in every such lease for an absolute term of years (thus distinguishing this from the former lease) there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid for the space of twenty eight days after the time thereby respectively appointed for payment thereof.” This part of the power, which is, as it were, uttered in the same breath with the former part—under the same enabling words, and united to them by the words “and also,” affords very important observations. 1st. The rents to be reserved in these leases are to be as much, or as great and beneficial, as were then yielded. Here then is a plain reference to the then existing state of rents. To prove this, the former leases were good evidence; or, 2dly. The [406] rents are to be the best and most improved that can be reasonably gotten.

This admits too of reference to extrinsic matters.

The third observation is as to the clause of re-entry prescribed by this part of the power, in case the rent be behind or unpaid for twenty-eight days.

With great deference to the judgment of those who entertain a different opinion, I cannot refrain from expressing my strong opinion on this part of the deed. In my mind it affords an argument of irresistible weight—that the parties to this deed, intentionally omitted an extension of the time of payment in the first part of the power under which the demise in question is contended to be valid; and that they intentionally inserted the extension of twenty-eight days in the second part. And I confess I feel myself alarmed for the fate of mens' deeds—if it shall be holden by your Lordships that the demise in question is valid, which contains an extension of the time of payment to fifteen additional days—not hinted at in the power itself, and inconsistent with the reddendum: and which also contains a provision which deprives the reversioner of his re-entry, if on any part of the premises there may chance to be sufficient distress. That the clause of distress imposes a difficulty on the reversioner, is proved by the case of *Rees, on the [407] demise of Powell*, against *King and Morris*, tried before Mr. Justice Heath, in the Summer of 1800, at Hereford, whose opinion was ratified by the opinion of the Judges of the Court of Exchequer in the following Term. It was there held, that a clause of forfeiture in a lease, in case no sufficient distress was to be found in the premises, must be pursued strictly, and every part of the premises must be searched.

The third part of the power is introduced in the same manner as the second part. This is the part which empowers the leasing of mines then open, or lands wherein persons may be willing to open mines. Annexed to this there are several restrictions running in this language. So as in every such lease there be reserved or made payable such parts of the lead, copper, ore, coal and other produce, to be gotten from the said mines, or such other yearly rent or income in respect thereof, as can be reasonably had or gotten for the same, without taking any fine, &c. And so as the lessees execute counterparts. And so as there be inserted such proper and usual covenants for the effectually working the mines &c. and doing all proper and necessary acts as are usually inserted in leases of the like nature. It is to be observed, that with respect to these leases there are special restrictions peculiarly applicable to them. The parties to the deed had all the parts of this power before them, and have cautiously introduced restrictions applicable to each part—and can a Court of Law add to these restrictions?

[408] The rent of the mines, or the parts of the produce to be reserved, are to be such as can be reasonably gotten—the covenants are to be the usual covenants for effectually working them, and doing all necessary acts. In the second and third parts

—the word reasonably is introduced; but it is wholly omitted in the first part. Is a court of Law authorized to transplant the word reasonable to the first part, when the parties have introduced it in the second and third parts, and omitted it in the first part? I humbly submit to your Lordships that this cannot be done, if it varies the construction of the words, as the parties have penned them. We are required to state to your Lordships our respective opinions. Whether, having regard to the true intent and meaning of the indenture of July, 1757, according to the legal construction of the several parts of it, and having due regard to the legal effect of the facts and circumstances found by the verdict—the demise is for any and what reason invalid?

I feel, that if I depart from the plain meaning of plain words—made (if it were possible) more plain by the context matter, that I shall be at sea without a compass. If the demise in question had contained a power of re-entry, framed in words literally corresponding with the power in the settlement, I conceive it would have been good. I have heard no valid objection to such a power of re-entry. Notwithstanding the most earnest attention to the subject, before and since [409] the arguments in the Exchequer Chamber and before your Lordships, I have not been able to raise in my mind a doubt of the fitness of such a clause, or of its being that which the parties intended.

For the reasons I have stated,

1st. I am of opinion that the former leases were not admissible in evidence to shew that they contain clauses similar to those to be found in the demise in question, respecting the extension of time of payment, and respecting the distress.

2d. I am of opinion, for the reasons I have given, that the demise in question is invalid.

The House has been told at the Bar that a decision that this demise is invalid, will have the effect of destroying other leases made under similar powers. I cannot take notice of such a statement.

1st. Because it is an assertion of a fact of which, as a Judge in a Court of Law, I can have no knowledge.

2d. If it were fit that it should weigh with us—ought we not to see the settlements and the leases, in order to know that the antecedentia et consequentia, are the same as in the case before your Lordships?

[410] A variation in the words and context matter, might vary the grounds of our judgment.

3dly. If there were other leases made under circumstances precisely similar, I would not vary the opinion I have formed. I cannot accommodate my opinion to the convenience of lessees under powers. Their estates must stand or fall by the authority under which they are made.

It is a maxim of our law, that it is better to suffer a mischief than an inconvenience. The mischief (if it be any) we can see the extent of. It will be, that certain demises, in consequence of the carelessness or ignorance of those who drew them, will be invalid, and they who were intended to take, in the event of there being no good subsisting leases, will take.

On the other hand, no one can foresee the end of inconveniences which would arise from the relaxation of the rules of the law in the construction of these deeds.

I have only a few words to add as to the cases of *Hotley v. Scot*, and *Coxe v. Day*.

From the report of the first case I cannot discover what was decided. It is to me unintelligible. But, supposing it to be applicable, we have, in the later case of *Coxe v. Day*, the decision of four learned men on the second question, which has great weight with me, and I cannot [411] see why it ought not to guide our judgment on the present occasion.

It is well known that the late Lord Chief Justice of the Common Pleas, Sir Vicary Gibbs, thought that decision right, and was of opinion that the present lease was invalid. He was in office when the present case found its way into the Exchequer Chamber.

HOLROYD, J. I think, that having due regard to the indenture of the 2d day of July, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th of September, 1803, as the same is stated in the special verdict, is invalid. By the death of Lord Vernon the lessor, who had an estate in him for life only, that demise

became invalid, unless it were made in conformity to one of the powers of leasing contained in the above-mentioned indenture of the 2d July, 1757.

[His Lordship then stated, very shortly, the nature of the three leasing powers.]

Each of those powers is clogged with qualifications of two descriptions, one class of which is comparative, or with reference either to the existing or the previous state of things, or to usage or custom, or to what can reasonably be had or [412] obtained: the other class is direct and absolute, without any reference or regard either to the existing or previous state of things, or to usage or custom, or to what can be reasonably had or obtained, or to any matter whatever. These last qualifications are superadded by the creatrix of the power, to be complied with at all events, as I think without reference or regard to any matter, and not to be varied, changed, or altered by, or at all to depend upon any usage, custom, or state of things, or any matter whatever.

The first of the above powers of leasing is that upon which the present question depends, the power of leasing for a life or lives, or for years determinable upon a life or lives. The qualifications with which that power is clogged are, as to the reservation of the rents, duties, and services, that they be such as were the ancient and accustomed, or more or as great or beneficial as at the time of demise were payable, or as much as a just proportion thereof amounts to, according to the value of the premises demised, or more, with the exception of heriots. These qualifications are comparative, or with reference expressly to the things there expressed, and must be such as on such comparison or reference shall be found conformable thereto, and are wholly dependent thereupon.

But the other class of qualifications superadded to this power, is direct and absolute, and without reference to and wholly independent, as it [413] seems to me, upon any other matter, except what the law requires, and to be complied with at all events, whatever may be or may have been any usage, custom, or state of things whatever. These other qualifications are, that the rents, duties, and services, be incident to and go along with the reversion and remainder; that the leases contain a power of re-entry for non-payment of the rent reserved; and do not contain any express clause, freeing the lessees from impeachment of waste; and that the lessees seal and deliver a counterpart of the lease.

It is upon one of these direct, absolute, and independent qualifications of that power, that the present question has arisen. That qualification is in the following words—"So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." This qualification being expressed in words that are direct and absolute, and without reference to any former leases, or to any prior or then existing state of things, or former management or disposition of the property, the fact found by the Jury, with respect to the former leases, cannot, I think, vary the legal construction to be given to this qualification. There is in the words no latent ambiguity which those former leases either raise or remove. If the words be not clear and explicit in themselves, their ambiguity, if any, is upon the face of the deed itself; and they cannot, I think, by law be allowed to crave in aid any former usage to vary or alter this construction, and this more especially in the [414] case of such a deed as the present, wherein the parties expressly direct that a reference to the then existing, or to former usage should be had recourse to, where they intend that either of them should be called in aid on the subject matter of these qualifications. Besides, it has been held, by the Court of King's Bench, in *Igoulson v. May* (7 East, 237), as well as by the Lord Chancellor in the same case (9 Ves. 329), ratifying similar doctrine that had before been held both by Lord Alvanley and Sir Wm. Grant, when Masters of the Rolls, on covenants for the renewal of leases, that the construction of deeds cannot be varied by the acts of the parties; and therefore various other leases that had been before successively made by the owners of the inheritance, for the time being, could not be taken in aid to construe the meaning of a covenant for renewal. The instability and uncertainty introduced into rights of property created by deed, by letting in such extrinsic evidence, and the mischiefs arising therefrom, would apply equally, as it seems to me, to the present case.

The present question arises in a case where the exercise of the power is by a person (namely Lord Vernon) who, previous to the creation of the power, was a stranger to the estate; and in a case where this qualification of the power given to him by his wife must be taken to have been inserted, as well for the benefit of herself as of [415]

the several other persons in remainder, in derogation of whose rights the exercise of the power would operate, so long as the lease should continue valid after the extinction of his own life estate. It would operate in derogation of her and their rights, by depriving them successively of the actual occupation and enjoyment of the demised premises themselves, which they would otherwise be entitled to have, and giving them successively in lieu thereof a rent or rents, such as the power required, however inadequate the same might be.

The power given to the tenant for life to lease for a term that may last beyond his own life is, agreeably to what is said by Lord Ellenborough in *Cole v. Day*, for the benefit of the tenant for life: the qualifications only, as he there also says, are for the benefit of those in remainder. And in this case those in remainder, who are to be protected by these qualifications, except the creatrix of the power herself, are not parties or privies, but are strangers to the deed; and therefore as to them the words of the deed are to have their full operation for their protection against the tenant for life who executed the power, and against whose act, which would or might be to their detriment, they were to be protected by this qualification. The very intent of prescribing these requisites is to protect the several remainder-men from the discretion of the tenant for life, in the exercise of this power of leasing given to him. The object of the qualification is to secure [416] to them the rent itself, and not to give them any substitute whatever in lieu thereof other than and except the land itself for which the rent was to be paid. For this purpose this qualification looks to and specifies some occasion or event, and that a simple unqualified one, namely, the non-payment of rent, not under any particular circumstances only, but generally whenever there is a non-payment of rent: that is to say, it looks to and specifies the default of the lessees by the non-payment of the rent, as the occasion or event on which those entitled to the rent to be paid for the land shall, for want of the rent, have the land itself—the *quid pro quo* the rent was to be paid. Whenever that event or default arises, the case then exists, I think, on which the land was to be had for that default, without any other matter being to be superadded thereupon, except what the general rules of law, independently of particular terms of contract, would require, such as those requiring in a particular manner and form a demand of the rent due.

The words applying to the power of re-entry required to be contained in the lease, are “a power of re-entry for non-payment of the rent thereby to be reserved,” that is, as I think, such power as will authorize the party, whenever there is a non-payment of the reserved rent, to re-enter. That is the expressed cause, on account of which he is to be at liberty to re-enter, which liberty must, I think, be co-extensive and co-existent with that cause: and that cause which is non-pay-[417]-ment of rent, such I mean as will authorize a re-entry, exists from the very instant that there is such a default of payment as the law requires to authorize a re-entry. And that default of payment equally exists from the moment of such a demand being made of the rent due, and non-payment thereon, without any subsequent definite period of time having elapsed: and whether there be or be not distrainable goods on the premises sufficient to pay the arrears of the rent, and by the sale of which the remainder-man may at his own trouble and risk pay himself those arrears. The words “for non-payment” must in this, I think, be taken to mean the same as either “because of,” “by reason of,” “on account of,” or “in case of” non-payment, that is to say, when that event occurs: and the same therefore as if the words were “on non-payment of rent.” That appears to me to be the proper sense and meaning of the words: and it is also as I think agreeable to the object of the qualification, which is, that the party shall have the land whenever the lessee fails to pay the rent for it. The lessee’s failure or default in the performance of a duty which it is incumbent upon him to perform, is the sole ground and consideration for entitling the party to re-enter, and have again the land without regard to any possibility or power the rent owner may have to obtain the rent, by any other means or exertions of his own.

But it has been argued, that this qualification, in requiring a power of re-entry, is silent as to [418] the time when it should be carried into effect: and therefore that it may be considered to require only, that there should be some reasonable power of re-entry for non-payment of the rent: and that the power of re-entry, reserved upon the lease in question, is a reasonable power of re-entry for non-payment of the rent; and therefore as much as the creatrix of the power has required. To this, besides observing that the word “reasonable” is not here used in the deed, though it is used

in two other instances in giving those powers where a discretion was intended to be given, I answer, that this qualification, in my opinion, is not to be so considered, if upon the due and proper construction of this leasing power, this leasing power, if fully executed, would have authorised a re-entry for non-payment of rent in any case in which such re-entry would not be authorised for non-payment of rent upon the lease in question. And I say that there are cases in which if the power of leasing had been fully executed, a re-entry might lawfully be made for the non-payment of rent, in which it could not lawfully be made for such non-payment under this lease. To try whether this be so or not, suppose the right of re-entry reserved by this lease, instead of its being in its present form, had used the very words of qualification used in the deed creating the power of leasing. Suppose the lease had been, "provided that it shall be lawful for the lessees, &c. to re-enter (or 'that they shall have power of re-entry') for non-payment of the rent hereby reserved." That is an easy and obvious way of framing the proviso, and most likely to be adopted, as I should think, by a person having recourse to and looking at the leasing power, as he ought to do, who is anxious to be secure; and that, clearly, I think, would have been a due execution of the power: and under such an execution of the power, by using those words in the lease, whenever there was a default of payment, whether fifteen days had elapsed or not since the rent became due, or whether a sufficient distress was on the demised premises or not, the right of re-entry would have arisen, in case the landlord had made such a demand of the rent as the law for that purpose requires, so that the same construction would be given to those words, where used in the lease, as if the words had been "on non-payment of rent:" whereas, according to the right of re-entry actually reserved, the landlord has no such right of re-entry (though the rent is due, and has been so demanded) for fifteen days, during which he would have such a right under such a due execution of the power of leasing, as I have supposed: nor could he have such right of re-entry at any period of time, when there was a sufficient distress on the premises on which he might levy for his rent, though upon the goods of innocent third persons, which right of re-entry he would have during all that period in the other case, and without the painful necessity of being driven, in any case, to his remedy by distress upon the goods of innocent strangers. So that he has not that right and specific remedy in lieu of his rent in those cases under [420] the lease in question, which he would have had under it, on such a due execution of the leasing power as I have above supposed, but a different one, and such as in some of such cases, at least, some conscientious persons would not resort to, or enforce—such as enforcing the power of distress upon innocent third persons.

The construction of the words in question, therefore, if used in a lease instead of being used in a leasing power, taken according to the proper and ordinary sense and meaning of the words used, would, as it appears to me, have given a right of re-entry immediately on non-payment of the rent. They cannot, therefore, I think, be properly deemed to have a different import and signification, when used in the leasing power, from what they would have when used in a lease made in conformity to that power: or than they would have, if they were used in any lease whatever.

There is not only no right of re-entry given for non-payment of the rent until a default of payment for fifteen days; but even on such default the right given by the proviso is not a right of re-entry to possess or enjoy the land, but a right only of distress in case there be a sufficient distress upon the premises. In the forms of leases contained in *Horseman's Conveyancing*, in the edition that I have, I have been able to find only one that is clogged with the insufficiency of distress: all the others appear to be without it. [421] Those leases appear to have been between the times of the statutes of W. & M. and Geo. II. and several of the conveyances there, for securing annuities, give first a power of distress in case the annuity be in arrear for a given number of days: and a right of entry and enjoyment till satisfaction, in case it be in arrear for a larger number of days, without regard to whether there be or be not any sufficient distress upon the premises.

I think too, that it affords an argument in favor of the above construction—and that nothing else can legally be deemed to have been in the contemplation or intention of the creatrix of the leasing power, when she used the words in question, than a mere simple non-payment or default of payment of rent generally, unaccompanied with any other fact or circumstance, except that which the general rule of law requires, namely, a demand—that it is manifest, that when she meant that any other fact or

circumstance should accompany that non-payment before the right of re-entry should be given, she has expressly mentioned it ; for in the second leasing power, she enables leases to be granted, though the right of re-entry be not reserved, except upon a lapse of non-payment for twenty-eight days after the time appointed for payment of the rent : and I do not see how the lease in question can be held to be valid except upon principles of law, that would have rendered it also valid, in case the creatrix of the leasing powers had also expressly added in the [422] second leasing power another ingredient besides that lapse of twenty-eight days, namely, the want of a sufficient distress upon the premises, without both of which, in addition to the non-payment of rent, a right of re-entry need not in that case have been reserved under the second leasing power.

But, in truth, the reserved right of re-entry which is now in question (whether it is to be deemed reasonable or unreasonable), is not a right of re-entry for non-payment of rent, but it is, in truth, a right of re-entry for a different thing, which may never exist ; notwithstanding there is a default of payment of rent, namely, for an aggregate, consisting in part, indeed, of that default, but of two other things besides, viz. a certain lapse of time, and a want of sufficient distress. It is, in reality, not a right of re-entry for non-payment of rent, but a right of re-entry for want of a sufficient distress in case of such non-payment. Instead of giving a right of re-entry for non-payment of rent, it refers the remainder-man to the right of distress on that event—a right which he would have by the general law, even without such reference ; and it gives him the right of re-entry only at a later time for a different thing, and on a further event—the want of a sufficient distress. It is not, therefore, in reality, a right of re-entry for the same thing as the creatrix of the leasing power required it should be for (and which right, as I have said before, must, I think, be co-extensive with the existence, with the thing or event or default for which it [423] was given), but it is a right of re-entry for a combination of things, all which must exist before the right of re-entry in question can be exercised : and, how reasonable soever it may be thought, that this qualification of this leasing power might have been given by its creatrix for the securing of the rent, instead of the qualification she has actually given to it ; it cannot, I think, be substituted for the qualification which she has actually given and required. But it has been argued, that all this is immaterial ; because of the general clause of re-entry that follows, for default of performance of any of the reservations, covenants &c. But it is so completely settled, both on the maxims and authorities of law, that the general clause of re-entry can extend only to cases not before specially provided for ; more especially when it would otherwise contradict and defeat the prior express provision, that I shall say no more on this point.

Then it has further been objected, that this leasing power being given and executed since the statute of the 4th Geo. II. (ch. 28, s. 2) the insertion of a want of sufficient distress on the demised premises in the lease, in order to give the right of re-entry, has become immaterial ; because (it has been urged) since that statute, no right of re-entry for non-payment of rent can be rendered effectual so as to regain the actual possession, unless where there is no sufficient distress to be found on the demised premises, countervailing the arrears of rent due. But that statute [424] does not appear to me to make any difference in the present case. That statute applies only to cases where the landlord has omitted to make such a demand of the rent as would entitle him to the forfeiture, and it substitutes, for his relief, other things to be done in lieu, and then gives him the benefit of a forfeiture, to which he would not otherwise be entitled : and it gives him that benefit only in certain cases, amongst which is the want of a sufficient distress, and on certain terms. But notwithstanding that statute, when a due demand of the rent has been made, a right of re-entry may since be given, and may be effectually enforced, though a sufficient distress be upon the demised premises. That statute too, applies only to cases where half-a-year's rent is in arrear, and not to cases where a less arrear of rent is due, as may be on a lease in question by a part payment ; although the rent is reserved, not quarterly, but half-yearly.

But it has been further urged, that not only the above statute of the 4 Geo. II., but all the cases, both at Law and in Equity, shew that the object of a power of re-entry is only to secure the payment of the rent. It was then contended, that the payment of the rent is as effectually and as beneficially secured by the power of re-entry actually reserved in the present case, as if that power had been in the words used in the leasing power ; inasmuch as it is said that it reserves the right of re-entry

in all cases where the landlord cannot himself, by a distress, obtain the payment [425] of the rent. This it was argued, appears, by the necessity there is (even after entry) of obtaining judgment and execution in an action of ejectment, before possession can be obtained, and by the relief which Courts, both of Law and Equity, but more particularly the latter, give, independently of the provisions of that statute, in cases of forfeiture for non-payment of rent.

But let us see how the case, as to this point stands. If the right of re-entry reserved had been merely for non-payment of the rent in the terms of the right of re-entry required by the leasing power, it is clear, I take it, that on a due demand of the rent being made (and by the statute 4 Geo. II. even without such demand, where half-a-year's rent remains due) the landlord would have been entitled, either to have the rent itself actually paid to him, or to have the land. No other act in that case need be done, or trouble or risk undergone by him with regard to the rent; but without further act trouble or risk on his part, he might immediately enter into the land, or immediately proceed to recover the possession thereof by an action of ejectment, against which the tenant could not get relief without his paying the rent itself, with costs: and unless he thus gets such relief, the landlord would be entitled to recover all the mesne profits from the time of the default by the non-payment of the rent. The right of re-entry actually reserved in the present case, gives him no power to re-enter or to proceed by ejectment until the expiration of fifteen [426] days, nor at any period of time until there is the want of a sufficient distress upon the premises; nor any right to recover the mesne profits further back than, not only the expiration of the fifteen days, but also the time when there can be proved to be, or when there was such want of distress: and so long as there continues such a distress, the only remedy the landlord has for the rent is by action for it, or by distress: so that instead of having the rent by the payment and act of the lessee himself, or in default thereof an immediate right to re-enter or recover possession of the land itself, the remainder-man is driven to the necessity of incurring, not only the trouble and expence of ascertaining whether there is or is not a sufficient legal distress upon the premises, whether of the property of the tenant or of third persons; and of waiting, where the distress is of standing corn, until it is ripe and cut (for till then it cannot, by the statute, be appraised or sold for payment of the rent): but also incurring the trouble delay and risk attending the making the distress, in such manner as is in no respect illegal, either by reason of the manner of making or disposing thereof, or by reason of the distrained property being privileged from distress by the same being in the way to market, or by reason of trade or otherwise. But the tenant may deprive him of the power of sale by a replevy of the distress, and it may happen, at the end of the replevin suit, that, by the elignment of the distrained property, the insufficiency of the pledges in re [427] plevin, and the insolvency, or death without sufficient assets unadministered of the sheriff and the tenant, his remedy by distress may finally fail, with the additional loss and costs both of the distress and of the replevin suit: and if this does not happen, he may still be without his rent, unless he take upon himself the trouble and expence of prosecuting execution pro retorno habendo, or for his debt and costs, and the trouble and risk of prosecuting some further action or actions against the sheriff or the bail in replevin, in case such execution shall prove ineffectual: and his remedy by ejectment would be delayed in that case, until these results of the replevin suit shall have been ascertained, even if an action of ejectment would then lie for the non-payment of that rent which had been before distrained for: so that after the termination of the distress and replevin suit, it may happen that the remainder-man may lose his rent, with the addition of costs.

The payment of the rent is not therefore, I think, as effectually and beneficially secured by the right of re-entry actually reserved, as if that right had been reserved in the words of or according to the leasing power.

I have considered the question as above, independently of the disputed authorities of *Case v. Parr* and *Doe, d. Vaughan, v. Minter*, both which cases, I think, were rightly decided, notwithstanding the prior case of *Holbey v. Seal*. [428] I have considered the question too as if in the lease the rent reserved had been a money rent only: because it has been so treated in the arguments here, and in the Courts below: but it is to be observed, that this is the case not of a lease for a money rent only, but also for a rent of another nature, although certainly a very small one, namely, the additional rent of a couple of fat capons or money, at the election, not of the tenant,

but of the lessor or remainder-man who would therefore be entitled, if he pleased, to have that rent in kind, instead of money. It has been considered on all sides, as the case of a lease for a money rent only, I presume, on this ground, that the special right of re-entry depending on the want of a sufficient distress, does not apply to this additional rent or reservation, but to the money rent only; and that the right of re-entry applicable to this additional rent, is the general right of re-entry subsequently given by the lease, in case of default in payment or performance of any of the reservations, covenants &c.: and this may be the case if the statute of 2 W. & M. (which is the statute giving the power of sale of a distress for rent) be deemed to be confined to money rents only; but if the default of payment of this additional rent be within the special right of re-entry depending on the want of a sufficient distress, more especially if this kind of rent be also not within the above statute of W. & M., so that this distress could not be sold under that statute for the purpose of raising or paying that rent—though, if it [429] could be sold for that purpose it would not raise the rent in kind agreeable to the landlord's right of election, but in money only, at least not without additional trouble or expence to the landlord of purchasing the rent in kind with the money raised by the sale, that is, either by doing it himself, or procuring another to do it—I say that in such case the question proposed to us by your Lordships, as it appears to me, would embrace still further considerations arising from those circumstances, as the distress for that small rent in kind, viz. the two capons, would in that case (that is to say, if it could not be sold under the statute) remain only a dry, unprofitable, chargeable pledge for that rent, in lieu of the productive security of the enjoyment of the land. This, however, it is unnecessary for me to consider; inasmuch as, whether the additional rent, in kind, would embrace further considerations as to the law of the case or not, I think, for the reasons which I have before stated, that, having due regard to every thing alluded to in the question proposed to us by your Lordships, the lease in question is invalid.

PARK, J. delivered his opinion, as far as his Lordship advanced any additional arguments in support of his former reasoning, as follows:

I shall answer the question, proposed to the Judges, very shortly; because I have so fully given my opinion upon it in another place, a full and accurate report of which, in two different [430] books, is in the hands of some of your Lordships. And meaning, in what I am to trouble the House with, to adhere to the opinion I formerly delivered, I, of course, in answer to your Lordships' question, must state, that, having a due regard, &c. (using the precise terms of the question proposed to the Judges, as in page 379), the demise of the 5th September, 1803, is, in my opinion, invalid.

I proceed to state to your Lordships, as the question requires, my reasons for so thinking.

But, before I do so, I beg your Lordships to believe me, when I positively disclaim the notion, that I thus give my opinion, in order to preserve my own consistency. I have often heard eminent Judges so declare; but surely consistency in error is no credit to the man or the Judge. For one, I should never be ashamed, and have lately so acted upon that feeling, where my understanding is convinced that I had upon some former occasion formed an erroneous judgment, manfully, fearlessly to acknowledge it; and as speedily as possible to retrace my steps.

[His Lordship then stated the two objections to this lease, which have been already so frequently repeated.]

These two objections, continued his Lordship, fall under very different considerations; but it [431] must be admitted, that if either of them prevail, the lease is invalid.

As to the general rules which govern the Courts in the construction of leasing powers, they are all now well understood; and have been so fully explained and commented upon by some of my learned Brothers, who have preceded me, that it would be a silly parade of learning, and a useless waste of the time of the House to enter upon them, it being sufficient to state that the intention of the parties, as it is to be collected from the instrument, is to be the governing principle in the construction. (Here his Lordship took up the argument as formerly delivered by him in the Exchequer Chamber, and which will be found, ante, p. 312, 313.) When this case was before the Exchequer Chamber, I stated, that if the only objection to this lease were the time given, before the lapse of which he could not re-enter for non-payment of the rent, as then advised, I should think the objection fatal. I have heard nothing

since to remove my doubt. It is said, indeed, that the indefinite article *a* being used, namely, a power—any power that is reasonable may be inserted. But what right have we to do this for the grantor of the power? Who has a right to insert this word? Who, if inserted, is to construe it? The Court or the Jury? If fifteen days be reasonable, why not twenty, twenty-five, and thirty? That this was never contemplated I think quite clear; for whenever time is meant to be given, it is expressed; and therefore she must [432] be presumed to have known, that where she meant to give time, it ought to be expressed; lest the giving it in one case should be construed, as I do, that it was not intended to be given in the other. But I have said, and I repeat, what right have we to insert the word reasonable into this power? If this word “reasonable” never found its way into powers, it might perhaps more fairly be argued that it was inherent in all. But looking at precedents and adjudged cases, we do find the words usual and reasonable sometimes jointly introduced, sometimes separately: and those words, when introduced, compel the Courts to consider what are usual—what are reasonable covenants under such powers. If then it is not unusual to insert such words, why are the Court to introduce them where the creator of the power has not, and who, by omitting them, must be taken to have intended that they should not be inserted?

But I am staggered by what is said in a book of great authority, and to which I think the professional public are much indebted, (Sugden*) that if this objection were to prevail, it would invalidate nine tenths of all the leases in the kingdom granted under powers. I can only say such a consequence is to be deeply deplored; but it is entirely owing to this, that those who have prepared such leases have chosen to follow their own new-fangled conceits, instead of using the exact words of the power, conferring the right [433] to lease upon certain terms, and upon certain terms only. This argument that many leases will be invalidated may be a very good one to your Lordships in your legislative capacity, on account of the hardship of the case; but cannot and ought not to influence you when your province is *ius dicere, non dare*.

However, if this were the only objection to the lease in question, on account of the long practice which has prevailed, as it is alleged, I might be inclined to pause before I presumed to offer my humble advice to your Lordships, that on this ground alone the lease would be void.

But the second objection seems to me to be impossible to be got over. I have thought much about it, both before I gave my judgment in the Exchequer Chamber and since. I have turned it in every point of view. I have heard all that the learning and ability of the Bar could suggest. I have, of course, been present at all the conferences with my learned Brethren. I have been most desirous to be convinced, if my opinion be erroneous: but, after all, I cannot raise in my own mind a probable doubt: and though, if the decision of your Lordships should be ultimately in favour of the lease, it will be my duty to conform to that opinion, I am at present bound to state my entire concurrence upon this point with my learned Brothers Richardson, Burrough, and Holroyd, who have preceded me. Their luminous exposition of the argument, and my [434] own judgment in the Exchequer Chamber, which is accurately reported both by Messrs. Broderip and Bingham and by Mr. Moore, and which is in the possession of some of your Lordships, render it unnecessary for me to do more, on this head, than to make an observation or two on the cases that have been quoted.

The main reliance on the other side is on the case of *Hollen v. Scot* (Lofft, 316). Of the reporter of that case I shall say no more than this (without forming any judgment of my own) that, during a long professional life of forty years, Lofft's Reports embracing a period of that great man's life who then presided in the Court of King's Bench during which, as to this part of them, there is no other reporter, (for the Reports of the very learned person, now at your Lordships' table [Cowper] did not commence till 1774, nearly two years after [this part of] Mr. Lofft's) I never heard them quoted three times in my life. But, without any observations of this kind, it is quite clear from that report, that none of the learned counsel then at the Bar (Mr. Dunning or Mr. Beaucroft) nor my Lord Mansfield, nor any of the Judges appear to have taken the least notice of the condition as to the want of a sufficient distress, which is the very point now under consideration; and which, from the terms of the

* On Powers, p. 625, 3d edition (or in 2d edition, 623).

power and lease in that case might have arisen. But, it is said, that Mr. Butler has a note (ante, p. 343) of that case, taken by him-[435]-self, in which it appears to have been mentioned. I have not seen that note, and therefore I can say nothing about it. I entertain great respect for that gentleman, and I do not wish to depreciate the labours of the young; but, unless he be much more advanced in life than, for the sake of the public, I wish him to be, he must, forty-eight years ago, have been a very young man. But, admitting the point to have been mentioned, it cannot have formed a prominent feature either in the argument at the Bar, or in the consideration of the Court: for if it had, it is impossible that Mr. Loft or any other man, in a report of four pages, should have omitted it. Can such a case, for a moment, be put in competition with that of *Coke v. Day*, where this clause was the main objection to the lease—a case most ably argued at the Bar by the now Chief Justice of that Court, and receiving the deliberate certificate of four eminent Judges, Lord Ellenborough and Justices Grose, Le Blanc, and Bayley? In the course of that argument Lord Ellenborough said, “There can be no doubt that it is more beneficial to the owner of the estate to have a power of re-entry at once upon the tenant, upon non-payment of rent within a certain time, than to have such a power only in case there shall be no sufficient distress upon the premises.” And in another part, when Mr. Abbott was strongly pressing on the Court that such a clause secured the landlord’s object, namely, by satisfying his rent more speedily than in any other way, Lord Ellenborough said, in answer, “In the one case it is to [436] be secured from time to time by successive suits, with the risk of sureties, if the distress be replevied: in the other it is secured, once for all, by the landlord’s re-possessioning himself of the land out of which the rent is derived.”

Can any one say, my Lords, that the one remedy is not more easy, more direct, and less circuitous, than the other? And that great man, Lord Ellenborough, again says, “Surely the direct power is more beneficial to the landlord.” The certificate of all the learned Judges is in direct conformity with these dicta of Lord Ellenborough; for it is, “We are of opinion that the power of re-entry reserved in and by the said lease for non-payment of the rent, is not made in conformity to the power in the settlement for granting leases of the freehold part of the said demised premises, and that the lease is void on that ground.” Not having seen any report of the judgment of the King’s Bench upon this case of *Doe, d. Jersey, v. Smith*, I cannot tell whether this case of *Coke v. Day* was re-called to their attention; but I am quite sure it is impossible to reconcile the one with the other. This was so strongly felt by two very learned Judges in the Court below, that at once they doubt the propriety of that decision: and one of them says, it is not law: for it is diametrically opposite to reason and common sense. I am sorry to say, I think directly the contrary: but I for one seriously object to this mode of getting rid of decisions because they militate against our own no-[437]-tions. I agree with the pointed manner in which this was expressed lately in this House by the Lord Chief Justice of the Common Pleas: and I hope I shall be excused for using his language. “If the law so settled is now to be considered as unsettled, I know not on what foundation, in point of law, any decision can stand.”

But the case of *Coke v. Day* is not a solitary case; for it again, in about three years after, came under the consideration of three of the same Judges who decided *Coke v. Day*, namely, Lord Ellenborough, and Justices Le Blanc and Bayley, with the addition of another learned person, now no more: (Mr. Justice Dampier) and they could not have decided as they did, without determining that such a clause as we are now considering, rendered a lease void where the power did not authorise it. The case I allude to is *Doe, d. Vaughan, v. Menier* (2 Maule & Selw. 276). That case was tried before the latter Judge, at Hereford, who thought the objection, such as we have here, was one that went to the whole lease; though it was partly of lands of which the lessor was seised in fee, and of lands in which he had only an estate for life, with a leasing power: provided there was a clause of re-entry for non-payment of rent for fifteen days. The lease was not executed according to that power; for it added, “and if there be no sufficient distress.” But the Court held that though the lease was void, because not executed accord-[438]ing to the power: yet it was good as to the land of which the lessor was seised in fee: and they apportioned the rent: which was an erroneous judgment, if this objection to the present lease be not a good one. The case of *Rees, on the demise of Powell, v. King* (Forrest, 19), I formerly thought, and

still think, sets this point at rest, by shewing that such a clause as this throws a burden upon the right of re-entry, which the maker of the power never contemplated. That case having been so often mentioned, it is enough to say of it, that it has decided, that, before a plaintiff in ejectment can recover upon a clause of re-entry in a lease, in case there be no sufficient distress on the premises, he must shew that every part of the premises has been searched, else he cannot say there was no sufficient distress. The Judge who first decided this was well known to some of your Lordships; and no man will decry the knowledge of the late Mr. Justice Heath. His opinion was confirmed by the Court of Exchequer. If the Courts of Westminster Hall were to overturn that decision, it would go a great way to shake my present opinion; but I do not learn that any of my Brethren are prepared to do so: and if, therefore, I feel myself bound, as I shall do, to call upon any plaintiff in ejectment on the circuit who has such a clog on his clause of re-entry as this, to prove that he has made a full search for a distress, before I permit such a plaintiff to recover, I cannot conscientiously advise your Lordships that this lease is valid: [439] most sincerely wishing however, that, consistently with my honest opinion, I could do so. Of one other point I must take notice, namely, that, as this lease contains a general clause of re-entry, it must necessarily control the special clause. To that position I for one cannot at present agree: for I find the contrary doctrine maintained from *Altham's case* (8 Co. 154), down to the present day.

[Upon this part of the case his Lordship employed the same reasoning, and adverted to the same authorities as he will be found to have done in his argument in the Exchequer Chamber, ante, p. 316.]

The point upon the statute of the 4th of Geo. the II. has been so ably handled, and so luminously explained by my learned Brother Holroyd, who has just addressed the House, that I shall not trouble your Lordships on that point, but to say, I entirely concur with him.

The next point is, whether the other leases should be admitted as evidence, and upon that I shall trouble the House very shortly. I am willing to admit, that if this deed upon the clause in question contains any latent ambiguity raised by extrinsic evidence, parol evidence or extrinsic evidence may be admitted to explain it, or to render it unambiguous. But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to con[440]-tradict, vary, or add to the terms of a deed. It would be of most dangerous consequence to admit such testimony: for then parties dealing on matters in writing, made upon advice and consideration would be subjected either to the uncertain testimony of vague and precarious memory, or, as in the case at Bar, to matter of which, at the time of contracting, they might have no knowledge, and of which they never intended to be under the controul. The written instrument, therefore unless in cases of fraud, or other excepted cases, with which I need not trouble your Lordships (and of which I insist this is not one) -- must be considered as speaking the sense of the parties to that deed or instrument. Upon this ground I conceive it was that the case of *Cooke v. Booth* (Cowp. 819) met with such a decided opinion against it in *Bayham v. Guy's Hospital* (3 Ves. 298) by Lord Alvanley, when Master of the Rolls, who not only states his own opinion, but that of the late Mr. Justice Wilson, who had argued the case of *Cooke v. Booth*, and who, Lord Alvanley says, was astonished at the decision: and it was also disapproved of by Lord Thurlow. The Master of the Rolls says, "I strongly protest against the argument of the learned Judges, in *Cooke v. Booth*, as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it." The case of *Tritton v. Foote* (2 Bro. C. C. 636) seems also directly at variance with *Cooke v. Booth*. In *Iggulden v. May(d)*, the Court [441] of Exchequer Chamber unanimously affirming a judgment of the Court of King's Bench, held that a covenant in a lease to grant a new lease with all such covenants, grants, and articles as in the said indenture is contained, does not bind the lessor to insert a covenant of renewal in the renewed lease: although it was alleged in the pleadings, that the covenant required had been introduced in various other cases before then successively made and executed on renewals from time to time granted. The Lord Chief Justice Mansfield, stopping the then Mr. Abbot, who was to have argued against the construction con-

(d) 2 N. R. 449. The original case and the pleadings are in 7 Eart. 237, and see also 9 Ves. 325.

tended for on the other side, said, that the case of *Cooke v. Booth* was the first time that the acts of the parties to a deed were ever made use of in a Court of Law to assist the construction of that deed: and in another part of his judgment his Lordship says, that is "a case which has been impeached upon all occasions, and in which the Court of King's Bench were misled by the renewals stated in the case sent by the Court of Chancery." Now what is asked for in the present case but to assist the construction of an unambiguous deed by the prior acts of the parties? And in a case which I argued as Counsel, in 2 East, 376 (*Doe, d. Allan, v. Calvert*), though the lease there was according to the custom of the country as to the time of holding: yet, being dated 29th March, it was held not to be a lease in possession; and that because the days of holding were, as to the tillage, from the 13th of February past; the pasture ground from the 5th of April next; and the residue of the premises from the 12th of May next.

[442] But, my Lords, in my opinion, cases are not wanted to prove that no evidence can be admitted to explain a deed which is plain and perspicuous in its terms, containing no ambiguity; much less to add clogs and conditions to it. I am asked then, is this a deed of that description? I answer, that in my opinion it is. I see no ambiguity: it is precise and definite in the powers granted. Every person of plain and common understanding, much more every person with a legal mind, can give it a clear and satisfactory solution. But I am told the case of *Fonnereau v. Poynt*: (1 Bro. Ch. Ca. 472) before Lord Chancellor Thurlow, is against my opinion. Upon the best attention I can pay to that case, I do not think so. That case was a bequest of the sum of 500l. stock, in long annuities, and similar bequests of smaller sums in the same stock to others. The question was, whether this was a bequest of 500l. a-year long annuities, or only 500l. in the long annuities. The case was very powerfully argued by one of your Lordships. I own I should have thought there was no difficulty in the construction: and Lord Thurlow seemed at first to be of that opinion: but he afterwards admitted evidence to shew the extent of the property of the testatrix, to see whether she could possibly mean 500l. a-year, when she had no such stock. But though his Lordship admitted this, he states the clear principle of law to be, that, for the wisest reasons, it will not admit of an instrument being construed [443] aliunde. And in the close of that case his Lordship says what I quote to your Lordships as strong in my favor: because he only lets in the evidence to explain what is uncertain.—"There is no doubt if the word stock had been left out, but that the meaning would be that the sum of 500l. was to be disposed of in long annuities, and to make a produce, and that produce to accumulate until the legatee should attain twenty-one. This being the doubtful interpretation upon the face of the will, the question arises, whether the state of the testatrix's fortune is not applicable to the construction of the will. It appears by some other parts of the will, that she was extremely anxious to make an ample provision for the family of the Fonnereaus. Considering then, the situation of her fortune, it is perfectly inconsistent to say that she could mean to give ten times more than she was worth, in legacies. My opinion therefore is, that the judgment must be reversed, and that I can let in the evidence of the value of the estate, not to control the bequests which the testatrix has made in words themselves distinct, nor to control a bequest which she has made of a subject which she had accurately described; but because the words she has used are uncertain. The peculiarity of this will furnishes sufficient doubt to warrant the admission of collateral evidence to explain it, and if so, the statement of the testatrix's fortune is applicable to the purpose of such an explanation." His Lordship, whether right or wrong in his notion, clearly admits evidence aliunde on the ground of uncertainty and ambiguity only, and leaves [444] the principle wholly untouched—that parol evidence, or evidence aliunde, cannot be admitted to contradict, add to, or vary the terms of a deed, will, or other written instrument. Now here, the terms of this power are clear and express, without limitation, clog or condition—nothing being doubtful or ambiguous—and the evidence sought to be admitted is not to explain that which is doubtful; but to add two clauses or two conditions to that which is absolute and unconditional: in short, to make a new deed in this respect.

The decision I am humbly recommending, steers clear of all vagueness and uncertainty, leaving nothing to the variety of conflicting opinions. For who is to decide what is reasonable? If the Judges—I should be inclined to think it would be mischievous in its consequences; but worse if the Jury are to be called on to decide

it. What can lead to such contrariety of decision? for we all know, in every transaction of human life, what is reasonable or unreasonable must depend upon the reasoning and feeling of every individual who has to consider the question.

I heard it said that this will unsettle many leases. I should lament it if it should have such an effect; but in that case the legislature might interpose. If, however, the mode of construing powers, which I am now proposing as the true one, had been always adhered to, no such evil could have ensued. The hardship of the individual case is represented: and if there be hardship, I also, as [445] an individual, lament it. This statement of hardship, and the consequences of what I should propose, have made me again and again examine this point with all the ability in my power; but, after all this consideration, feeling that it is my sworn and therefore bounden duty to declare what I believe the law to be now—not to say what it ought to be—I think, that, to decide in favor of the lease, would be to make a power different substantially from that which was made; and to make conditions which the creator of it never intended. This would be my opinion if I stood alone, but I am happy not to be singular in my judgment on this important question, although I am opposed to others whose ability I respect, and whose learning I revere.

BAYLEY, J.—Upon the best consideration I am able to give this case, I can find no reason for departing from the original opinion which I formerly entertained when this case first came before the Court of King's Bench—that the lease in question is conformable to the leasing power in the deed of settlement; and is therefore valid. On the case of *Core v. Day*, I find it necessary to state that, when this question was under the consideration of the Court, that decision was perfectly in their recollection; and they considered that their judgment in the present case, did not in any respect break in upon, or clash with that determination.

The clause in the settlement under which this [446] lease was authorized requires it to contain “a power of re-entry—for non-payment of the rent:” and the first question for your Lordships’ consideration is, whether this lease does or does not contain a power of re-entry for non-payment of the rent? It contains, in fact, a proviso that, if the rent be behind or unpaid by the space of fifteen days; and no sufficient distress can be had upon the premises, the persons entitled to the rent and the freehold and inheritance may re-enter. Is this, or is it not, a power given to the landlord? Undoubtedly it is. Does it not enable them to re-enter? It does: and for what cause? For non-payment of the rent reserved. I admit that it is not an immediate or unconditional power of re-entry; but still it is—“a power of re-entry”—and “for non-payment of the rent reserved.”

It is material to this question to see what the law was with regard to these powers from the earliest times. Referring to Coke, Littleton (sect. 325), we find instances of various conditions for re-entry, “if the rent be behind by a week after the day of payment” or “by a month,” or “half a year.” We find also from the Year Books (20 Hen. VI. 30, 31. 6 Hen. VII. 3. Bro. Abr. tit. Entre Congeable, pl. 90) that the time for making demand of the rent to warrant a re-entry is at the end of the last day of such week, month, or half year, and not on the rent day. It is not, therefore, inconsistent in law with a requisition, that there should be reserved [447] a power of re-entry, that it be not immediate; or that it be postponed for some length of time after the day fixed for the payment of the rent. In Godbolt, p. 110, ca. 130*, we have an instance of a condition for re-entry, “if the rent be behind, and no sufficient distress upon the land.” I therefore consider that a power of re-entry on condition that the rent be behind and no sufficient distress upon the land, is an acknowledged legal power of re-entry for non-payment of rent. The power, as reserved in this case, may, however, not be the most beneficial power to the reversioner which could be devised: and being qualified with these conditions it may in certain possible cases not afford the conveniences of an absolute right of re-entry; but still it is a power of re-entry, and, if it be sufficient to secure the payment of the rent, I hold that this lease does contain in terms all that is required by the words of the leasing power in the settlement.

But then it is urged, by those who would impugn this lease as not being a good execution of the power to demise, that, admitting it to contain a power of re-entry, it is not such a power as the indenture of the 2d of July, 1757, due regard being had

* *Hoodie and Wenscombe's case*, 29 Eliz.

to its intent and meaning in legal construction, requires to be inserted in the leases to be made under this particular power. That argument however necessarily as-[448]sumes that the words of the power are not so clear and precise but that they are capable of more than one meaning: otherwise indeed the proposition would be self-evident. Many different sorts of powers are known to the law, some more beneficial, others less so: some are qualified, some are not: some are conditioned to hold the land till the rent is satisfied out of the profits (Co. Litt. sect. 328); some to hold till the rent is satisfied aliunde: some (as here) to restore the reversioner to his former estate (Co. Litt. s. 324): others there are with the conditions which form the subject-matter of the objections to this lease, and which I have already noticed: some again (though very few) have neither of those conditions: and the question now for your Lordships' consideration, I apprehend, is which of these powers, having due regard to the intent and meaning of the indenture of 2d July, 1757, that instrument, according to legal construction, requires?

The intent and meaning of the indenture is to be collected, either from the indenture, intrinsically, without looking out of it; or from the contents of the instrument combined with the consideration of the state of the property at the time when it was made. And then arises the other question—whether the evidence of the then existing leases, and of the powers of re-entry therein contained, and which I shall presently consider, be admissible or not, not for the purpose of explaining, adding to, or varying a [449] written instrument: but to shew the meaning of the language which the settlor has used in this requisition, which she has left quite indefinite and necessarily to be supplied by reference to matters extrinsic. Taking it first, however, without reference to any such extrinsic matter, it seems to me that the intent and meaning of the indenture per se, and without looking beyond it, or out of it, was, that the reversioner should have either of such of those powers as would give him a proper and reasonable security for his rent by way of re-entry. If nothing short of a right of immediate re-entry—whether there were a sufficient distress upon the premises or not—would give him that security, I might be of opinion that, in such a case, he would be entitled to have such a power inserted in the lease as would alone ensure to him that right. But if any of the other species of power would give him a proper and reasonable security, it seems to me, that the insertion of either of those other powers would satisfy all that the indenture of 1757, in legal construction of its meaning, requires. The rent is not a rack-rent: it is merely an old accustomed rent of only 2l. 1s. 6d. per annum, payable half yearly; and for a lease for three lives, the lessee surrendered a subsisting lease, upon which at least one life must have been in esse, and paid 105l. A half year's rent therefore would be 1l. 0s. 9d. only: and such a rent was certainly not likely to occasion the reversioner much thought or care, as to any probability of loss of it; for he could not consider it possible that the premises would ever [450] be so completely deserted as that there should be no sufficient distress upon them at any time: nor was the rent of such consequence as to make it probable that the tenant could, upon any occasion, be induced to replevy a distress. For such a rent, therefore, the power in question to re-enter at the end of fifteen days, if there were no sufficient distress upon the premises, appears to me an adequate and reasonable security; and I should be disposed to think that for such a rent, a clause of re-entry without giving any days of grace, would be unreasonable; because the immediate exercise of such a right would be oppressive. Nor do I think it unreasonable to restrain the reversioner from the enforcing the power of re-entry, whilst there should be a sufficient distress upon the premises; because the legislature did not think it unreasonable to deny the landlord the benefit of the 4 Geo. II. c. 28, where there was a sufficient distress: and the landlord can have no difficulty in ascertaining whether there be such a distress or not; for he has a right to enter daily with his bailiff upon the premises to see whether there be such a distress, and according to the case in *Godbolt* (ca. 130, p. 110), if there be nothing that he can see upon the premises to distrain, he is warranted in concluding that there are no distrainable goods there. The words of the report are, "In that case it was holden, by all the Justices, that if a man make a lease, rendering rent upon condition, that if the rent be behind, and no sufficient distress upon the land, that then the lessor may re-enter; if the rent be behind, and [451] there be a piece of lead, or other thing hidden in the land, and no other thing there to be distrained, the lessor may re-enter; for the distress ought to be open, and to be come

by; for if it should be otherwise said a sufficient distress, one might inclose money, or other things within a wall; and thereby the lessor should be excluded of his re-entry." I am therefore of opinion, that, without looking beyond the indenture of 1757, the power in question is conformable with the requisition, and within the true intent and meaning of that indenture: and that it is, in the legal construction thereof, as large and beneficial a power of re-entry, as that indenture required. I am of opinion also that, in judging of the true intent and meaning of the indenture of July, 1757, in this respect, we are at liberty to take into consideration the state of the property at the time when that indenture was made, to see to what restrictions the lessees were then subject, and what rights the lessor then retained. The settlor having used the indefinite words, "a power of re-entry," by shewing, as I have done, that there are many such powers recognized by the law, I shew that there is an ambiguity in those words, whether latent or patent, which makes it necessary to refer to the actual state of the property at the time when the settlement in which those words were used was made, in order to discover the intent of the settlor, and in what sense she used those words? I have never before heard it doubted, whether the nature and the general mode of tenure of an estate, and the interest of the owner were admissible in [452] proof to ascertain the nature and design of an indefinite power to lease granted by the settlor of the property. I am not by so doing, construing a legal instrument by the acts of the parties, or by their understanding of it; as was done in *Cooke v. Booth* (Cowp. 819), but by shewing from the circumstances and situation of the parties, and the estate and interest which the settlor had at the time, I am enabling the House to judge what, in legal construction, was the meaning of the creator of the power in using indefinite terms—a question which sends so many cases from one side of Westminster Hall to the other: and I am not aware that there is any legal authority for excluding the evidence of such circumstances and situation for such a purpose. On the contrary, there are several authorities for admitting extrinsic evidence where the doubtful wording of an instrument seems to render it necessary to seek an explanation aliunde. In *Doe, on the demise of Allan, v. Culvert* (2 East, 376), which was argued on a question, whether the lease there was a lease in possession or reversion; the custom of letting was given in evidence to shew that the periods mentioned in the habendum of the lease for the tenant's entry on the part of the premises then in question, were the usual periods of entry customary in that part of the country. That evidence was admitted without objection, and argued upon without objection: and that fact was held by the Court, who did not advert to its being inadmissible, not to have the effect of controuling, [453] on the principle of intention, the words of the power (which was to lease in possession and not in reversion) so as to get rid of the objection, that a lease dated the 29th of March, under which entry was to be made by the tenant as to all the ground, except the tillage, on the 5th of April, and 12th of May then next ensuing, was a lease in reversion, and therefore not warranted by the power. How that case bears on the question, so as to support the proposition, that the extrinsic evidence received in this case was inadmissible, I am quite at a loss to discover.

In the case of one making a deed or will, have we not a right, when it is necessary to the understanding of it, as it frequently is, to enquire what estate he had at the time of executing the instrument? That is often a necessary fact to know, because the true construction often turns upon it, and may be wholly varied according to the result of the enquiry. I will put this familiar case: if one grant to another a lease for life, without expressing it to be for the life of the lessor, or of the lessee—is not evidence not only admissible, but necessary, to shew what interest the lessor had in the property at the time? for if he were tenant in fee, the lessee would take a lease for his own life; whereas, if the lessor were tenant in tail, or for life only, the lessee would take only for the life of the lessor. [His Lordship then adverted to the doctrine in *Sheppard's Touchstone*, p. 88.] So, where a testator gives a sum of money by the description of so much stock; if he have such [454] stock, it is a specific bequest of that stock; but if he has it not at the time of his death, evidence may be received to shew that it had been transferred to some other fund, and the bequest would thereupon be established. That was acted upon in the case of *School v. Midway* (3 Ves. 306), where extrinsic evidence was admitted to shew that the testator had no such stock as he had bequeathed, having transferred it to another fund before his death. In *Masters v. Masters* (1 P. W. 425), extrinsic evidence must have been

admitted to have rescued the bequest there, from the effect of that uncertainty which would otherwise have rendered it void. I wish to call your Lordships' more particular attention to the case so much relied on by my Brother Park, of *Fonnerau v. Poyntz*. In that case the testatrix gave to Mary Poyntz the sum of 500*l.* stock in long annuities, the same sum stock to another person, and 200*l.* and 100*l.* stock in long annuities to two other persons, the interest of the two latter sums to accumulate till the legatees should attain twenty-one, and then the whole to be transferred to them by her executors: and she bequeathed the residue of her estate to her two nephews. The testatrix having only 120*l.* stock at her death in long annuities, parol evidence was there admitted (after it had been at first held by Lord Thurlow not to be admissible) to shew the actual amount of her fortune, and the state of her property (which was admitted to be external evidence) in order to enable [455] the Court to construe the will by the criterion of her intention, if it might be collected from the state of her circumstances. Lord Thurlow ultimately decided that the peculiarity of the will furnished sufficient doubt to warrant the admission of collateral evidence, to explain whether he meant to bequeath to the legatees a gross sum to accumulate, or that sum per annum by way of annuity: and on admitting the evidence, the same sum to be paid as an annuity, was found to be ten times as much as she was worth. Extrinsic evidence in that case, therefore, was received and acted upon to explain the meaning and intention of the testatrix as to these bequests, which were otherwise uncertain, and could not, in fact, have been established or satisfied. The Master of the Rolls afterwards (adverting to that case), in deciding *Selwood v. Mildmay*, says, "Lord Thurlow's only doubt was, whether parol evidence was admissible to ascertain whether the testatrix did not mean capital; but he had no doubt that she must know all the circumstances of her affairs: therefor his first opinion was, that, though it did appear she could not mean to give so much more than she could afford, yet he doubted whether he could give the words a meaning so different from their natural meaning." Applying those principles to this case, the evidence objected to here must necessarily be held to be admissible on the same or stronger grounds; because it is not offered to set up a construction against the natural meaning and import of the words, nor to control or modify a power distinctly and accurately describ-[456]-ed; but to remove an ambiguity upon the face of the instrument which creates it, and which, by using general and indefinite terms, renders it capable of being satisfied in several ways. Therefore it is, that I think we may, in this case, look to the state of this property at the time when the settlement was made, in order to be enabled to ascertain, from the nature of her estate and interest in the property, and the circumstances under which it was usually demised at the time, what her intention was with respect to the sort of power which she was desirous of having introduced into the leases. From that extrinsic evidence we find the case to stand thus:—Lady Louisa Barbara Mansel being tenant for life, with a power of appointment in fee, of a very considerable estate, part of which was then let out upon leases for lives at small rents, payable partly in money and partly in a render of capons, or money at the election of the landlord: and those leases contained powers of re-entry "in case the rents reserved should be behind for fifteen days, and there should be no sufficient distress upon the premises." She then settled that estate, amongst other uses, to her husband for his life, with a power enabling him to make leases of a part of the property which had been long before so let for lives, so as there should be reserved the ancient and accustomed rents; and so as there should be contained in the leases a power of re-entry for non-payment of the rent: and also with a power to make leases at rack-rent of other parts of the estate; so as they should contain powers [457] of re-entry in case the rent should be in arrear for twenty-eight days. The true question, therefore, which arises upon these powers is, whether by requiring in the life leases, generally, a power of re-entry, she meant to require more than the same description of power with which the then existing life leases were burthened; and she must be taken to have known what that power was. Had she been dissatisfied with it, or desirous of making any alteration in that respect, is it to be supposed that she would not have used more definite terms in the requisition than these which she has contented herself with, requiring, generally, a power of re-entry? more especially when we see that in providing for securing the rack-rents, where the right of re-entry is obviously of so much more importance, she gives the tenant an indulgence of twenty-eight days. Can it be supposed that she intended

to be less indulgent in respect of the small rents which bore comparatively no proportion to the value of the property? I cannot consider that she could have had any such intention. Therefore—the settlor not having prescribed or suggested any particular species of power, as being required by her to be contained in the leases; and as the power which this lease contains is reasonable, and amply sufficient to answer every legal purpose: and being besides the very species of power which was at that time inserted in all the leases in force upon this estate—I submit to your Lordships, that this lease was warranted by the terms of the leasing power: and that, for these reasons, the original judgment [458] of the Court of King's Bench ought to be affirmed.

Wood, Baron.—In answer to the question proposed, (which he stated) expressed his opinion to be,—that the power contained in the marriage settlement was well executed.

[His Lordship having delivered his reasons for that opinion so nearly in substance in the terms of his judgment in the Exchequer Chamber, though not quite so fully, it would be superfluous to repeat them.] He concluded by saying, that, as the power of leasing leaves it to the discretion of the lessor to make a reasonable lease: and as the power of re-entry contained in the proviso is reasonable in its conditions, I therefore think that the lease is not invalid.

The House then adjourned till Friday.

Friday, 18th May.—GRAHAM, Baron preceded the detail of his reasons for the opinion which he was about to deliver, by stating the terms of the first leasing power, and particularly those parts of it which refer to the lands then leased for lives or years determinable on lives, and require as a condition that there shall be reserved in all such leases as should be made under it, the ancient and accustomed or as great and beneficial rents, duties, and services as were then reserved and made payable; and the other principal condition, that there should be contained therein a power of [459] re-entry for non-payment of the rent to be reserved—and he then read the words of the proviso in the lease. Now (continued his Lordship) how all these directions which we find in this leasing power were to be pursued without a general reference to the tenor of the former leases, I am at a loss to conceive. That reference was, in point of fact, had; and it being found that the leases uniformly gave the tenant a respite of fifteen days for the payment of the rent, and that there was also annexed the further qualification to the clause of re-entry, that there be no sufficient distress on the premises, whereby the arrearages of this half-yearly rent of one pound might be fully raised, levied, and paid; the framer of the lease of 1803 adopted the same form of reserving the power of re-entry in that lease: and the question now for your Lordships' consideration is, whether this lease, containing, as it does, a clause for re-entry for non-payment of the rent, with those same conditions annexed, is a proper and valid execution of the power given by the settlement. Whether it be so or not, depends, as I conceive, on the following considerations:—whether it be substantially conformable to the intention of the creator of the power—whether the objects of the annexed conditions are reasonable and legal—and whether, in their effect, they are injurious to the rights and interests of the remainder-man. If it be not admitted, that this power is capable of a liberal construction, (and I will not trouble your Lordships with cases to shew that such is the rule [460] with respect to the construction of such powers in general) at least it must be admitted, that common sense should prevail. Powers of this description pervade the settlements of all the great and opulent families in the kingdom, and on that consideration a slight or immaterial departure, even from a strictly prescribed form, ought not to be suffered to invalidate the execution of them. If there had been any prescribed form or mode of leasing pointed out by directions plainly expressed in this instrument, that mode could not be materially departed from I allow; for, where a prudent father, tenant for life, has provided by the execution of such a power as this for his younger children, where the eldest son would otherwise succeed to the bulk of the property—if a question should arise under such circumstances, the consideration of the state of the property would dispose you to give every effect to such a power as might best accord with the intention of the creator of it, rather than permit the reversioner, by taking advantage of an objection of this nature, to avoid the leases, to the prejudice of the lessee, or to the younger branches of the family against whom the lessee would be entitled to recover out of the assets of the lessor. So also would it be proper to consider whether any sensible inconvenience to

the remainder-man must be the necessary consequence of the execution of the power in question, with reference still to the intention of the settlor. We are first to find out then what the creator of this power meant by the terms which she has used [461] in expressing this condition to be observed in the exercise of it. She has required "a" power with-ut prescribing in terms, any form of words, or any particular manner in which it was to be reserved. It is a very general direction, that the lease should contain a power for [or because of] the non-payment of the rent. So general a direction must leave the verbal exposition of the clause to further care, when it should become necessary, in putting it in practice, to give to it terms of greater precision; and no conveyancer could have framed a clause for re-entry in the very words: he must have in some respect or other made it more particular and precise. A power necessarily implies a selection of one out of several, and both the Common Law and the Statute have furnished different modes in which such a power might be drawn. Besides it is quite clear, from the general tenor of the instrument, that it was the intention of the creator of the power, that the person who was to make these demises should abide by the form in which the former leases had been made. This general direction necessarily culls, therefore, independently of any intention, for the exercise of judgment in the execution of the power—not of legal or definitive judgment; but of the fair discretion of the party to whom the execution of it was intrusted by the creator of the power.

It must be considered sufficient therefore if the lessor have provided such a power of re-entry as should be fit, suited, and adequate to the [462] occasion, and to the legal objects of such powers, and be commensurate with them. And what are the objects of powers of re-entry as recognized at Law and in Equity? They are merely coercive means of enforcing the payment of rent; and that is now the only purpose for which such clauses can be intended, or for which they can be enforced: for Courts of Equity would never have suffered them to have been inserted for any other purpose. They would always enjoin the landlord from putting them literally in execution, whenever the tenant should pay the arrears of rent and costs. The remainder-man therefore cannot have been placed in a worse condition by the qualifications annexed to this clause of re-entry, than he would have been in by the Law, if there were no such qualifications inserted.

Then, in the faithful exercise of his judgment or discretion by the lessor in the execution of this power so generally worded, he would naturally consult his professional adviser; and he again would necessarily, upon reading the terms of it, resort to the former subsisting leases of the same property in order to ascertain the ancient rents, duties, and services, or the heriots usually reserved; for how otherwise could he do so? Could he, on reading these words, forbear to examine the former leases, where he would be sure to find the best information to direct him; and having found what were the usual rents and services, he must then consider of the fit and proper clauses to ensure them: he would then seek fur-[463]-ther to learn by what provisions that had usually been effected, and if he met with nothing there to assist him in acting agreeable to this requisition, which is much too general and uncertain to follow literally, he might think he could not do better than take the statute of the 4 of Geo. the II. for his guide, and adopt the qualifications which were then considered both at Law and in Equity to be most reasonable as applicable to the execution of such powers. Whilst, however, I think that the execution of the power in the first instance was left to the discretion of the tenant for life, I do not say that his discretion, if not conformable with it in any very material respect, would conclude the Courts of Law; but I cannot admit that the validity of the execution of a power should be left to the consideration of a Jury, or the determination of a Court of Law, in the first instance, without leaving any thing to the discretion of the lessor, and the intention of the creator of the power. I am therefore clearly of opinion, that the former leases were properly taken as a guide by the person who was to execute the power: and subject only to the doubt entertained by very learned men, I consider them decisive evidence of what ought to be the true construction of this power according to the intention of the parties to the settlement. The decision of *Cooke v. Booth* (Cowp. 819) I am aware has been considered to be over-ruled by subsequent determinations: but I think that case very [464] distinguishable from this, because the Court were there required to put a construction upon a covenant sufficiently explicit in its terms, and without any ambiguity; whereas the terms of the requisition in this power could not be transcribed

literally as a complete covenant, into a lease, without some qualification to perfect the power and render it practicable. The creator of the power has expressly required the old and accustomed leases to be consulted in many respects, and why should they not for the usual clauses which were necessarily to be engrafted upon the covenants for which that reference was directed. This extrinsic evidence therefore was not resorted to in the present instance for the purpose of explaining the meaning of the instrument, but as a guide to direct the party who was to exercise a judgment in preparing a further instrument, according to the general requisition of a power in the former as to the particular manner in which it was to be prepared; and where, without such additional particularity it would be impracticable in effect; but still so as to be conformable in substance, I admit, with the directions of the power in requiring such restrictions.

I will not involve the case by adverting to any of the facts in evidence which are beside the question, but proceed at once to the objection that has been taken to this lease. It has been urged, that there is an obvious difference between reserving a simple power of re-entry, and one which should be clogged with conditions not [465] authorized by the power to demise, qualifying the right reserved and impeding its execution. It is true these conditions are not made part of the requisition of the leasing power, in words, but I say they are in substance: nor do they in effect clog the right or impede its execution; but on the contrary, they are more beneficial to the remainder-man, and facilitate his only accessible rights, by removing the ancient Common Law difficulties under which he would have laboured, or the restraining power of a Court of Equity, if those qualifications had not been introduced. [His Lordship here enumerated the formalities attending the enforcing the right of re-entry at the Common Law, (all of which, he observed, must have been submitted to at enormous and immediate expence for the sake of a distant prospect of ultimately recovering a rent of one pound) and descanted on the advantages to the remainder-man of being placed in a condition to proceed under the statute.] I assume, continued his Lordship, that the object of the statute was to enable the landlord and tenant mutually to avail themselves in a more summary way of the benefits which the equitable jurisdiction of the Courts would previously have afforded them; but I have never understood that the statute intended the power of re entry to be absolute. Now, what better guide than the provisions of this statute, could the maker of the lease in question have taken in the execution of the leasing power? When this settlement was made, the statute had been passed many years; and the beneficial effects of its operation must [466] have been universally felt. The objects of the clause for re entry for non payment of rent therefore being merely and solely for the purpose of securing and enforcing the payment of it; and as it cannot by law be used for any other purpose, I am clearly of opinion that the inconveniences which have been pointed out in this case as the necessary consequence of the two qualifications which are annexed to this proviso for re entry for non-payment of the rent reserved, can have no existence in fact; and that the introduction of those qualifications into the power of re entry inserted in this lease, does not invalidate the demise.

As to the authority of the case of *Care v. Day* which has been relied on in support of the objection founded on the condition of there being no sufficient distress, I shall confine myself in my observations on that case to what has been said by the other Judges. I find that I have been reported to have expressed myself in terms of animadversion certainly much stronger than I could have intended, and I believe stronger than I did. All that I meant to say, and all that I think I did say, was, in substance, that the present case was very distinguishable from that of *Care v. Day*; and that the case of *Hollen v. Scot* was decidedly opposed to the doctrine said to have been established by that of *Care v. Day*, and particularly according to the note of the former case as taken by Mr. Butler. I said that I considered that an express authority, deciding, that [467] the qualifications of the power of re entry, which form the foundation of the objections taken to this lease, did not make void a lease executed under such a power. Some expressions of disapprobation may have escaped me, and probably did, of a doctrine contrary to that determination, and which I, for one, do not consider impugned by the ultimate opinion of the Court upon the facts of the case of *Care v. Day*. Of the incidental dicta attributed to Lord Ellenborough in the course of the argument, which may be considered as adverse to the doctrine in *Hollen v. Scot*, I might have observed, while contrasting the two cases and balancing the authorities, that that great legal character Lord Ellenborough would be more likely to overlook

reasons founded on equitable grounds than Lord Mansfield : and all that I meant was, to have placed the two decisions on fair and equal terms, leaving the preponderance of either on, the equipoise, to their own due weight. Having stated the substance of what I meant to say upon the former occasion, I now add, that I entirely agree with one of my learned Brothers (Mr. Justice Best) in considering, that a necessity having been imposed on the reversioner, that the rent should be lawfully demanded, was a deviation from the power which creates a very material distinction, and very much confirms my view of it. There are also these further very marked points of difference between the two cases. In *Cove v. Day* there were no such limitations of the particular estate as there are here. [468] The tenant for life had power to let all or any part of the premises for short terms absolute in possession, without taking any fine for making such leases, reserving the best and most improved rents. There were there no terms of reference to the state of the property, or to former modes of leasing, or to ancient rents or services. There was nothing left to further judgment or discretion, and nothing extrinsic to be inquired of : and the lessor was not referred to, nor did he require any thing as a guide in framing the leases which he might grant under the power. All these circumstances of difference wholly distinguish the cases, and make it unnecessary to advert to the doubt thrown on the decision in *Cove v. Day*, by the determinations in *Holley v. Sool* and in the present case. The question therefore may be considered as unfettered by decisive uncontradicted authority, either way : and I see no reason for changing my former opinion that this lease is a valid execution of the power.

RICHARDS, Lord Chief Baron, having stated the question, proceeded in substance as follows :—I entirely concur in the opinion which my Brother Graham has just delivered upon the question propounded to us by your Lordships ; and I derive (as he has done) the reasons upon which my own opinion is founded, principally from the terms of the instrument by which the several leasing powers are given. [Here his Lordship stated the terms of the three powers &c., and the material facts of the case applying to the present question of the construction of the first.] Now what occurs [469] to me as most material to observe with respect to the different conditions on which the three powers are to be exercised as explanatory of the intention of the creator of them with respect to the mode in which the power in question was to be executed, is this. In the third power—that which enables the tenant for life to make leases of the mines—we find that no clause of re-entry for non-payment of rent is required to be inserted. In the second power, or that which authorizes demises for terms of years absolute, the leases are required to contain a clause of re-entry in case the rent should be unpaid by the space of twenty-eight days. Such is the qualification of the power of re-entry expressly prescribed where the rent and the beneficial occupation run together and are co-extensive and to be considered of the same value. Then the power in question (which is the first in the deed) enables Lord and Lady Vernon, as either should become tenant for life, to demise such parts of the estate as had been before demised for lives or years determinable on lives for the same term, reserving the ancient and accustomed, or as great and beneficial rents, duties, and services, or more, as had been, &c. Now it appears to me, as my Brother who last addressed your Lordships has already well observed, to be quite impossible to know what was to be done by the person who should have to exercise this power of leasing, so as to execute it conformably with the intention of the creator of it, without looking into the legal instruments then existing affecting the pro-[470]-perty of this family, and particularly the then subsisting leases, and all such papers as had been executed between the landlords and their tenants, regarding the various modes of tenure of the several parts of this estate, and the general state of the family property. [His Lordship then adverted to the proviso for re-entry on non-payment of the rent contained in the lease in question, and stated its terms and those of the two qualifications.] On the trial of the ejectment former leases were produced to shew that this proviso so qualified had been, on all occasions, introduced as one of the usual conditions on which this part of the property had been accustomed to be demised : and how could that usage be otherwise ascertained ? I consider that that fact was material for the consideration of the Jury in such a case as this ; and it was for that purpose fit and proper that they should look into the leases which were unexpired at the time when the deed of settlement was executed ; and therefore it must, as a necessary consequence, be my opinion that those leases were properly admitted in evidence at the

trial to prove the fact of such a proviso being usual and customary and conformable with the ancient practice in the family of demising the same property.

Now the words of the leasing power on which this question arises are, "And so as there be contained in every such a power of re-entry for non-payment of the rent thereby to be reserved." A more general power cannot well be expressed or conceived. The requisition is without any [471] qualification. A power only is required, and that power is to be for non-payment of the rent, and not on non-payment, as was well argued at the Bar, which latter word might perhaps have been considered as having reference to the time of the accrual of the right of re-entry; (if that had been the word used) but the word is *for*, which must be taken to be used solely with reference to the occasion on which it was to be given.

Now, in this case, where the lessee must have paid to the lessor, in consideration of his lease, the full value of his interest at once, at the commencement of the term, exclusive only of the small nominal rent of 2*l.* a year, is it to be supposed, that it was the intention of the creator of these powers to vacate in one instant a lease so granted for valuable consideration, for an accidental and trivially inconvenient default in the payment of so inconsiderable a rent, where the rent and the occupation run together? That construction would have the effect of putting such tenants in a much worse condition than those who had leases under the other power at a rack rent, and who were not to pay any thing until after they had enjoyed the possession of the premises, and were then to be indulged with an extension of the time for payment of their rent for twenty-eight days beyond the day fixed by their lease.

Lord Vernon then having occasion to exercise the first leasing power, and finding, from the settlement, that a power of re-entry was to be [472] contained in the lease he was about to make, inserts therein, in the execution of the power by which he was authorized to make the demise, the proviso contained in the lease in question: (the terms of which his Lordship stated).

The question arising upon that, and which is now for your Lordships' consideration, is whether that proviso is agreeable to the terms of the leasing power given to him by the settlement. Two objections were made to it on the part of the lessor of the plaintiff. One is, that the time for re-entry for non-payment of the rent has been extended in the proviso fifteen days beyond the time authorized by the power; whereas the right of re-entry should have been immediate and absolute. The other is, that the power of re-entry is required to be reserved without reference to any condition; whereas there has been superadded to it in the proviso a condition, that the lessor or reversioner shall not be permitted to re-enter so long as there is a sufficient distress upon the premises. My Lords, the answer to those objections, as it appears to me is, that it is clearly established, that in the construction of all powers we are to be governed by the intention of the parties creating them; and that intention must in all cases be collected from a fair interpretation of the language in which they are worded. In this case, all that we can collect from the words of the power is, that it was the intention of the parties to the deed that there should be a power to re-enter, contained in the leases to be made under [473] the power, in the settlement now under consideration. The words are too general to afford any precise directions respecting the execution of it; and therefore, the fair exposition of it must be collected from the situation of the parties under all the circumstances attending the state of the property at the time when the settlement was made. (His Lordship then adverted to the circumstances of the case, and continued :) Now the object of the creator of the power in this case—as it is to be gathered from the settlement, when expanded according to those rules by the terms of the instrument, regard being also had to the facts—was clearly, as I think, to have the new lease planned on the old and accustomed terms of the former leases. One of those terms was, that there should be a clause of re-entry similar to the present for non-payment of the rent, as we find from the fact of such a clause having been uniformly inserted. It has been ruled in many cases, that courts are to be more liberal, if any inclination may be allowed in construing leases made under powers, rather in favor of the lessee against the lessor, where the power proceeds from the owner of the inheritance than where it proceeds from a stranger; and it has been contended, in argument, that that distinction is to be taken in this case; because the estate originally moved from Lady Vernon, so that Lord Vernon, the tenant for life, who made this lease under the power given to him by her is to be regarded as a stranger, he having originally no interest in the estate, and

that there-[474] fore his acts are to be construed more strictly against the lessee, and in his own favor, than if he had been originally the owner of the estate. But we find here, by looking to the uses of the settlement, and I beg of your Lordships to observe this, that the same power is given in the same terms to Lady Vernon in each particular instance. Therefore, the power, though exercised by Lord Vernon, must be construed in the same way as if it had been exercised by Lady Vernon: and if so, we must therefore consider this lease, as if it had been executed by the person from whom the estate originally moved, and who may fairly be considered as in a situation similar to the case which I am about to suggest and upon which some of your Lordships can have no doubt. Now, let us suppose that a landlord having a fee simple in his property, should enter into an agreement in writing with his tenant to grant him a lease on certain conditions; and one of those was, that it should contain a power of re-entry for non-payment of the rent to be reserved. If it should afterwards become necessary to file a bill in Equity for a specific performance of that contract; a Court of Equity would, upon making a decree for a lease, order it to be referred to the Master to settle the terms in which such lease should be framed. Can any one doubt, that on such a reference, the intention and meaning of the parties to be collected from all the circumstances of the case, ought not to be considered. The question of intention would be the only guide where the words are the same or as general as those which [475] are used in this power. The Court of Equity would order the power of re-entry to be qualified with usual and reasonable conditions, such as the qualifications of the present power are. They would unquestionably extend the period for re-entry to a reasonable time beyond the day fixed for the payment of the rent, referring, at the same time, to a sufficiency or insufficiency of distress, as in the present lease. I mention this case of an agreement, because it seems to me to apply very closely to the case before your Lordships. Courts of Equity adopt the same principle and practice in hundreds of instances, such as leases by guardians, of infants, committees of lunatics, and the like. The Court so acts because it will execute the intention of the parties: and a Court of Law in construing powers is equally bound to adopt the intention of the parties creating the power: nor is there any difference recognised in Courts of Equity between powers and any other instruments in their effect and operation. If, therefore, Lord Vernon had agreed to grant a lease according to the terms of this power, and a bill in equity had been filed for a specific performance, and the prayer of that bill had been decreed; the power of re-entry, required to be inserted in the lease, would have been drawn up in the Master's office, qualified, as this is, with the conditions now objected to, as being the usual terms. The Court would, I doubt not, direct a lease to be executed with a power of re-entry, upon the usual and reasonable terms which should be according to its construction agreeable to the intention of the [476] parties creating the power, and I presume, the lease to be executed under the orders of the Court, would be similar to that which has been executed in this case. I am the more willing to refer to the proceedings of a Court of Equity, because I am speaking in the presence of those who have perhaps more knowledge and experience than any persons of the present or former times. If then the Court of Chancery would have directed a lease to be made under these circumstances in precisely the same terms, how can we now say that this lease is invalid, because it contains these conditions? I understand too, for I am unwilling to advert to my own experience, that the practice of conveyancers in respect to the clause of re-entry for non-payment of rent has always been uniformly consistent, in giving an extension of the time beyond the day of payment; and that practice is founded on an assumed intention of the parties. For that reason the most eminent conveyancers, as we find from the established precedents, have ever been in the habit of extending the time to any such number of days as under the circumstances they may have considered reasonable: and although so delaying the payment may in some cases be contrary to the strict terms of a power; yet it has always been done, and it would be a just course even if it were not the universal practice. The uniformity of the practice of proceeding on the intention ascribed, affords strong evidence of its acknowledged propriety; and it is so inveterate that it would be highly dangerous now to affect it: and I have ever understood that the Judges have always considered an uni-[477]-versal or even a very general practice amongst conveyancers a sufficient ground for their decisions: although they might not have entirely approved of the principle on which that practice had proceeded. On that point, therefore, namely, the extension of the time, I am of opinion that this lease

is valid: and that the proviso for re-entry contained therein, is a good execution of the power. I have always been strongly inclined to support the lease against that first objection on these grounds, and I think that it ought not to prevail.

As to the other ground of objection I have not been able to learn that any general understanding, respecting the practice of inserting such a condition in similar clauses, in respect of the execution of powers, has prevailed among conveyancers, nor can I find that any decision has taken place by which I must consider myself bound, in a judicial point of view. In the absence of all authority therefore I must confess that the very strong and able arguments, which were pressed upon the point, had at first certainly very considerable influence on my judgment, and induced me to form that opinion which I have before given upon this case. But on further consideration, I am glad to find myself compelled by more mature deliberation to retract the opinion which I had then formed; because I now incline to think, that those who then differed from me, in holding this second objection to be also unfounded, entertained the more correct view of the case; and I feel great consolation in thus having the opportunity of doing so. Not-[478]-withstanding it is very true, that the condition now in question would subject the reversioner to some inconveniences—and that was a consideration which, in the former occasion, weighed very considerably with me: yet if I am right, in now holding this lease to be a good execution of the power, on the ground that it is conformable to it, regard being had to the intention of the creator of the powers on the first point (which was that the right of re-entry to be reserved was to be reasonable in its terms), there is nothing to prevent us from enquiring further, as to whether this other condition also, the absence of a sufficient distress, be not equally a reasonable qualification: and if it be, we must then hold, that that is likewise within the intention of the creator of the power; and therefore conformable to the terms of the requisition. Every man's experience informs him, that such a qualification of the clause of re-entry is usual in leases in general; and therefore it must be considered to be a reasonable qualification. Then the presence of the same condition in all the preceding leases which were given in evidence, proves, that in the estimation of the family it was deemed reasonable and proper, according to their construction of its import. The deed too, which gives the power to demise, requires the insertion of a power of re-entry in the leases, in the most general terms, requiring indefinitely a power of re-entry for non-payment of rent, and specifying no mode in which that power is to be reserved: neither prescribing nor prohibit [479]-ing any qualification or condition; but leaving it entirely open to the discretion of the lessor. Then we find, that in point of fact, this lease does contain a clause, giving a power for re-entry for non-payment of rent: and under a requisition in terms so general and indefinite, I cannot but consider, that a power of re-entry, with the usual and reasonable qualifications, would satisfy the condition on which such leases were to be made. By such a power of re-entry all which the law requires to be exacted is security for the payment of the rent: it is, as it were, penal; and these qualifications are no more than conditions which the law would require to have failed, before it would enforce the terms of the power; and if so, the conditions, upon which alone this power could be enforced, are reasonable and proper, and therefore not inconsistent with the power to demise. The reason and object of those conditions are quite obvious. The power itself being only to secure the payment of rent, a Court of Equity, acting on reasonable grounds, has always held it to be satisfied by payment of the rent in arrear, and costs; because the clause being merely to secure the rent to the reversioner, it ought not to be permitted to destroy the interest granted to the lessee. Such was always the principle on which Courts of Equity acted; and now the Legislature (by the stat. of the 4th of Geo. the II., an act expressly passed in aid of landlords) has transferred it into the law, which must be considered as a legislative recognition that the condition of the clause is reasonable and proper, and [480] it ought to be a sufficient authority for sanctioning its insertion in the execution of a general power to demise, requiring only a clause of re-entry for non-payment of the rent.

I beg here again to request your Lordships' attention to the observations which I have before made on the proceedings of Courts of Equity: as they apply to this head as well as to the former. I concur in saying that those Courts would direct a clause similar to that which is now in question. Now let me suppose that this had been a lease granted by Lady Vernon, in which case it has not been denied that it would be according to the power; because, as the estate moved from her Ladyship, she would

not have been a stranger: and as the construction of the power would then be more in favour of the lessee, the lease, in its present terms, would be considered to be valid: and there can be no different construction of the same words: for the construction, in both cases, must be on the intention ascribed to the parties who used them in the settlement. Then the lessee is a purchaser, for valuable consideration, under that settlement: for he has paid the value of the estate, proportionate to the term demised to him, except the small rent and the duties: and we are therefore bound to protect his interest, if consistently with the terms of the power, and the circumstances of the case, we can do so: and most assuredly, every Court must feel inclined to support the lease, which has been executed by Lord Vernon to the plaintiff in error. The clause objected to is reasonable, and [481] perfectly calculated to secure the rent—it is inserted in all general leases—it is sanctioned by Parliament—it is, as I concur, agreeable to the proceedings in Courts of Equity, which act on the intention of parties, collected from the instruments executed by them—and it is consistent with all the other leases in the family, made under similar powers.

Under these circumstances, therefore, I confess, that on further and better consideration of the question, I am of opinion that this lease is valid: and that it is as now worded (but that in any other terms it would not be so) a good execution of the power, according to the intention of the parties to the deed of settlement.

DALLAS, Lord Chief Justice (C. B.). In answer to the question which your Lordships have been pleased to propose to the learned Judges, I am of opinion that the lease in question is invalid, as not being a good execution of the power.

Two objections arise for your Lordships' consideration. The first is founded on the extension of the time for payment of the rent by fifteen days: the second, on the clause providing that there be no sufficient distress. The case has been argued at the Bar, and considered by the learned Judges, on the double ground of authority and principle, and to each of those grounds I shall separately advert.

[482] And first as to the fifteen days—I consider that on that point this case is untouched by authority, at least there is no decision, entitled to be regarded as an authority, governing the case before your Lordships. The single case cited (from Willes) is of a negative nature, that is, it is one in which, although other objections were taken, this was not. On that case I think, with great deference, a great deal too much stress has been laid: for without saying, at present, whether the objection be well or ill founded—good or bad, intrinsically considered, I will only observe, that when it is seen how it weighs with many learned persons, now that it is taken: it seems to me that it is going a great way indeed to assume, that, if it had been taken formerly, it would not have succeeded; and much too far to infer, that not having been taken, it is to be considered as proof that, by common consent, it was treated as not fit to take. The more natural and rational supposition I should apprehend to be, that it was not adverted to at the time; at least, this is the opinion I should form; for I know not on what legitimate ground of reasoning we can assume, that what appears to be deemed so important now was considered and rejected as utterly unfounded then.

Still, however, giving to that case all the weight it is fairly entitled to: it is admitted to be but negative authority. And the question now occurring and requiring positive decision, it must be examined and determined on express authority, if there be any: or if there be no authority, then [483] on principle. Such then being the only case to be found applying to the objection founded on the fifteen days, I will next consider the authorities applying to the provision as to there being no sufficient distress.

Here again, in support of the validity of the lease, one case only has been cited, as bearing directly on the point, viz. *Hottel v. Scot*. On that case I shall not waste time by dwelling longer than, in this last stage of the discussion, I feel to be necessary: and therefore, as to the imperfection of the report—the character of the reporter as such—the insufficiency of the reasoning as reported—and the other grounds of objection made by some of the learned Judges with whom I agree in opinion, to these I shall merely refer: repeating only for myself what I said upon a former occasion, and am not disposed, on reflection, to retract. The particular point now under consideration does not appear to have been adverted to then in the decision, reported as it is; still as it must have been different if the objection then and now made had been deemed valid—I think that in fairness I must take it, such as it is, to be a case

adverse to the opinion which I entertain. Taking it then as such, and trying it as authority upon the ground of objection to which at present I am addressing my observations, the extension of the time to fifteen days, the first objection to it is, that it is a single case not professing to be grounded on any that had preceded it, nor appearing to have been supported by any that have followed it : but, on the contrary, the only case which has [484] since approached the question—that of *Care v. Day*—is in direct opposition to it : for so I consider it, and for reasons which I shall presently give. I need scarcely add, that a case—dissented from as it now is by so many of the learned Judges, admitted to be inconsistent with the decision in *Care v. Day*, and at all events confessedly at variance with the observations and reasoning of Lord Ellenborough throughout the whole of the argument in that case—can scarcely, as mere authority, be considered of much avail.

In opposition to *Holley v. Scot*, as I have said it appears to me to be, is the case of *Care v. Day*. But here again I wish to deal fairly with the whole subject of authority. And though to a certain degree, and to what degree I shall presently examine, that case must be permitted to operate : still, I think, it is not to be relied on strictly as a perfect authority even in favor of my view of the subject : first, because if *Holley v. Scot* be rightly reported, it would be in opposition to *Care v. Day* : and thus we should only have case against case : and further, with respect to *Care v. Day*, of the two learned Judges of the Court of King's Bench who now support the judgment of that Court, it is disapproved of by one as to the grounds on which it stands, and expressly and in terms dissented from by the other : and, lastly, because, being a decision of the same Court by which this case was in the first instance decided, if it be distinguishable, as it is contended it is, then it does not apply : and, if not to be distinguished, nothing [485] of authority can result from two cases decided by the same Court in opposition to each other.

To dispose therefore of the whole subject of authority, it appears to me that, though these cases, as cited, have afforded much matter for observation and argument, they furnish nothing like authority, when correctly considered in a judicial point of view.

A word or two only, before quitting this part of the subject, on what has been much relied on as applied to the objection of the fifteen days, namely, that the prevalence of such leases, which are according to the general practice, is to be taken as evincing, it is said, the sense of the profession : and that great mischief will result from now holding the objection to be good. I admit that such topics would be of much weight undoubtedly : unless, if when strictly examined, the practice should be found to have crept in against principle : (and it is not pretended to depend upon any positive authority) but I can only say, that being bound to decide upon the objection now that it is made, I must do so upon principle : and if principle and practice are at variance, practice must give way : and in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for, and applied else where. This, however, at most confines itself to the objection as to the fifteen days : for, with respect to the clause of distress, it is not pretended to be founded upon universal usage or practice, [486] and the only decided case (*Care v. Day*) is directly the other way, holding the introduction of such a condition to be an abuse of the power, and that therefore it renders the lease void. As far as the argument in favor of the extension of the time to fifteen days is founded on the general practice, I admit it must operate in proportion to the length of time and number of leases, in the course of which that practice has been adopted : and that becomes, for that very reason, and in precisely the same proportion, stronger against the clause as to distress, inasmuch as in all such leases no such clause is to be found : and my Brother Holroyd, to whose labour of research and profundity of learning we are all of us at times so much indebted, has informed your Lordships that, after a laborious search, he has not been able to find in the old Books of Precedents more than one instance of such a clause in a lease, and that not appearing to have been followed up in common use. Practice in its favor is therefore not only wanting, but practice is in that respect the other way : and upon that point practice and authority go hand in hand.

Having made these observations on the authorities, I come now to consider the case on principle. And first, I admit that— if the power be to be deemed indefinite as to time, and therefore to be exercised in a reasonable manner, leaving it to the discretion of the party by whom it is to be executed, to decide what is reasonable— if

does not appear to me, that giving fifteen days in the [487] way in which they are given, can be considered as unreasonable. In truth, I deem it quite immaterial to any real interest of the parties, or as to any substantial effect, whether twenty shillings are to be paid by the one and received by the other fifteen days sooner or later. And so I apprehend the party might have thought, had his attention been drawn to the point. But when I am told of what the party really intended, as of an independent and substantive intention, collateral to the instrument itself and pre-existent, having caused the power to be framed precisely as it is, I can only say I take the probability to be, if we could look to the mere matter of fact, that the party himself never entertained precise intention of any sort on the occasion. It is said that the substantial purposes were to be accomplished; and that the detail of execution was of course left to others. But this supposed intention may account for all the difficulties that have arisen. Drawn as the power is, it was probably supposed, by professional persons, that the former leases might be looked at, and the clause in question being found there, was therefore adopted, and I agree reasonably adopted if such leases were to govern or might govern; but, whether they were so to govern or not, is one of the questions in this case, and which, if decided in the affirmative, would support the lease against this objection as far as it goes; and even if decided the other way, the case will still depend on the other general grounds, and the lease may, notwithstanding that objection, be got over, yet be deemed invalid. Fifteen days, therefore, if [488] time might be given, I admit I should consider as not unreasonably given, if we are at liberty to form any opinion in this case as to what were reasonable; but that it is which I consider we are not left at liberty to do by the terms of this leasing power. In like manner as to the clause of distress, I see no actual injury likely to result from it in this particular case. I agree with several of the learned Judges, that it is not probable that twenty shillings of half-yearly rent would be suffered, if demanded, to remain in arrear; or if in arrear, that in the case of leases upon fines, a distress to the value of twenty shillings would not be found. But that is a way of trying this question which is precluded by the very nature of the question itself. The providing for a particular event not only pre-supposes the possibility, but even the actual occurrence of such event: it pre-supposes it, purposely to provide for it; and it anticipates and adapts itself to it. The question, therefore, arises on what the parties have said and done, not on the reasonableness of doing it, or on the sufficiency or insufficiency of what may have been done, the weight and value of which we are not at liberty to consider; and therefore, without looking out of the instrument, but to the instrument alone, and searching in it for the intent to be collected from what is there expressed, if sufficiently expressed, we must treat the question as your Lordships desire us to treat it, that is, as one of construction arising on the terms of the instrument, such as it is, as to what is the legal effect of the power authorising the [489] lease: in other words, whether the terms of the lease being compared with the power in the deed, it is a good execution of it: and I agree, that in looking to the power, the intention of the party must govern, as it is to be collected from the whole instrument construed fairly and liberally.

First, then, the power directs a clause of re-entry for non-payment of rent, and for that merely. Nothing is said as to time—nothing as to distress—nothing as to what is reasonable—nothing as to what is usual—nothing, in short, that refers to any former lease or leases in any way whatever, so as to furnish a rule. The words “ancient” and “accustomed,” are terms to be found in the power as words of reference applying to the rent required to be reserved; but we nowhere find the words “reasonable” and “usual,” as applicable to the terms in which the power of re-entry is to be reserved: and therefore I think the leases are only to be referred to for the purpose of ascertaining what were the ancient and accustomed rents; but not for the terms in which the clause for re-entry was to be worded, or for any thing else. In the other powers we do indeed find the words “reasonable” and “usual”; but we find them unconnected with any reference to former leases, and inserted for other objects and purposes, very distinct from the object of the required power of re-entry.

Then as to the time appointed for payment of the rent. That time may be as definitively fixed by the happening of an event as by any express [490] specification of a given period, cannot, I think, be denied: and if rent be made payable on a particular day, connected with a clause of re-entry for it if not paid, I can only understand it to mean if not paid on the day when made payable. In this there is nothing

ambiguous—nothing deficient—nothing to be implied—nothing to complete what is expressed. It has not been argued that if the lease had been drawn in the very terms of the power it would not have been a due and valid execution of the power. But it has been said, that the rent to be reserved under the first power is merely nominal, and it has been asked—because in the same instrument twenty-eight days are given for payment on the leases at rack-rent, which are a substantial and heavy rent, before forfeiture can attach for non-payment—could the party intend a provision so preposterous and harsh as that a forfeiture should become the immediate consequence of a half-yearly rent of twenty shillings falling into arrear? To that I answer, that this suggestion of harshness appears to me to be mere imagination, and nothing more: for what of real harshness is there in making an estate liable to forfeiture upon non-payment of a sum so small as from its very smallness not to require time to be given to pay it. Fifteen days were scarcely necessary to put a party into condition to pay twenty shillings: and further, why it should be left to the person who was to receive the rent, to judge of what time was to be given, where no time is mentioned, rather than where the party has herself extended it to twenty eight days, I am altogether at a loss to conceive. If I were at li-**[491]**erty therefore to conjecture as to the intent, independently of the words made use of, my conjecture would be, that the maker of the deed intended that there should be an indulgence given where the rack-rent was reserved, and therefore she so expressed herself; but that as to the small rent she meant nothing of the sort, or beyond what she has said, and therefore was intentionally silent, whereby she has excluded the possibility of supposing that any time was meant to be given, still less that she had left it open to the discretion of another to decide for her what she could quite as well have decided for herself. In the particular case perhaps the time may be of no material consequence to the parties either way: but as applying to future cases, and involving principles applicable to the construction of all instruments, it becomes of real magnitude and importance, and on that account it weighs very considerably with me in forming my judgment on this case. It is not in the operation of the clause, as it would apply to the lease treated as a valid lease, that any difficulty arises: but in the application of the lease to the power with a view to try the validity of the lease. But for the sake of the argument I will suppose the question to be, whether the power might not, from its general terms, be so construed as to imply a reasonable discretion to have been intended as to time: although that would be begging the question, making the power, in that view, a definite and not an indefinite one—in such case I would ask, who is to judge what would be a reasonable time. Overlooking for the present all the other difficulties that arise on **[492]** this point, if I were to take for answer—the competent tribunal according to the nature of the case—it must then become a question what would be the competent tribunal? On the trial of this ejectment was it the Jury or the Judge? and again, if in the result it were possible to ascertain which of the two might be the competent tribunal, still that result could only be attained as now, through the means of a doubtful and ruinous controversy. This uncertainty as to tribunal, with the additional uncertainty as to result—that result depending on the uncertainty of opinion, which must necessarily be different with different men, of which these proceedings have in every stage, and this day in particular, afforded ample proof and furnish a striking instance—are sufficient ground for rejecting so mischievous a notion. On the other hand, all inconveniences introduced by holding the power to be indefinite, might and would have been at once avoided, simply by framing the proviso in the lease in the plain words of the power. One way it would be certain: the other opens at least to much question: and it is this substitution of uncertainty for certainty—this vague rule of discretion that throws open the gate to litigation which otherwise would be closed and fastened against it that constitutes my fundamental objection so to understand and so to construe this power. If therefore the question were, whether the term reasonable should be implied or not, I should hold that it ought not to be implied, even if we were at liberty to imply it, in a power framed as this is. Out of the very difficulty in which we are at this moment involved my objec-**[493]**tion grows: and if there were hardship in the case, and it could not be got over without breaking in upon rules, I say that hardship must remain. On that objection I think the lease, not being conformable with the power as worded, is not valid.

I come now to the second objection: and though in one light it is the most material, yet it will not be necessary in this last stage of the proceeding to discuss it at any

length—I mean the restraining the right to re-enter to the case of there being no sufficient distress to be found on the premises. With respect to this, all I have hitherto said as to time applies with increase of force. It is a further clog not warranted by the original power, and it is one which does not rest on a possible speculative injury merely. The case so often referred to in the Exchequer (*a*) affords a practical comment on the nature of such a condition: for when resorted to as a remedy, it shews the wrong which may result. The lessor of the plaintiff failed there, because some obscure corner of the premises had not been searched: and what right has the tenant for life to expose the remainder-man to such peril? That case is precisely this, and in a similar proceeding the effect would have been and would again be the same. Then in support of the validity of this objection, the case of *Cove v. Day* is, as I think, in point. It is so, as I conceive, in the decision—it is so beyond all doubt, in what was said by Lord Ellenborough in the course of the argument throughout the whole case, and which [494] leaves no room for inference. Whether that case may be fairly distinguished or not in any respect I have already examined, and will not repeat.

The argument drawn from the statute, and from the general notion of such a clause being considered as a mere security for rent, was brought forward then as now; but it was mentioned only to be overruled, the point not appearing to the Court to be sufficiently tenable to admit of discussion.

To one or two other points I shall now shortly advert. I can scarcely think that the question can be reduced to one of mere verbal nicety: but if it were, I cannot myself perceive the difference taken in this case between “on” and “for.” For non-payment of rent I consider to be equivalent to on non-payment of rent: I have however no hesitation in admitting that “on” and “for” may be sometimes different and sometimes synonymous in sense, this depending on the context and the subject-matter. But looking at the subject matter, and taking the whole of this instrument into consideration, I think there is no reason for distinguishing them on the present occasion. In like manner as to the term “beneficial,” I conceive it to refer to the lessor or the remainder-man, and not to the lessee: and being so understood, if there be any weight in the observations I have hitherto made, such a reservation would be less beneficial to the lessor than the direct clause, unclogged with any conditions as to time or distress. On the argument, that under the words of reference to former leases [495] and reservations, which it was contended must be taken to refer to them for all purposes, and that therefore those former leases might be looked at, it seems to me that argument turns the other way. The power directs that there be reserved the ancient and accustomed rents, or as great and beneficial rents, duties, and services, &c. thereby letting in, I admit, the former leases as evidence of what rent was ancient and accustomed, and so as to duties and services: but the deed following up those general words with special and particular words shewing the reference was not intended to affect the clause as to entry, there being particular words specially providing for this right, and in terms directing how it shall be reserved, it must be taken to exclude them for all other purposes. Having mentioned the former leases as admissible only in these respects, I will merely further say, I think they were not admissible, except for the purposes as to which they expressly or by necessary implication refer. This is indeed a necessary consequence of all I have already said, and without therefore going at large into the wide field which the argument in this respect has occupied, but referring generally to the opinions and reasoning of those who think as I do, I will merely state the broad ground and leading principles of law on which I found my opinion, which are—that, there being no ambiguity in the terms of the deed, and no mention of any time to be given: nor any reference to former leases, as connected with this subject: nor any such generality of expression as to let in extrinsic evidence to restrain or qualify or to exclude: but as all is ex-[496]-pressed with a clear, specific, and definite sense and meaning, such evidence is not admissible. This conclusion, it will be admitted, must follow if the premises are well founded: but whether they are or not, depends, as far as my opinion goes, on the validity of the general grounds on which that opinion rests, and of which it is for your Lordships ultimately to judge.

ABBOTT, Lord Chief Justice I am of opinion, that the demise of the 5th of September, 1803, is not invalid. Your Lordships are now so fully possessed of the general and even the particular powers contained in the settlement out of which this

lease was derived, and also of the clauses that are contained in the lease itself that I shall forbear to trouble your Lordships in reading that short abstract of them with which I had provided myself.

The objection upon which it is now sought to avoid the lease, is that the clause of re-entry for non payment of the rent is not such as is required by the settlement, and this for two reasons. First, because it allows to the tenant fifteen days for payment of the rent beyond the days mentioned in the lease: and, secondly, because it is restricted to those particular instances wherein no sufficient distress or distresses can or may be had or taken upon the premises, whereby the same and all arrearages thereof, if any be, may be fully raised, levied, and paid. This objection is certainly *strictissimi juris*, and as such is by no means to be favoured; though, if the *strictissimum jus* be found upon due consideration [497] to be with the objector, a court of law is bound to yield to his objection. As I have already intimated, I think the right, in this case, is not with the objector.

In the course of the argument at the bar, your Lordships' attention was called to a supposed distinction in the construction of powers, between such as are created by the owner of the inheritance, limiting a partial estate to himself, to be exercised by himself as owner of such partial estate, and such as are created by the owner of the inheritance to be exercised by a stranger to whom he may have limited a partial estate, or to whom he may have given the power as a naked power unconnected with any estate in the land. Such a distinction appears inapplicable to the present case, because the owner of the inheritance has here limited a partial estate, first to a stranger, and secondly to herself, and the words of the power must have the same meaning, whether the question had arisen upon an execution thereof by the stranger or by herself. It was also argued that the power of leasing being for the benefit of the tenant for life, the qualifications and restrictions imposed upon the exercise of the power are for the benefit of the remainder man, and therefore that the clauses of qualification and restriction are to be construed most beneficially for the latter. This point also appears to have little weight, in the present case, because adverting to the amount of the fine paid upon the surrender of an existing lease, and to the amount of the rent reserved, I think it cannot be supposed that the [498] purchaser of the present lease would have given one farthing less if the clause of re-entry had been strictly confined to non-payment of the rent at the very day, or that the estate of the remainderman would now be worth one farthing more if the lease in question had contained a clause to that effect, instead of the clause upon which those objections have arisen. And being of opinion that the tenant for life could derive no benefit, and that the remainderman sustains no prejudice as to the value of his interest from the form in which the clause of re entry is framed in this lease, I think a court of law may reasonably regard the interest of the tenant—the purchaser of the lease—and put such a reasonable and liberal construction upon the words of the power in the settlement as will give effect to the lease rather than yield to critical forms and subtle objections, adduced for the purpose of defeating it. And this becomes the more important if it be true, as has been suggested, that very many leases are in existence containing clauses similar to the present, and derived from powers expressed in language similar to that of the power from which this lease was derived. Considerations of this nature certainly ought not to controul or vary the sense of plain and unambiguous words, but they may be reasonably entertained for the construction of words of doubtful import—not merely by reason of the consequences of a decision in a particular case, affecting numerous other cases of the like nature—but because the fact suggested is evidence of the general opinion entertained by professional men upon the meaning of the words [499] of a legal instrument. These words, in the present case, are “a power of re entry for non payment of the rent to be thereby reserved.” And the first question is, whether these words may be understood to mean a reasonable power, or must be confined to a strict power, without any conditions, which the landlord may exercise if the rent be not paid at the very day, and without regard to any property to be found on the devised premises, upon which he may levy his rent, and thereby compensate himself at his tenant's expence, for his tenant's neglect. If the words may be understood to mean a reasonable power, the only remaining question will be, whether the power of re-entry, contained in this lease, be a reasonable power. I shall therefore proceed, in the first place, my Lords, to shew that, in my opinion, the words in question may be understood to mean a reasonable power. Non payment is a mere

neglect or default : and if the words “a power of re-entry for non-payment of the rent” are to be taken strictly and ad litteram, they will import a power of re-entry for the mere neglect or default of the tenant ; but this cannot possibly be their legal import or effect ; because by the common law of England, a landlord never could enter for the mere neglect or default of his tenant in this respect, under any power or clause, in whatever language expressed. Some act is always required to be done by the landlord in order to entitle himself to exercise his power : and this is required, to prevent the tenant from being surprized or injured. This act, at the common [500] law, was an actual demand of the rent on the part of the landlord ; and the common law required this demand to be made in a most precise and peculiar manner. It was to be made just at the close of the last day of payment (allowing the tenant the whole day to prepare his money) at a time when so much day-light remained as might be sufficient to view and count the money, and no more. It was to be made at the door of the demised messuage, if there were any on the premises ; and if there were none, then at such usual and notorious place of resort, where the tenant might reasonably be expected to be found, if he was not altogether absent ; and it was to be of the precise sum then accruing due, not including any former arrears, all of which, although due, and recoverable by distress or action, were considered as waived by the landlord, on a question of forfeiture by his prior neglect to demand or enter for them. Then if the words of the power, or rather of the qualification of the power, contained in the settlement, cannot receive a literal construction, and be held to apply to a case of neglect or default only according to their literal purport, they must receive some other and different construction, which must, in my opinion, be a reasonable construction, and a construction properly suited to the object and purpose in view, that is to secure and enforce the payment of the rent ; so that, on the one hand, the tenant may not hold the land without payment, to the prejudice of the landlord, nor, on the other hand, be dispossessed of it, if either himself or the land, [501] which is emphatically said to be debtor for rent, presents payment, or the means of payment, without unreasonable delay or prejudice to the landlord.

It has been objected, however, that if the literal or strict meaning of the words be not adopted, no other meaning can be : because, as it was said, Courts of Law cannot say what is a reasonable power, or clause of re-entry. But I conceive that in this, as in all other cases, Courts of Law can find out what is reasonable, and that in some cases they are absolutely required so to do. In many cases of a general nature, or prevailing usage, the Judges may be able to decide the point of themselves : in others, which may depend upon particular facts and circumstances, the assistance of a Jury may be requisite : and wherever such assistance is required, there are ready modes of obtaining it. I will mention one instance in which Courts of Law are required by the legislature to discover and decide, if the point be litigated, a question upon the reasonable execution of the power. By the General Inclosure Act (41 Geo. III. U. K. c. 109, s. 38), a rector or vicar is enabled to lease his allotment, under certain restrictions, mentioned in the act, and amongst others, “So that there be inserted in the lease, power of re-entry on non-payment of the rent or rents to be thereby reserved within a reasonable time, to be therein limited, after the same shall become due.” A lease of such an allotment, must therefore provide, that if the rent [502] be unpaid for some specified number of days or weeks after the day of reservation, the rector or vicar may re-enter ; and if any question should arise, whether the number of days specified in a particular lease be, or be not a reasonable time, the Courts of Law must necessarily find some mode of deciding the question.

For these reasons, my Lords, I am of opinion, that the words of the clause in question may, and ought to be understood to mean a reasonable power of re-entry : and taking this to be the legitimate meaning of the words, I proceed to shew that, in my opinion, the power of re-entry, contained in the particular instance of the lease in question, is a reasonable power.

Usage is of great weight in considering what is reasonable ; and it cannot be denied that the power of re-entry, as expressed in this lease, is, in form and substance, such as was frequently found in leases before the execution of the settlement by Louisa Barbara Mansel, which was in 1757. This is a fact that must have been in the knowledge of some of your Lordships, without recurring to the special verdict for information as to the leases of this particular estate. If any space of time could be allowed beyond the days of payment prescribed in the reservation, the space of fifteen days, which is

the period allowed in the present lease, will not, I am persuaded, be thought an unreasonable space of time. Indeed, although this objection was pointed out, [503] it was not so much insisted upon at your Lordships' bar; nor could it be in the construction of a settlement allowing twenty-eight days for payment, in leases, to be made at a rack-rent. The main stress of the argument was applied to that part of the clause in the lease, which narrows the power of re-entry, to cases wherein no sufficient distress can or may be had and taken upon the premises, whereby the rents and services, and all arrearages thereof, may be fully raised, levied, and paid.

Upon this part of the argument, the case of *Coke v. Day* (13 East, 118), was quoted and relied upon. It has, however, been discovered, that the decision in that case is contrary to a prior decision of the Court of King's Bench, in a case of *Hollen v. Scot*, reported in Lofft, 316, and of which a more correct MS. note was also cited. This earlier case was certainly unknown to the counsel by whom *Coke v. Day* was argued, and probably to the Court also: so that the decision in *Coke v. Day* is not wholly free from question as to its own particular circumstances. It was certainly not thought applicable to the present case by the two surviving Judges of the Court when the present case was before them: and it is distinguishable from this by the difference of the language of the clause upon which it arose; for in that case, the words of the clause were not general, as in the present,—"a power of re-entry [504] for non-payment of the rent," but special—"a power of re-entry, if the rent be behind for the space of twenty-one days:" which words do not so easily admit the introduction of any other qualification or matter as the general words of the present clause. So that, upon the whole, the case of *Coke v. Day* does not appear to contain a decision precisely in point to the present case, and therefore, in respect of authority, the question still appears to be left open, whether, in the absence of any words denoting a contrary intention in the mind of the framer of the clause, a restriction of the right or power of re-entry to the absence of a sufficient distress, be a reasonable restriction in a lease like the present; for if it be, then a right or power so restrained is a reasonable right or power of re-entry; and the introduction of such a right or power into the present lease is a good execution of the leasing power contained in the settlement.

Such a restriction of the right had prevailed in practice before the execution of this settlement in 1757. It was known and in use, though probably less general or frequent, before the passing of the statute 4 Geo. II. c. 28, in 1731. If the effect of that statute be, as at least one very learned person has thought, to alter entirely the common law, and to take away the right of re-entry, under any circumstances of demand and refusal of the rent, where a sufficient distress can be found, then certainly the express introduction of the words of restriction cannot invalidate [505] the lease, because it is only an expression of a matter tacitly contained and implied by operation of law. But supposing the statute not to have this effect, still, in my opinion, the restriction is reasonable in itself, in a case like the present. The instances of proceeding at the common law, by the demand of the rent, since the statute was passed, are very few—the proceeding is in itself troublesome and difficult, as will appear by the circumstances required, which I have already mentioned. It was indeed so troublesome and difficult, and found to be attended with so little benefit to land lords, that the statute was passed for their relief, substituting the absence of distress in the place of demand. Can it then be said, that the reversioner is unreasonably restrained, or prejudiced, by the introduction of a matter which the legislature has thought generally beneficial to landlords, and which, in all probability, he himself would have adopted, even if the terms of the lease had been such as to have allowed him to act otherwise? I say, that in all probability he would have adopted it, because I presume his only wish, like that of every other reasonable person, must be to obtain the payment of his rent in the most easy and speedy manner, and whatever difficulty there may be in viewing a messuage or farm, so as to ascertain whether sufficient be found upon it to answer the arrears of a rent, bearing, as in this case, a very small proportion to the annual value of the tenement: still I have the authority of the legislature, and of the experience upon which the statute was founded, for saying that this difficulty is less in [506] practice than the difficulty of making such a demand as would authorize a re-entry at the common law. If any thing more be desired by the reversioner than a speedy and easy mode of securing and enforcing the payment of the reserved rent, I should say that he desires more than the framer of the settlement intended to give, and more than the law ought reasonably to allow. The power of

re-entry, in whatever words it be expressed, can be exercised only in one of two modes, that is, either by making a demand at the common law, without regarding the value of the distrainable goods on the premises, or by ascertaining that no sufficient goods are to be found on the premises, without regarding a demand of payment. For the reasons already given, I think the latter must be considered as the most effectual and beneficial mode, and therefore, speaking generally of cases of this nature, I can discover no reason for resorting to the former, except a hope (certainly not entertained in this particular case) that the tenant being taken by surprise, and not expecting a demand, may not be prepared for immediate payment in money, and a desire to take advantage of his want of preparation, and deprive him of the residue of his term, or harass him with a law-suit. To such a motive a Court of Law will never lend its aid, and a construction calculated to give effect to such a motive would be contrary to the general principles of the law: and it ought not to be omitted, that the present question arises upon the construction of that part of a leasing power which is intended to create a forfeiture of the lease executed under [507] the power. It is said in our books, that forfeitures are odious in the law: and this is the reason assigned for requiring so much formality and precision in the demand of the rent at the common law. And for the same reason, in addition to all the others with which I have troubled your Lordships, I think such a construction ought to be put upon the words of the settlement as will tend rather to the exclusion than to the introduction of forfeitures of the leases to be granted under it. For these reasons, I am of opinion, that the demise of the 5th of September, 1803, is not invalid.

THE LORD CHANCELLOR. This question is, in every point of view, undoubtedly, in all its bearings and consequences, one of the greatest importance. It is of very considerable importance to the immediate parties, and to others whose rights depend on the result of your Lordships' determination of this cause, whether your Lordships shall pronounce the lease in question to be valid, or invalid. The establishment of the invalidity of this lease would, it has been said, give rise to many other questions of a similar nature: and therefore not only is every tenant who holds under a lease founded on a similar title deeply interested in your Lordships' decision, but the consequences are not confined to their interests only—as the lessees under such demises, which are said to be very general, if these leases should be held to be not valid, would severally have a right to recover an equivalent over, against the assets of the original lessors, as was the case of [508] the Queensberry leases. Beyond those considerations, the public interest also demands your Lordships' peculiar care, as that interest is materially involved in the result of this case, which is to furnish a principle for future determinations, and which renders it of the utmost consequence that it should be rightly decided. If, therefore, I could expect that I might be brought to change the opinion which I have long entertained on this question, or be enabled, consistently with the time and attention required by my other important duties, to throw my sentiments into a more formal shape, and better arrangement, I should be desirous of taking further time for delivering my more deliberate opinion at a future day, when my judgment should have been more matured by the fullest consideration.

Differing as I do, and which gives me much pain, from many of those for whose talents and learning I have every reason to entertain the highest esteem, I am inclined, in so doing, to treat their opinions with profound respect. Otherwise, I must confess that the course and habits of my professional life have so disposed my mind to consider such questions as those now before your Lordships, that it gave me at first very much surprise to find that on some of these questions there should have existed any doubt or difference of opinion.

As to the authorities which have been cited, as applicable to this case, we have been referred to the case of *Holley v. Scot*, and the conflicting decision of *Care v. Day*, besides the negative [509] authority of the case in Willes, who, I may observe here, was certainly a very great common lawyer: and I avail myself of the information respecting the two former cases which has fallen from the two learned Chief Justices, in the impression which I am to permit myself to receive from those determinations, with the further authority of two of the Judges of the Court below * who have before given their opinion on the point, in the judgment pronounced in this very case. But I cannot admit that all the authority which the subject-matter of this case is capable

* Lord Ellenborough, and Mr. Justice Bayley.

of has been brought forward. It has been soundly urged that the practice of professional men, by whom the conveyances of the real property of the Kingdom have been devised and prepared for a long series of years, is a sufficient ground for supporting a doubtful proposition of law, and that but for the consequences of shaking title to property, the Judges of the Courts in Westminster-Hall have frequently declared, that if certain points depending on such established practice had been *res integræ*, they would not have assented to the doctrine to which, in the particular cases, that practice had given the sanction of authority.

But Courts of Law should, as I think, go still further than they commonly do in considering questions of this nature. They should enquire of decisions in Courts of Equity, not for points founded on determinations merely equitable, but for legal judgments proceeding upon [510] legal grounds, such as those Courts of Equity have for a long series of years been in the daily habit of pronouncing as the foundation of their directions and decrees.

From the years 1772 to 1780, which I consider the most profitable period of my life, I spent the intermediate time in the office of a conveyancer, where I became acquainted with the practice and opinion of the most eminent men of that time; and I know that in those days, if it had been required, that a lease should be prepared under such a leasing power as this, given by a marriage settlement, it never would have occurred to any one who possessed any knowledge on such subjects, to have questioned, whether the introduction of a delay of fifteen days in the clause providing for the power of re-entry, would render the lease invalid for non conformity with such a leasing power. And that I think may be fairly urged in considering what may be termed the unwritten authority applicable to this case. Such marriage settlements as these are often framed in very different ways. In some, the tenants for life are the persons to whom the power of making leases is wholly entrusted. But as one great object of giving that power is to ensure the due management and cultivation of the estate, it is often in well drawn settlements given to the trustees to preserve contingent remainders to provide against such cases as these, where the father and mother die, and leases are necessary to be made for the advantage of the estate; and therefore the inheritance and legal estate is often given [511] to trustees for the purpose of making leases during the infancy of the *cestuis que use*, and then the trustees to preserve contingent remainders; or the trustees of the inheritance, having no interest, are empowered to make such leases. Now the form and usage of practice, as it regards such leases so made by the trustees, must necessarily have very considerable weight in determining the conditions on which such leases should be granted. In the majority of such settlements, no mention is made of any period to be given to the tenant for the payment of the rents; and yet in almost all the leases under such powers, a certain number of days is given. Many leases under such powers too, are made under the authority and sanction of the Court of Chancery, and of such leases, I will say, in vindication of those who have been my predecessors, and of those who may be my successors, although not for myself, that in all cases of leases directed to be made by the Chancellor, the form in which they have been directed to be made, is an authority of law, for saying that they have been made in due execution of the several powers; for he is the competent authority to say whether they are drawn according to the powers. He is a Judge both of Law and of Equity, and invested as he is with competent authority, it is his opinion which must decide whether such leases are made according to the legal construction of the language of the power, and its legal effect. Can then recourse be had to a better source in judging of a question of this nature, than the practice and the decrees of the Court of Chancery?

[512] Let me suppose that, in the present case, the Chancellor was called upon in his judicial character by these parties having contracted for a lease to be made by virtue of this leasing power, and the person claiming to have the lease had instituted a suit for specific performance of such a contract; and suppose the Chancellor should decree a lease to be made, he would in pursuance of the established practice of his predecessors, direct the lease to be made with a power of re-entry, worded as this clause is, giving the tenant an extension of the time, within which he must pay the rent. It would be his province to determine ultimately whether the extension of time so given was reasonable, and whether in all respects the lease so directed to be executed were within the terms of the power. And here I venture to say, that in all the cases of that nature which have come before my predecessors, their decisions are as much

entitled to be considered as of authority, nay, even more so than any others which come before your Lordships.

My Lords, now that I am on the subject of authority, it may be proper to observe here, that there are certain cases wherein the legislature has adverted to reasonable time, as being a well known subject-matter of legal recognition. Upon the division of commorable lands under inclosure acts, there are always amongst those who have claims, a class of persons entitled to considerable allotments, in which they have only estates for life. I mean Parsons and Vicars. A Parson or Vicar is autho-[513]-rized by the General Inclosure Act *, to make leases of their allotments for any term, not exceeding twenty-one years: but it is provided, that in such leases there must be a power of re-entry within a reasonable time. That has been acted upon ever since the statute passed, and in such leases it has always been the universal practice, to give the tenant a certain number of days, just in the same way as it has been done in the present instance. Now let me ask what difficulty can Courts of Justice have in deciding what shall be considered a reasonable time, when the Legislature has so expressly recognized it as a well known incident to such leases? I must say that in my opinion it would be most unreasonable to say, that Courts should hold that fourteen or fifteen days given to a tenant for the payment of his rent before his lease should be forfeited would be reasonable in the case of a lease made by a rector or vicar under this inclosure act: but unreasonable in one made by a tenant for life under such a power as this in an ordinary settlement, (the form of which has been adopted, and transferred into this clause in the act, to enable the person to demise the allotment) and a direct breach of the terms of the power contained in that settlement.

[514] In this case, independently of the practice having been always founded on the principle that such a power of leasing as this admits of the superadding these legal and reasonable conditions to the right of re-entry, a contrary decision proceeding from your Lordships, would be one of the most mischievous in its effects that ever was pronounced. Taking it that this special verdict contains every thing which ought for the purpose of this question to be found, I see nothing in the case which requires such a decision.

An argument has arisen which has been much pressed at the Bar, on the admission of what is called extrinsic evidence. But in this case I think that extrinsic evidence admitted was not only admissible, but necessary and unavoidable, for you could not come to a proper conclusion through the medium of what is contained within the four corners of this instrument only, or without having recourse to other instruments. You are referred to them by the deed itself, and you must necessarily resort to them for obtaining the meaning of the power. In this case there were existing leases in the year 1757, the time when the settlement was made, and that instrument not only refers to those leases, but it does so in the very part wherein the leasing power is given. They must therefore necessarily be referred to, and in all their parts, in order to understand the object of the creator of the power, before it can be known in what manner it should be executed, so as to be conformable with her view and intention. I do [515] not mean to say that we should go beyond that, to leases which had been made of the property before that time, or look further than to the leases then in existence, in order to become acquainted with the state of the property at that period; but we are directed to resort to them for that purpose: and if they shew that a system of leasing adapted to the then state of the property was pursued, it is impossible to shut our eyes to that evidence, proving, as it does, that the power was intended to be accommodated to the then state of the property.

Having made these general observations, I must now call your Lordships' attention to the facts of the case. [Having very summarily stated them], and being about to read the words of the first leasing power, his Lordship adverted to the statute (a) empowering the committees of lunatic tenants for life, to execute powers of granting leases for lives under the direction and order of the Chancellor, as an additional head

* 41 Geo. 3 (U. K.), c. 109, s. 38. The words of the act are, "So as there be contained in every such lease, power of re-entry on non-payment of the rent or rents thereby to be reserved, within a reasonable time, to be therein limited, after the same shall become due."

(a) 47 Geo. III. ch. 75, ss. 3 & 4.

of authority, on the point of the admissibility of reasonable qualification of the power of re-entry.]

Under that statute (continued his Lordship), I never had any doubt in directing a committee to make leases, that he might qualify the ordinary reservation of a power of re-entry for non-payment of the rent, inserting a restriction as to that [516] power that until the rent should be arrear for fourteen or fifteen days, the estate should not be forfeited. So if a parson or vicar, having an allotment under an inclosure act, had become lunatic, the Court would have acted in the same way as to the leases of their allotment: and but for the opinion which I understand had been delivered in the Exchequer Chamber, in this case I should never have had any doubt about the propriety of it.

It is very material to consider, in construing this power in a marriage settlement, that it is a contract which all the parties to it have entered into with each other; and when we come to settle questions which arise between the temporary landlord and the tenant, on the construction of leases granted under the power, we must consider the landlord as having acted *bonâ fide* on the behalf of all the parties interested in the inheritance under the original deed, and they are not to be encouraged by Courts in being astute to find out matter of forfeiture, or to be suffered to defeat the leases by mere matter of misconception, if, upon a fair construction, they may be supported. Then we must not overlook that a considerable fine has been paid in consideration of the lease in question, and that is, in fact, a payment of rent. It is a tender of so much rent in advance, and at once, instead of a future succession of payments from time to time, and the small annual rents and other services reserved, are comparatively of very little value.

[517] (His Lordship then stated the terms of the other leasing powers, commenting on the distinctions, so often already observed on, in prescribing the several modes of leasing applicable to the different property which was to be the subject-matter of the demises in the contemplation of the settlor, and particularly noticing the reference to the ancient and accustomed rents, duties, and services in the power to lease for lives, and to the usual covenants usually inserted in leases of the like nature in the power to let for mining, and the omission of any reference in the power to lease for short terms absolute.]

Now, unless (said his Lordship) the conveyancers of modern times are much abler than those of the last century, and have some mode of dispensing with what was formerly considered indispensable, they must necessarily be obliged to look into the existing leases in the first case, and into such as are usual in the last, to all of which the deed has in one part or another referred them, in order to prepare the leases in such a form as the settlor has required, to be observed by the persons who were to frame them. There is another very important requisition in the first leasing power, to which it is very material that I should direct your Lordships' attention. It requires that there be reserved during the continuance of the estate demised, as great or beneficial rents, duties, and services, or more, as now are or at the time of demising the premises &c. to be demised, were reserved or made payable in [518] respect thereof. If therefore an existing lease in 1757 were produced, and I do not carry it further than that period, it is impossible to say, that under this power regard is not to be had to that lease: in construing the object of the power according to the intention of the creator of it, you are bound to receive in evidence that to which the power so expressly refers. Can any thing be stronger than those words, not only are there to be reserved the ancient and accustomed rents &c. or more, but as great or beneficial rents, duties, and services, or more, as now are or at the time of demising the premises so to be demised were reserved? I am entitled to advise your Lordships that this word "or" should be understood, as if it were "and" in this case; and in the next leasing power we find the words used are as great and beneficial rents, which I consider gives to the word beneficial a signification of great importance, when read with a view to collect the intention of the framer of the instrument as to the execution of this power, and under a deed so referring to existing leases, and in such terms. I have great doubt if this proviso in the lease had not been framed just as it is, whether for that reason the lease would not have been bad; for it is not, as has been truly said, so much the quantum of the rent as the principle of the reservation of it, to which regard must be had by your Lordships in determining questions of this nature: the word more relates to the amount beneficial to all the other incidents of the reservation of the rent, and

particularly to the security [519] for the payment, and it is only required to be as beneficial as the existing reservations were. Now if the same rent be reserved in the same manner, is it not as beneficially reserved? The same rent may be reserved in a different manner, and not as beneficial to the inheritance. By the words following "And so as," occurring in that part of the settlement, where the best and most improved yearly rent that can be obtained, is required to be reserved from half-year, to half-year *de anno in annum*, the creator of the power expressly says, that for non-payment of that rent there shall be no re-entry till the tenant shall have been allowed twenty-eight days after for the payment of it. In the terms of the first power certainly there is no mention made of any time within which, beyond the day of the reservation of rent, the arrear may be paid. But is not a power to re-enter, if the rent shall be unpaid for the space of fifteen days, a power of re-entry reserved: and is it not reserved for non-payment of the rent? It is not an absolute power, but it is a power; and where are there any words in that part of the deed which direct that it shall be an unconditional power. There is no such thing expressed in this part of the instrument, although in a future part we find it expressly directed to be reserved conditionally.

Previous to the agitation of this question (such is the consequence of what my professional habits have been, as I have before said) it would have very much astonished me to have been told, that [520] the superadding these two qualifications to a proviso for re-entry reserved in a lease under this general power, would have the effect of rendering the instrument invalid: and if sitting elsewhere I had been called on to decide, that the tenant, filing a bill for a specific performance of a contract for a lease, under this power, could have no other than such a one as should contain a peremptory clause for re-entry, in case the rent should not be paid on the day appointed, I should have held it contrary to all the principles of law to turn him out of the Court for refusing to accept or execute a lease with such a proviso. I see no sort of reason why there should be any difference made in leases at rack rent, and those for which an equivalent consideration has been paid; in the first instance, by way of fine, provided it be as beneficially reserved, which alone would be sufficient to make it a good execution of the leasing power.

What I have hitherto said on the condition of the delay of fifteen days certainly does not touch the other alternative of there being no sufficient distress on the premises: unless your Lordships should be of opinion that the power of re-entry directed to be contained in the lease, must be taken to mean a reasonable power: and —if (it having been the constant and uniform course in the practice of conveyancing, as sanctioned by the Courts, to apply that quality to such a condition, and accordingly to insert it in every lease) it must [521] now be deemed in law to be a reasonable condition —in that case the observations I have already made will so far apply to this second objection. The term reasonable is not applicable certainly to the quantity of the rent to be reserved, but is wholly restricted to the beneficial reservation of that rent, be it what it may, as it affects the security of payment whenever the rent should become due.

Although I do not agree to the extent of the proposition laid down by a very learned Judge who, I think, is as old in the law as myself, I mean my Brother Wood, who has stated it as his opinion, that the statute of the 4th Geo. II. is imperative on landlords as to their adopting, in all cases, the remedy there furnished; yet upon the construction of that statute, and of the General Inclosure Act, to which I have alluded, it is sufficient for the present purpose to observe, that they furnish abundant authority for holding that the insertion of such a condition in a clause for re-entry is warranted as being reasonable, and that its introduction therefore may be considered as no objection to a power of re-entry so qualified, but that it may notwithstanding be deemed to be a good execution of this leasing power.

Having already drawn your Lordships' attention to the extreme importance of the general effect which the decision of this case will have upon the whole class of tenants holding property under this sort of tenure, and whose leases are [522] for the most part, if not universally, founded on titles and framed in words which will render them liable to these same objections, I wish it to be understood, that it is not now to be considered by your Lordships in deciding this question, whether leases of this nature are more beneficial either to the remainder-man, or the tenant for life, for that is not the principle on which this case should be decided.

The true question is, whether the reservation of rent be provided for by the covenant in this lease in the way most beneficial to the whole inheritance, and all the persons who may be thereafter interested. In pursuing that enquiry, and indeed in the whole administration of the law, nothing is more important than to consider what has always been the approved practice in such cases, and what rules that practice has introduced: for to those it must always be the safest course to adhere. If once you depart from that course, it must be taken into consideration that no tenant for life, nor trustee, can or will hereafter act in the execution of a power without the previous sanction of a court, which can only be obtained through the dilatory and expensive medium of a litigated suit. I shall only observe in conclusion, as Mr. Justice Bayley has put this question. There is a power of re-entry for non-payment of rent contained in this lease, and such powers are divers as is acknowledged in the books. It is a reasonable power, having the usual legal conditions: and if, on the one hand it be said that [523] those conditions are not expressly required by the leasing power given by the settlement, it may be answered on the other hand, that they are such as there is nothing to be found there which condemns. You have moreover the authority of the Legislature for holding them to be reasonable, at least: and therefore I say that the lease appears to me to be a good execution of the power, and if so, it should be pronounced to be valid. That is the opinion which it is my duty to submit to your Lordships; but it is not for me to anticipate whether your Lordships will adopt it in the judgment which you may pronounce.

LORD REDESDALE delivered his opinion nearly as follows:—Having in the earlier part of my life had much intercourse with persons eminent in the practice of conveyancing, which furnished me with opportunities of information on cases of this description, I shall therefore offer such reasons as occur to me for holding the opinion which I have formed on this question. On the subject of the practice of conveyancers having weight in determining points of this nature so high has the authority of ancient and uniform practice ever been considered, that even the construction of an act of Parliament has been adopted from, and founded on the practice of lawyers conversant with the principles of common assurances: and that principle was sanctioned and adopted by this House in the case of *The Earl of Buckinghamshire v. Drury* (a). If your Lordships should [524] decide that regard is not to be had to long established forms and practice in considering questions of this nature, by such a decision every man's title to his property would be endangered. But more especially is it necessary that the established practice should be adverted to in aid of the construction of instruments of this description, framed from precedents constantly acted upon, and never disputed in Courts of Law. How else are we to understand such instruments, if not by giving the technical effect to the words employed by the parties to them, which are in truth the words of the professional persons who advise them, and are used as being best calculated to carry into execution the intentions of the party who instructs them, who are of course informed of their meaning and legal import? Therefore it is that I hold that we are to be bound by the practice of conveyancers, which, on subjects of this sort, is so important as to be tantamount to a practical exposition of the law, as it affects such subjects: and most mischievous would be the consequence if it were not so, and if titles should be made to depend on verbal criticism, and be impeachable by means of the literal construction of the instruments which create them. If that be so, the facts of this case, and the words themselves of the power and of the proviso, must decide this question when applied, as they ought in all cases to be, to the subject-matter. The three powers relate to three distinct descriptions of the property (stating them). That distinction must convince us that the person who framed this settle [525] ment, contemplated the different circumstances in which the three descriptions of property then were: and that she meant to give by the several powers the same degree of enjoyment of each as had been given of the same property before, which as to that which is the subject matter of the present question was, that the tenant for life should have the advantage arising from renewals of the existing leases, from time to time, as the lives should drop during his possession. She has required only that he should reserve as great or beneficial rents, &c. or more (and not less) than had been reserved in the former leases; and not only the rents, but every other service was to be reserved in exactly

the same manner as in the prior leases. The power to lease the second description of property, requires the best and most improved rents to be reserved, and then are added, the words "that can be reasonably had or obtained for the same." If that word reasonably, which is introduced there merely out of caution, had not been added, would it not have been implied? and if that word had been absent, and a lease had been made reserving, in reasonable estimation, the most improved rent that could fairly, honestly, and reasonably be obtained without fine or premium, would not that have been a good lease? That word, therefore, being introduced, does not in any respect alter the terms of the power: for it must have been so construed without it. Of the two powers to lease for lives or years determinable on lives, and for short terms at rack rent, one requires the power of re-entry to be reserved in [526] one way, the other in another; and I think that was designedly so varied. With respect to the latter, the power of re-entry is to be given for non-payment of the rent within twenty-eight days after it has become due, pointing out the time in precise words. Why then were not precise words used in the other power? For this obvious and manifest reason: because the first power referred to the mode of executing the power which had been observed in the prior and existing leases, and it was intended that whatever might have been the mode, should still continue to be followed; or if there should be found to be no such power of re-entry for non-payment of the rent reserved there, then that some such power was to be inserted in the new leases. It is a mistake to say that the words of the power in the deed are precise and specific in their directions. That is the fallacy on which much of the reasoning has been founded to shew that this lease is invalid. The words are not precise—they are vague and loose, amounting to nothing more than a mere note or memorandum, importing, that in case there should be no power of re-entry for non-payment of the rent inserted in the former demises, such a power should be introduced in the new leases, which were however still in all other respects to be conformable to the old ones. In the former leases there was a power of re-entry reserved not only for non payment of the rent, but for the non-performance of the other services, such as the render of capons, and doing suit of mill, &c. to all of which the power extended. [527] The power in the settlement, therefore, being quite general, without giving any definite directions as to the mode of executing it—being in short merely in the nature of a memorandum, if I may so call it, that the leases should contain a power of re-entry, the maker of this lease has put the natural construction upon the words: and the construction which is attempted to be put upon them, in support of these objections, is a forced construction, and an attempt to render them more precise and strict than they really are.

Now let us suppose that a contract had been entered into between the parties to this lease for a lease of the property in question, and it had been agreed that it should contain a power of re-entry for the non-payment of the rent to be reserved. If on a suit for specific performance of that contract a Court of Equity should decree it to be specifically performed, would the Court ever have thought, that under the terms of this clause in the settlement, they were bound to direct a clause to be inserted in the lease, giving an absolute power of re-entry on non-payment of the rent, unqualified by the ordinary provisions of a few days' extension of the time and the absence of a sufficient distress? Would not the words be construed according to the common and ordinary practice which must have been borne in mind by the conveyancer, who prepared the settlement, when he inserted this general clause for reserving a power of re-entry? The professional character and habits of the person who framed the deed must be regarded—[528]—ed, and the technical acception of the clause, according to the common notions of such persons really must be resorted to, in order to ascertain the intention of the parties to the instrument, who are made to express themselves in his more accurate language. Having then recourse to such means of construction, we must see that this clause was no more than a mere minute or memorandum, the terms of which were to be supplied more definitely in the lease, as it must have been if it had been made one of the terms of a contract for a lease entered into between these parties. I consider, therefore, that it must be taken to have been the intention of the parties to the instrument, that the terms of this clause should be advisedly not precise, thereby designedly leaving it to be interpreted by the clause to that effect in the former leases, if they contained such a clause, but if they did not, that a reasonable power of re-entry should be inserted in the future leases. If there were a power of re-entry reserved in the former leases, no especial directions, as to the insertion of

such a power in the new leases would be necessary, because the rent being required to be reserved in as beneficial a manner, it must have been reserved in the same words and in none other. Now, as all the doubt in this case has been founded upon the construction of the words of the instrument, and they were clearly not intended to express precisely and positively how what was required to be done should be done, that doubt may be best removed by ascertaining what a Court of Equity would [529] have ordered to be done on a question brought before them by a suit for specific performance of a contract for a lease entered into in such loose terms as these: and there can be no doubt that a Court of Equity would, in decreeing the execution of a lease, have directed that it should contain a power of re-entry in all respects similar to that which is contained in the proviso in this lease, construing this loose clause precisely as it has been construed by the maker of the lease in question. So, I apprehend, would a Court of Law also have construed such a contract, if a question on the terms of such a power had been agitated before them. They would enquire in what manner a Court of Equity would have directed such a lease to have been drawn, and what form of lease was in received use amongst conveyancers of established character in business in such cases, and they would decide accordingly.

Upon the whole, therefore, it does seem to me that the lease now under your Lordships' consideration is valid; because, as it has been found by the special verdict, it was made in conformity with the former leases: and I consider the references in the deed to those former leases, as having the effect of requiring the new leases to be made, and construed by reference to the contents of those former leases; and that they were properly taken by the tenant for life, as a guide to assist him in framing the instruments in the first instance: and if any question should after [530]-wards arise as to its being a good execution of the power, I think the most effectual means of determining it is by investigation of the former leases, which have been admitted in evidence. If, on inspection of those leases, there should be found a similar power of re-entry reserved, or if no such clause should be found there, the power in the new lease be reasonable and adequate, that would be sufficient to enable your Lordships to decide, that the new lease so framed, was a good execution of the power to lease, the words of which ought not to be construed as meaning a precise and positive power of re-entry, as it has been contended it does, but a reasonable and ordinary power.

Therefore, upon the particular words of the clause in the deed and settlement, and not on any general view of this case, I think that the lease in question ought to be supported, and that the judgment of the Court of Exchequer Chamber ought to be reversed, and the judgment of the Court of King's Bench affirmed.

On the motion of the Lord Chancellor the House at once ordered the judgment of the Court of Exchequer Chamber to be

Reversed:

And the original judgment of the Court of King's Bench to be Affirmed.

[531] **WEAK, ON THE DEM. OF BURGE v. CALLAWAY AND OTHERS.** Saturday, 15th May 1819.—Rule for judgment as in case of a nonsuit, for not proceeding to trial after issue joined (obtained in the next Term, as it may be in this Court, and notice of trial given and countermanded, the plaintiff's attorney voluntarily although too late, if it had been an ordinary case), giving a peremptory undertaking to proceed at the next Assizes—discharged, and without costs, on its being shewn as cause that a serious domestic misfortune had prevented the plaintiff's solicitor from proceeding to trial. The voluntary undertaking so given, however, must be afterwards made a rule of Court.

Sir William Owen now shewed cause against a rule which had been obtained by West (3d May) for judgment as in case of a nonsuit for not proceeding to trial, issue having been joined in Hilary Term, on an affidavit of the solicitor for the lessors of the plaintiff, stating that a serious domestic misfortune had prevented his attending the assizes, of which he had given notice to the defendant's solicitor, informing him at the same time that he had written to his own agent to countermand the notice of trial, and had apprized the sheriff, that he might not summon a Jury: and the affidavit of the agent stated that he had, on the 24th March, given notice of countermand, accompanied by an undertaking peremptorily to proceed at the next Assizes.

Under these circumstances it was prayed that the rule might be discharged (the plaintiff being already under a peremptory undertaking given in the notice of countermand) without costs, on the ground that the countermand, founded on such a reason, and accompanied with a peremptory undertaking, was sufficient: and that in such a case the application ought not to have been made, at least the costs should be ordered to abide the event.

[532] West, in support of the rule, submitted that the defendants were entitled in this Court to move for judgment as in case of a nonsuit for not proceeding to trial in the next Term after issue joined: and that at all events he urged the defendants would be entitled to costs by the rule of the Court. The peremptory undertaking being merely voluntary, he insisted was altogether insufficient.

In reply it was observed that, although the practice in this Court differed in respect of the time for applying for judgment as in case of a nonsuit, and for the costs: yet particular circumstances would always be considered by the Court, and in this case, where the object of the application was the obtaining costs (which appeared from the defendants having moved for them on the 1st instant) sufficient reason had been given for relaxing the rule.

The Court expressed disapprobation of the application under the circumstances, and observed, that it had been rightly said that they would not insist on a general rule of practice in a matter of this sort, where particular circumstances justified a departure from it.

As to the undertaking given, the Court (although they intimated that the plaintiff's attorney might have been attached upon it) considered that it ought to be repeated, in order to be made a rule of Court—and on those terms, they

Discharged the rule, without Costs.

[533] *THE ATTORNEY GENERAL v. KENT.* Tuesday, 18th May 1819.—The statute 56 Geo. III. ch. 110, is general, and extends to all tanners, whether using bark or sumack: and the penalty imposed on the removing and concealing any hides or skins from the view of the officer, is cumulative on the penalty imposed by the 9th of Anne, ch. 11, s. 17.

One of the counts in this information was framed on the 4th section of the 56 Geo. III. ch. 110, s. 4, to recover from the defendant, who was a sumack tanner, the penalty of 200l. for removing and concealing hides from the view of the officer. A verdict having been found for the Crown.

Jervis moved that the judgment might be entered for the defendant, on the ground that he was not within that statute, which he contended applied wholly to tanners in bark, and that the 9th Anne, ch. 11, only applied to shomack tanners.

The Court, having granted a rule, the Lord Chief Baron reported the evidence, observing, that the fact of concealment had been proved beyond doubt, and therefore the only question would be, the amount of the penalties.

The Attorney General, Clarke, and Walton, now shewed cause, and

Jervis and the Common Serjeant endeavoured to support the rule.

For the defendant it was contended that the 56th of Geo. III. having repealed expressly only [534] the provision of the 9th of Anne (sect. 12) respecting the shaving of any hide or calve skin before they should be thoroughly tanned, leaving the 16th and 17th sections unrepealed, it had, by the 4th section not imposed a cumulative penalty on the sumack tanner who was not included under the general name of "tanner," by which the bark tanner only was meant, and so in a penal statute it should be considered. That proposition was attempted to be supported by a critical comparative examination of the terms of the two acts of Parliament.

For the Crown it was contended that the two acts were in *pari materia*, and that the latter penalty was cumulative, and it was urged that the act of the 56th Geo. III. was general in its terms, including under the denomination of "tanners," all the trade of every description.

The Court held that the latter act was general, and applied to all tanners of every description, and they adverted to the language of the statute, to shew that it was so. They observed that it would go to repeal the 56th Geo. III. in great measure, if they should hold that it did not apply to any other than the bark tanner—that the 9th of Anne, ch. 11, was general beyond all doubt, expressly including the shumack

tanner, and that from the words and whole tenor of the 56 Geo. III. that also must be considered general, and therefore they discharged the rule.

Rule discharged.

[535] *BLORE v. MOTTRAM*. Saturday, 22d May 1819. —Where an assignment of the bail-bond be taken after bail above have been put in, but not perfected, and the plaintiff's clerk in court has consented to an order for staying proceedings on the bail-bond, on payment of costs, he is not entitled to have the security of the bail-bond, because he has waived the right which arises from having lost a trial by his own conduct.

Sir William Owen had obtained a rule, calling on the plaintiff to shew cause why the order made by Mr. Baron Garrow (that an order of Mr. Baron Wood for staying proceedings on the bail-bond assigned in this cause, on payment of costs, the defendant having put in bail and rendered, should stand on the terms of the bail-bond standing as a security), should not be rescinded.

The facts on which this application was founded were, that the defendant residing in Denbighshire, was arrested on a writ of *quo minus*, returnable the 8th of February, 1819, and on that day a declaration was filed. On the 16th he put in bail before Mr. Baron Wood, at his house, and gave the plaintiff's clerk in court notice on the 17th. On the 23d of February, the plaintiff's clerk in court took an assignment of the bail-bond, and put it in suit. On the 2d of April, the defendant surrendered in discharge of his bail, of which the bail gave notice on the 5th. On the 28th a summons to stay proceedings on the bond was served, and was indorsed by the plaintiff's clerk in court, "Take an order, on payment on taxation:" and on the 30th an order was made accordingly by Mr. Baron Wood. The plaintiff's clerk in court, on the 4th of May, took out a summons for rescinding that order, which was ordered by Mr. Baron Garrow on the 6th.

[536] Jones, D. F. now shewed cause, on an affidavit of the plaintiff's clerk in court, stating that conceiving the plaintiff had, by the defendant's neglect, lost a trial at the last Assizes, and as the bail-bond had become forfeited, and ought to remain as a security for the debt, he did not pursue the order of the 30th of April, on which he had incautiously indorsed a consent, but obtained the order in question. He submitted, therefore, that as a trial had been lost, and the bond had become forfeited, the bail bond ought to stand as a security, notwithstanding what had since taken place.

Sir William Owen, on the contrary, contended that the plaintiff could not have gone to trial before, as the defendant had till the 1st day of Easter Term to perfect bail above, unless he would have waived exceptions to the bail; and his taking an assignment of the bail bond shewed that he did not waive the exceptions. He also submitted, that another reason in this case why the bail bond should not stand as a security was, that the assignment being after the bail had been put in was irregular; and that the plaintiff had also waived the forfeiture of the bond by consenting to the order of the 30th of April.

The Court, under these circumstances, made the

Rule absolute.

[537] *HAYWARD v. GREENWOOD AND OTHERS AND EXETER COLLEGE*. Monday, 24th May 1819. —The Court will grant an injunction to stay trial of an ejectment at the next Assizes, on a motion made on the 27th of February, of which notice had been given to the defendant's clerk in Court only on the 26th, if moved on merits confessed in an answer put in only on that day, because there is only one day of sitting in the Hilary vacation, which ought not to prejudice suitors, and it can be no surprise on a defendant under such circumstances. Nor will they dissolve such an injunction before the hearing on an affidavit. —Such an application refused, with costs.

An injunction was granted, on the 27th of February last, in Gray's Inn Hall, to restrain the defendants from proceeding in an action of ejectment commenced against the plaintiff, to recover possession of a copyhold estate for lives, which had been sold to the defendant at a public auction.

The injunction had been obtained on a bill filed for a specific performance of the

contract for the purchase, charging that the defendants had refused to perfect the plaintiff's title, by the College substituting the life of the defendant Greenwood for that of the plaintiff, and had brought an ejectment. The bill was filed on the 11th of February. The defendants appeared on the 12th, and put in their answer on the 26th. On that day (the 26th) the plaintiff gave the defendants notice (dated the 26th) that the Court would be moved on Saturday next, the 27th, for an injunction to restrain them from proceeding in the ejectment, on the merits confessed in their answer—and that in the event of the Court granting such injunction, that the same might extend to stay the trial of the ejectment at the then next ensuing Assizes for the county of Oxford.

[538] Beames accordingly moved for the injunction on the 27th, previously apprising the Court, that it might be urged by the counsel for the defendants, that the notice of motion given for the 27th, being only one day's notice, would be an objection to granting it: but he submitted, that as the answer had been put in only on the 26th, the day on which the notice was given, and that as the Court sat on no other day than this, the shortness of the notice would not be considered an objection, in a case where the motion was made on the merits confessed in the defendants' answer, in which case there could be no surprise.

[Having mentioned that Dauncey and Spence held briefs for the defendants, the Court inquired if they were prepared to oppose the motion on the merits, and on their saying that they were not instructed to do so,]

The Court, adopting the reasons urged in support of the motion, observed that the circumstance of their having only one day of sitting in the Hilary vacation, ought not to prejudice the suitors, by operating as an objection to granting a motion of this nature, under these circumstances; and they then granted the injunction^{*1}.

[539] Taunton, W. E. now moved to dissolve that injunction, upon an affidavit, stating that the plaintiff had not, since the injunction had been granted, applied to the defendants to settle the fine payable on the change of life, or to be admitted at a Court held since for the manor; and he submitted, that as the injunction had been granted ex parte for the purpose of enabling the tenant to apply to be admitted, his not having done so was good ground for now dissolving it.

Beames opposed it, submitting that the Court could not thus try the merits of an injunction, on affidavits filed since it had been granted, to which

The Court assented, saying that they could not dissolve the injunction on such grounds, before the hearing. They therefore

Refused the motion, with Costs^{*2}.

[540] BATE v. CARTWRIGHT. Monday, 24th May 1819.—Money deposited with a stakeholder, as a bet on the event of a foot race, may be recovered from him by either party, in an action for money had and received, after the race has been run, and the parties differ as to the winner.—A nonsuit, on the ground that such actions are an idle waste of the time, and hindrance of the business of Courts of Law, set aside.

[Referred to, *Hampden v. Walsh*, 1876, 1 Q. B. D. 193.]

In this action, which was for money had and received, to recover a sum of 10l. deposited in the hands of the defendant, as stakeholder of the sums betted, to abide the result of a wager of 5l. on a foot race, Mr. Baron Garrow nonsuited the plaintiff at the trial, holding that the wager was in itself of that nature which the Courts had, according to the current of authorities, endeavoured to discourage, by refusing to try such frivolous questions, arising out of the idle folly of parties, to the hindrance of the sober and necessary business of the other suitors.

Jervis obtained a rule to shew cause why that nonsuit should not be set aside, on the authority of the case of *Cotton v. Thurland* (5 T. R. 405).

Mr. Baron Garrow reported the evidence, the substance of which was, that the plaintiff and another person had betted 5l. on the race, and had deposited the money in the hands of the defendant, and the race having been run, and the plaintiff having,

^{*1} Ex relatione, Mr. Beames, as to this point.

^{*2} Vide *Blucor v. Wilkinson*, 13 Ves. 454.

as he stated, won the wager, sought by this action to recover the 10l.; but there being some doubt suggested to him as to his right to recover the whole, he afterwards insisted only on the sum of 5l. originally deposited by him.

[541] Puller and Male now endeavoured to support the nonsuit. They submitted that a foot race was an illegal game within the statutes of 16 Cha. II. c. 7, and 9 Anne, c. 14, and that it had been determined to be so in *Lyttell v. Longbottom* (2 Wils. 36), *Clayton v. Jennings* (2 Bl. 706), *Brown v. Berkeley* (Cowp. 281), *Hobden v. Pajol* (2 Bos. & Pul. 51), and *Ximenes v. Japtes* (6 T. R. 499), and they contended, that it was become an established principle in the Courts, that where a deposit of money was made for securing a bet on an illegal game, or any illegal consideration, they would not lend their aid to enable a party to recover it; and they cited *Hewson v. Hancock* (8 T. R. 575), *Lowry v. Boudieu* (Doug. 468), *Fandjek v. Hewitt* (1 East, 96), *Morck v. Abel* (3 Bos. & Pul. 35), *Booyer v. Bampton* (2 Str. 1155), and *Andree and Another v. Fletcher* (3 T. R. 266).

They finally urged that this at least was the kind of claim which it had been considered that Judges should refuse to try, whether the wager was illegal or not; and they cited the case of *Eltham v. Kingsman* (1 Barn. & Ald. 683), as a strong authority on that point. In the present case, they stated the real question was, whether the plaintiff or another person was in fact the depositor; and one ground of the defence would have been, that the defendant had paid the money over to another person. A case was mentioned by Puller, memoriter, as [542] having been recently brought on before Mr. Justice Abbott, at Guildhall (*Britton v. Davis*), where a similar question was raised, and his Lordship said, that he would not suffer the time of the Court to be squandered on such idle questions; but it being intimated, that the defendant could prove the payment of the money over to a third person, Mr. Justice Abbott then said, the cause might in that case proceed; but he added, that where a party was so foolish as to deposit money in such a way, he must get it again as he could, but that he had no means of recovering it at law.

Jervis, in support of the rule, submitted that the illegality of the wager* had nothing to do with the merits of this action, for that according to the authority of *Cotton v. Thurland*, the plaintiff was still entitled to recover the sum deposited by him with this defendant; and on that point he also cited the case of *Farmer v. Russell* (a) and *Falkney v. Remous* (1 Bur. 2069), and the doctrine stated and authorities collected in Selwyn's *Nisi Prius* (c).

[Wood, Baron, observed that where a plaintiff's right to bring an action was doubtful in law, he should consider that a Judge could not refuse to try it.]

Cur. adv. vult.

[543] The Lord Chief Baron now delivered the opinion of the Court. The question in this case is, whether the action lies. The last, and indeed the only decision that can be said to be in point, is that in *Cotton v. Thurland*, in 1793, and that, we think, determines this point. Lord Kenyon, in delivering his judgment on that occasion, distinguishes the case of an action brought against a stakeholder from that of a policy of insurance, where the risk has been run, and the party attempts to regain his money: and he put entirely out of the question the illegality of the subject-matter of the wager. The principal ground on which that case appears to have been determined was the fact of the money being still in the hands of the stakeholder and whilst it be, the depositor may recover it from him. The other Judges concur with him, Mr. Justice Grose changing his former opinion, and the Court overrule the decision of Mr. Justice Wilson. We are bound by a case determined so solemnly, and although many cases have been cited, all of which we have looked into, we think that there are none that can sustain this nonsuit against the authority of that which I have particularly mentioned. We therefore make this

Rule absolute.

* Quære, Whether such a wager be illegal?

(a) 1 Bos. & Pul. 296. Dissentientibus Rooke and Eyre, JJ.

(c) Vol. i. tit. Assumpsit, Rules 7 & 8, and the notes.

[544] GAINSFORD v. BLACHFORD. Monday, 24th May 1819.—If a person who is asked by a tradesman respecting the circumstances and credit of another, tells him that he has been paid a debt due to himself from such person, and that he was ready to give him credit for any thing he wanted: that representation would not be sufficient to support an action for a deceitful misrepresentation of such person's circumstances, whereby the tradesman was induced to give him credit, although such person had been before that time discharged under an insolvent act, and the defendant knew it, but did not mention it.—Such a colloquium will not support an innuendo that a defendant meant thereby, that such person was in good circumstances, and fit to be trusted generally with goods on credit.—The Court arrested that judgment, after a second verdict given for the plaintiff, in such a case, upon a new trial granted on the same objections, viz. that the innuendo was not warranted by the words, and that the action could not be maintained unless it were.

This action having been tried again at the last Sittings before the Lord Chief Baron, and the Jury having again given a verdict for the plaintiff on the same evidence,

Jervis moved, in the early part of the Term, that the judgment might be arrested, on the ground, that the words laid in the declaration *, as having been spoken by the defendant in answer to inquiries made by the plaintiff, respecting the circumstances of a third person, to whom the plaintiff was about to sell goods on credit, did not warrant the innuendo which the pleader had founded on them; and obtained a rule, against which

Chitty now shewed cause, submitting, that the innuendo was not too extensive; and that if it were, it did not vitiate the other allegations in the declaration.

He contended that, with reference to an inquiry of another by a tradesman, of a customer's fitness to be trusted with goods on credit, an answer that he was ready to give him credit for any thing was amply sufficient to warrant the innuendo, that such person was fit to be trusted generally—that it was competent to a party to explain in his declaration, by an innuendo, what he considered to be the meaning of words addressed to him; and it would be for the Jury to say whether, under the circumstances in evidence, the innuendo was borne out. In the case of *Oldham v. Peake* (2 Bl. 959), the Court held that the words "you are guilty of the death" of a particular person may be explained, by an innuendo, to mean the murder of that person, although the colloquium be only of the death. There the Court said, that the innuendo was not contradictory, but explanatory; not introductory of new matter, but ascertaining the meaning of the old. So it is here. That case was also a motion in arrest of judgment: and the Court added, "whether it was true or not, that such was the defendant's meaning, was a fact for the Jury to decide upon."

[Wood, Baron, observed that he had seen declarations for words spoken ironically with an innuendo.]

The Jury have affirmed it, and it is now too late to object to it. In the case of *The King v. Aylett* (1 T. R. 63), the Court said, that the business of an innuendo was by reference to pre-[546]-ceding matter, to fix more precisely the meaning of it. That was all which had been done by this innuendo; and the suppression of the material fact, proved to be within the defendant's knowledge of the person inquired of having been recently discharged under an insolvent act, gave so much appearance of intentional fraud, or, at least, of misrepresentation to the transaction, as to justify the suspicion of a design to mislead, on which the innuendo was founded; and which would be sufficient to maintain the action by bringing it within the cases of *Eyre and Another v. Dunsford* (1 East, 318), *Tapp and Another v. Lee* (3 Bos. & Pul. 367), and *Hutchinson v. Bell* (1 Taunt. 558).

He then submitted that the answer of the defendant standing alone, and without the innuendo, would furnish sufficient ground for the present action: and in that case the innuendo might be rejected as surplusage, as had been held in *Roberts v. Camden* (9 East, 93); and the unnecessarily proceeding further by inserting an innuendo in

* The nature of the action, and the terms of the declaration, are fully stated in the case of the same name in the 6th Volume of these Reports, p. 36.

the declaration, instead of giving evidence to that effect, did not vitiate the count : *Taylor v. Eastwood* (1 ib. 212).

He also urged that this objection, being made after verdict upon a second trial, was cured by the verdict, and "not being against the right of the matter of the suit," is within the 16th and [547] 17th Cha. II. ch. 8, for preventing arrests of judgment : citing *Stennel v. Hogg* (1 Wms.'s Saunders, 228, and the note), and *Richards v. Simonds* (2 Wils. 40).

If, however, the Court should be of opinion, that the first count was bad for any defect in the innuendo, the verdict might still be maintained on the second count, which was free from that objection : and that in such a case the Court, if they thought proper, might award a venire de novo *, which would be the regular course : but that it was not a ground for arresting the judgment : *Eddowes v. Hopkins* (Doug. 377).

[The Court suggested that there was not enough stated in the declaration : for that it should have been averred that the plaintiff had informed the defendant of his motive for making the inquiries respecting the person to whom the credit was to be given, and that he had been referred to him for that purpose, so as that it might appear that the defendant had been sufficiently warned to be on his guard : nothing of which had been done in this case : and Mr. Baron Wood observed, that he remembered the first case of the kind in which such an action had been brought, and where the Court, after much doubt, held, that it might be maintained, saying that, although a person was not obliged to answer such a question, if he did, it must be answered truly.]

[548] Jervis, in support of the rule, insisted, that any one count being bad, where the damages are general, would be fatal to the declaration : and the judgment must be arrested, for a venire de novo will not be awarded : citing *Holt v. Schuchfeld* (6 T. R. 691) ; and in this case the evidence applies as well to the bad as to the good count.

As to the objection taken to the innuendo, that it enlarged the sense of the words of the colloquium, he cited the case of *Hawkes v. Hawkey* (8 East, 427), where the Court held that that could not be done.

In this instance he contended, that the innuendo had very considerably and materially enlarged the sense of colloquium, beyond the fair meaning of the words ; and therefore vitiated the count, and consequently the declaration. Admitting that the action might have been sustained by the colloquium, without the aid of the innuendo, that is out of the question at present, which is merely whether the declaration is bad ; for the first count having this innuendo, which is not supported by any fair exposition of the words, whatever effect the verdict might have in aiding the defect of the second count, the statutes of Jeofails could in no way be applied to the first count : and he submitted therefore that the judgment should be arrested.

Cur adv. vult.

[549] RICHARDS, Lord Chief Baron, now delivered judgment. The questions in this case are, whether the innuendo in this declaration is supported by the colloquium ? and whether, if it be not, it may be rejected as surplusage ! (stating the declaration &c.). We do not consider that the innuendo is agreeable to the sense of the words on which it is founded, or that they are to be understood so largely. That defendant does not say that Hofer was a person in such circumstances as that he might safely be trusted by all the world. He states merely that he himself was ready to give him credit : and so he might have been, and there was nothing in so saying, without much more, which could have the effect of misleading the plaintiff.

On the other point we are of opinion, that without this innuendo, the words would not be sufficient to support this action if they were proved. I may lend a man money, and consider that I was safe in doing so, although he might not be in good circumstances, and I knew it ; but telling another that I would do so, by no means implies that he might. The other part of the colloquium proves that to be the construction which the defendant himself put on his own words, and that he so confined them ; for, he says, that Hofer had owed him money, and had paid it. As we think therefore that the innuendo is not warranted by the words, and that without it they would not be sufficient to maintain the present action, we are of opinion, that the rule for arresting the judgment must be made absolute.

Rule absolute.

* Tidd's Practice, 928, 929.

[550] WARN AND UX. Administratrix, &c. v. BICKFORD. Monday, 24th May 1819.—Assignment of breach of covenant in general words, although in the words of the covenant, held ill upon a demurrer to the defendant's plea, because the assignment did not shew any particular act of the plaintiff, or in what particular respect he had refused to act which amounted to a breach of his covenant.—Such bad assignment not cured by pleading over a set-off of a demand (claimed in a different right from that in which the plaintiff, who was an administratrix sued) to a declaration in covenant for unliquidated damages.

[See further, 9 Price, 43.]

This was a demurrer to a plea of set-off to a declaration in covenant by the plaintiff and his wife, as administratrix of her former husband, on the ground, that the subject-matter of the set-off was not due from the wife in the same right; and it was admitted that that plea could not be supported: but the defendant relied on an objection to the declaration, that the breaches of covenant were not well assigned.

The declaration stated that the defendant (by indenture of demise to trustees) did thereby covenant, promise, and agree, to and with Thomas Bickford (the intestate), that he or his widow and child, or children, and their descendants, should and lawfully might, during &c. peaceably and quietly, respectively have and enjoy, and receive and take annuities of 100*l.* and 20*l.* (secured to them thereby); and that defendant or any claiming under him should not nor would hinder, molest, or disturb him, her, or them, in the peaceable enjoyment thereof in any manner whatsoever: And further, that defendant should and would, from time to time, and at all times thereafter, upon every reasonable request, and at the cost and charges in the law of the said Thomas Bickford, or the person or persons requiring the same, make, do, acknowledge, execute, and suffer, [551] or cause &c. all and every suit, further, and other lawful and reasonable act and acts, thing and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting and securing the said several annuities, and raising the said sum of 400*l.* thereby respectively intended to be granted, secured, and raised.

Upon that covenant the plaintiff assigned, amongst others, the following breaches (being the third and fourth)—that defendant did not nor would permit and suffer plaintiffs peaceably and quietly to have (&c.) the said annuity; but, on the contrary thereof, then and there hindered, molested, and disturbed the plaintiffs, in right of plaintiff's wife and her children, in the peaceable enjoyment of the said last-mentioned sum of money so due for the said last-mentioned annuity, contrary &c. And although said plaintiff afterwards, and after the expiration of five years &c. for the further, better, more perfect and absolute raising the said sum of 400*l.* in said indenture mentioned, to wit, on 1st January, 1818, at the proper costs and charges in the law of the said plaintiffs, requested said defendant to make, do, and execute such acts and things as were necessary for raising said sum of 400*l.* in said indenture specified, according to the true intent and meaning of said indenture, yet said defendant did not nor would, when he was so requested as aforesaid, or at any time before or since, at the proper costs &c. or otherwise, make, do, and execute all or any [552] act or acts, thing or things, which were necessary for raising the said sum of 400*l.* &c.

The defendant pleaded non est factum and a set-off: and the plaintiffs replied and demurred on the following grounds, that money due from defendant to plaintiff's wife, as administratrix, could not be set-off against, or covered by money due from the intestate to defendant; and that the declaration being in covenant for unliquidated damages, a set-off could not be pleaded.

Wilde, in support of the demurrer, anticipating that the defendant would rely principally on the alleged defects in the assigning the third and fourth breaches in the declaration, submitted, that the covenant being in substance—that the defendant would, upon the reasonable request of the person requiring the same, make, do, acknowledge, execute, and suffer all and every such further and other lawful and reasonable acts &c. for the further, better, more perfect, and absolute securing the several annuities, and raising the sum of 400*l.*, as should be lawfully advised or required by the counsel of the persons interested therein—the breaches being assigned in the very words of the covenant, were well assigned. The defendant covenanted to do all necessary acts; the breach is, that he refused to do any. He admitted that they were not assigned in

the most regular manner, and that they might perhaps have been held bad on special demurrer to the declaration; but he insisted, that on this demur [553]-rer (to the defendant's plea) the defendant was not entitled to take advantage of such an objection, or of any of which he could not have availed himself after verdict, or, at least, on general demurrer to the declaration.

He also urged that there was, in this case, no reason for stating a refusal to do any particular; because the refusal was general, and therefore the Court cannot but see, from what is stated on the record, that there was a positive breach of covenant; and that, in a case of this sort, was quite sufficient, unless there be a special demurrer. That was the result of the case of *Jones v. Barkley* (Doug. 684); and is still more clearly established in the cases of *Charlton v. Winstanley and Wife* (5 East, 266), and *Bowdell v. Parsons* (10 ib. 359). He submitted, therefore, that as the Court could see from the whole record that there had been in fact a substantive breach of covenant, and that by pleading over the defendant had admitted all that was alleged, which is in principle the effect of pleading over, the breach was well enough assigned to be secure upon a demurrer by the plaintiff to the defendant's plea.

Erskine, in support of the plea, admitting the difficulties raised by the demurrer, relied upon the ill assignment of the third and fourth breaches: contending that, as to the third breach, the acts of hindrance ought to be set out, that the Court [554] might see what sort of molestation it was which had been charged, and whether it came within the purview of the covenant, and that a general assignment was insufficient, citing *Fraunce's case* (8 Co. 91), *White v. Ewer* (Cro. Eliz. 823), and *Wotton v. Hele* (2 Wms.'s Saunders, 180, and note 10).

The assignment of the fourth breach, he contended, was still worse, as it did not state any violation either in form or substance of the covenant to which it was meant to be applied; and this being in the nature of a general demurrer to the whole declaration, the defendant might have judgment on that breach, notwithstanding he should be barred for the residue: and he cited Com. Dig. tit. Pleading (C. 47), submitting also that here no such request, as the covenant required, appeared to have been made.

He then denied that the defendant having pleaded over in this case, was placed in the same situation as if a verdict had passed against him; and insisted that the Court might decide this case, as if it had come on upon a general demurrer to the declaration, according to the very pointed distinction taken in note 10 to the case of *Wotton v. Hele* (2 Wms.'s Saunders, 181); and he also cited *Birks v. Trippet* (1 Saund. 32). He submitted, that the present case was very distinguishable from that of *Pudsey v. Newsam* (Yelv. 44); because there the covenantor was, at all events, to do some act [555] to assure the minor to the covenantee before a certain day, if required, whether necessary or not, or specified or not; whereas here it was not peremptory upon the defendant that he should do any act by a given time, and non constat that any act was necessary: or if any were necessary, that it had been required. In this declaration also, there being no averment, that any further assurance was necessary, distinguished it from the case of *Jones v. Barkley* where the Court held, that, by what had passed, the defendant had sufficiently shewn that he was ready to do all that might be reasonably required of him.

He also submitted that such a general breach could not be traversed, or if it were, it would be an immaterial traverse.

Wilde, in reply, submitted that most of the difficulties of assigning breaches had been obviated by the statute of Anne, and many of the old objections could now only be taken advantage of by special demurrer; and he cited *Foster v. Pierson*, to shew, that in latter times such particularity as had been formerly thought necessary was not required. *White v. Ewer*, he observed, was before the statute of Anne; and it was now considered that a breach might be assigned in words as general as the covenant, to avoid unnecessary length in the declaration.

By pleading over, the effect of which is to admit the allegations of the declaration, and that [556] he had broken the covenant, he contended the defendant had waived the objection, as had been decided by very many cases, Vin. Abr. tit. Plea and Pleadings (G.); and particularly that of *Thorpe v. Thorpe* (12 Mod. 455, and 1 Ld. Raym. 662, S. C.).

Adv. vult.

RICHARDS, Lord Chief Baron, now delivered the judgment of the Court. We are

of opinion that the plea cannot be maintained. We have therefore to consider the objection which has been raised to the declaration, that the breach is stated too loosely and indefinitely: (stating the covenant and fourth breach). It has been urged that the breach is not more general than the covenant, and that is certainly true. The breach is indeed assigned in the words of the covenant: but we think that that is not in this case sufficient: for it does not bring before the Court the subject-matter of complaint: we therefore consider the objection good.

It was then said that the defendant should have demurred specially, and that he has waived what advantage he might have taken of it by pleading over. The Court, however, are of opinion, that he has not waived it. If by pleading over he had shewn a breach of covenant by his plea, it might have cured the defect: but that is not shewn by this plea. Therefore there must be

Judgment for the defendant.

[557] THE ATTORNEY-GENERAL v. FRENCH. Monday, 24th May 1819.—Notice of trial of information given from time to time from the Sittings after Easter Term, 1818, till the Sittings after Michaelmas, when it was given for the Sittings after the next Hilary Term (the trial having been postponed for defect of special Jurymen), and the cause was not tried on the last occasion, on account of the absence of a material witness for the Crown, who being expected till the last moment, the notice was not then countermanded—Held a sufficient proceeding effectually to prevent the recognizance of bail being vacated, as it may be where the Attorney-General has not taken any effectual proceedings for three successive Terms

A rule had been obtained in the early part of the Term by the Common Serjeant, calling on the Attorney-General to shew cause why the recognizance of bail in this case should not be vacated and discharged, for want of prosecution, on an affidavit, stating that the information was delivered over at the General Seal Day after Hilary, 1818, the defendant having been previously arrested and given bail—that in Easter Term following he pleaded, and notice of trial was given for the following Sittings, but was countermanded, and another notice was given for the Sittings after the following Trinity Term, when the cause was entered and called on for trial; but as there were only four special jurymen, and the Crown would not pray a tales, the cause was not tried—that another notice of trial was then given for the Sittings after Michaelmas, when the cause was not tried, for the same reason; and another notice of trial was given for the Sittings after last Hilary Term, and the cause was entered, but not tried, nor was the notice countermanded.

The Attorney-General, Clarke, and Walton now shewed for cause, that notice of trial had been given for the Sittings after Hilary Term, but the cause could not be brought on, on account of the absence of a material witness for the [558] Crown, who was expected to attend up to the last moment, which was the only reason why the notice had not been countermanded: and they submitted, that three Terms had not elapsed, under these circumstances, without an effectual proceeding.

The Court held that, in this case, it had been shewn to their satisfaction, that an effectual proceeding had been had within three Terms, and therefore they

Discharged the Rule:

But they stated, that if it could be shewn that there was reason for supposing that the notices were not intended to be followed up, they should not consider notice of trial and countermand a sufficient proceeding to save the discharge of the defendant's recognizance: nor if the not proceeding to trial accordingly were not accounted for.

End of Easter Term.

[559] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER. TRINITY TERM, 59 GEO. III. AND THE SITTINGS AFTER.

MEMORANDA.

In the preceding Vacation, Sir S. Shepherd, late Attorney General, was appointed Lord Chief Baron of the Court of Exchequer in Scotland.

Charles Warren, Esq. one of His Majesty's Counsel, was appointed Attorney General to His Royal Highness the Prince of Wales, and Chief Justice of Chester.

[560] GENERAL ORDER. [FROM THE EXCHEQUER CHAMBER MINUTE BOOK.] Thursday, 17th June 1819.—No cause can be put into the paper of twelve, till after the return of the subpoena to hear judgment.

Ordered, that in future, no cause be put into the paper of twelve, till after the return of the subpoena to hear judgment.

THE ATTORNEY GENERAL v. BEATSON AND ANOTHER. Friday, 18th June 1819.—The legacy duty on bequests of personal property in India, by will there, and administration granted under it there, is payable, if it be remitted to England, and applied by another administrator in Scotland, under administration granted in England.

[Distinguished, *Hay v. Fairlie*, 1826, 1 Russ. 117; *In re Bruce*, 1832, 2 Cr. & J. 436; 2 Tyrw. 475; *Attorney-General v. Forbes (or Jackson)*, 1834, 3 Tyrw. 982; 2 Cl. & F. 48; 8 Bligh (N. S.), 42. Referred to, *Attorney-General v. Hope*, 1834, 2 Cl. & F. 84; 1 Cr. M. & R. 541, 555; 4 Tyr. 899; 8 Bligh (N. S.), 51. Not applied, *Arnold v. Arnold*, 1837, 2 Myl. & Cr. 271. Treated as overruled, *Thomson v. Advocate-General*, 1845, 12 Cl. & F. 1.]

This information (filed for the recovery of certain duties imposed by the statutes respecting duties on legacies) came on to be tried before the Lord Chief Baron at Westminster, at the Sittings after Hilary Term, 1819, when a verdict was taken for the Crown for the sum of 8000*l.* subject to the opinion of the Court on the following case:—

William Hope, late of Madras, in the East Indies, merchant, in the information mentioned, a native of Scotland, having been domiciled at Madras aforesaid, for twenty years and upwards, made a will there, dated 26th January, 1819. He embarked on board the “*Jane Duchess of Gordon*,” on the 30th January, 1809, with his wife and family, and sailed from Madras for London, leaving his said will behind him at Madras, and in about the month of March following, the said vessel was lost at sea, and every person on board perished.

[561] The said William Hope was possessed of considerable personal estate at Madras and elsewhere in the East Indies. On the 19th July, 1811, the Supreme Court of Judicature at Madras granted letters of administration, with the will of the said William Hope annexed, to Gilbert Ricketts, esq. as Registrar of that Court, with the usual powers to demand and receive the credits of the testator and to pay his debts and legacies, and administer his effects in the East Indies. On the 13th February, 1812, administration, with the will annexed, was granted by the Prerogative Court of the Archbishop of Canterbury to James Murray, who was one of the residuary legatees mentioned in the said will of the said William Hope, and in the said information. The effects were sworn to be under 5000*l.* in the province of Canterbury. The said James Murray was born, and always domiciled in Scotland. In the month of February, 1812, the said James Murray executed a power of attorney to John Carstairs, of London, esq. to receive all monies due to him in Great Britain: and at the same time the said James Murray also executed a power of attorney to Messrs. Arbuthnot, De Monte and M'Taggart, of Madras, to settle all accounts, and to receive all monies due to him the said James Murray (as such administrator of the said William Hope), in the East Indies. Gilbert Ricketts, as administrator, collected the testator's assets in the East Indies, paid his debts and the legacies given to such of the legatees as resided in India, and paid over the balance to Messrs. [562] Arbuthnot, De Monte, and M'Taggart, as the attorneys of the said James Murray. James Murray died in Scotland on or about the 10th day of October, 1814, having made a will, dated the 7th day of September, 1813, and appointed the defendants executors thereof, and the said defendants proved the said James Murray's will in the Prerogative Court of the Archbishop of Canterbury, on the 25th of November, 1814. Between the month of February, 1812, and the month of October, 1814, effects

of the said William Hope, in India, to the value of 8000*l.* were collected and received as aforesaid, and remitted by the said Messrs. Arbuthnot, De Monte, and M'Taggart, by the orders of the said James Murray, from India, to Mr. Carstairs, the attorney and agent of and for the said James Murray, in England, and Mr. Carstairs remitted the said sum of 8000*l.* to the said James Murray in Scotland.

The said James Murray in his life-time did retain the said sum of 20,000*l.* so remitted from India to England, and from England to Scotland, as aforesaid, to and for his own use and benefit, under and by virtue of the said will of the said William Hope: and the said sum of 20,000*l.* was part of the residue of the personal estate and effects of the said William Hope, deceased. The said James Murray was a stranger in blood to the said William Hope.

If the Court should be of opinion upon the facts stated, that the said 20,000*l.* is subject to [563] the legacy duty, then the verdict entered for the Crown was to stand for the sum of 30,000*l.*; but if the Court should be of a contrary opinion, then a verdict to be entered for the defendants. Either party to be at liberty to turn this special case into a special verdict if the Court should think proper.

Shepherd, for the Crown, relied upon the case of *The Attorney General v. Cockerell* (ante, vol. i. p. 165).

Campbell, for the defendant, endeavoured to distinguish the present case, as the special verdict found expressly, that the testator was domiciled in Madras, and administration was granted there: and Murray, who was domiciled in Scotland, had received the money, not as administrator, but as legatee; and that, although he took out administration here, it was not necessary that he should do so. In the case cited, General Duff having brought the assets to England, it became necessary that the other executor in England should prove the will here.

The Court were of opinion that Murray was an administrator in fact and in law; and therefore, and because the testator's personal estate had been applied in England, they gave

Judgment for the Crown.

Application being made on the part of the defendant, to be permitted to turn the case into a special verdict, the Court refused it.

[564] *GREENWAY v. CARRINGTON* *. Monday, 21st June 1819.—If a small part only of a plaintiff's demand be on a bill of exchange, and the bulk of the debt be for goods sold and delivered, for part of which the bill was given, the Court will not bring back the venue (which had been changed on the usual affidavit) on the ground of the action being brought upon a bill of exchange.

The plaintiff declared against defendant as the drawer of a bill of exchange, and also for goods sold and delivered.

Richards having, on a former day, obtained a rule to change the venue upon the usual affidavit:

Jones now moved to bring it back, upon the ground of the action being upon a bill of exchange; and he cited *Ward v. Corlough* (Barnes, 480), *Rice v. Finall* (ib. 483), *Evans v. Weaver* (1 Bos. & Pul. 20), and *Whitburn v. Staines* (2 ib. 355), in which last case the Court of Common Pleas held that the venue could not be changed on an award.

[Wood, Baron, said that case was not in point, and expressed considerable doubt of it as a general proposition; adding, that in the cases there referred to, the whole of the demand may have been founded upon specialty: and he observed, that it would be most unreasonable to hold that the venue could not be changed where only a small part of the demand was founded on a bill of exchange.]

[565] It appeared by the particulars of the plaintiff's demand, that the sum claimed for goods sold and delivered was nearly treble the amount of the sum for which the bill had been drawn; and that the bill had in fact been given in part satisfaction of the original debt for the goods sold.

Per Curiam. This cause cannot be brought within the general rule, that the venue in an action on a bill of exchange cannot be changed. Here it clearly appears, that only a part (and a very inconsiderable part) of the sum sought to be recovered

* Ex relatione Mr. R. B. Comyn.

is due upon the bill : and that in point of fact the bill has been given upon the original demand, viz. for goods sold and delivered : so that this must be substantially considered as an action for goods sold and delivered. It is not enough to say that part of the demand arises upon a bill of exchange : otherwise a plaintiff, by inserting a count upon a bill, might defeat the defendant of his right to change the venue.

Jones, therefore, took nothing by his motion*.

[566] IN THE EXCHEQUER CHAMBER. [ERROR FROM THE COURT OF EXCHEQUER.]

ARGUED AT SERJEANTS' INN, CORAM ABBOTT, Lord Chief Justice, and DALLAS, Lord Chief Justice, C. B.

LANE AND ANOTHER v. CROCKETT. Tuesday, 22d June : Tuesday, 11th May 1819. —

In an action against a sheriff, for removing goods seized under a fieri facias, without paying the landlord a year's rent, under the statute of 8th of Anne, wherein the plaintiff recovered a verdict, the Court refused a new trial, on the ground that the goods having been afterwards returned, the plaintiff had not been damnified, because while they were in the custody of the law, the landlord could not distrain them.—The want of an allegation in the declaration, that the sheriff had notice of rent due, is not the subject of a motion for a new trial, but should be moved in arrest of judgment.—The Court will not permit a motion to be made in arrest of judgment, after the expiration of the first four days of the Term next after the trial of the cause, and a rule nisi for a new trial has been disposed of. The motion should be made in the alternative in the first instance. The common allegation of "the defendant well knowing the premises," in the declaration, will, after verdict, cure the omission of an averment, that the defendant had notice of rent being in arrear.—So held on a writ of error founded on that objection. Quere, whether any other allegation of notice be necessary?

This was an action brought against the Sheriff of Staffordshire, by the plaintiffs, who were the landlords of George Emery, for a removal of goods &c. taken under a fieri facias on behalf of a judgment creditor, without paying the plaintiffs a year's rent, according to the provision of the statute of the 8th Anne, ch. 14.

On the trial, the Jury found a verdict for the plaintiffs, on the first count of the declaration.

[567] In Michaelmas Term, 58 Geo. III., Jervis had obtained a rule to shew cause why there should not be a new trial, on the ground that the sheriff, having been proved to have returned the cattle which had been seized, to the premises from which they were taken, the removal was *damnum absque injuria*, as the landlord might then have distrained them—and that as the declaration had not only not averred that the sheriff had notice before the removal, that any rent was due, but had expressly negatived it, the action was not maintainable.

Hilary Term 1818. — Taunton now shewed cause, and

Jervis and Puller endeavoured to support the rule.

The Court held, on the first point, that as the goods which had been removed could not be distrained while in the custody of the law, the returning of them to the premises had not exonerated the sheriff.

On the second point, they determined, that the question of the plaintiffs not having brought themselves within the statute, by alleging that the sheriff had notice, could only be raised by motion in arrest of judgment, which as it had not been made within the first four days of the next Term after the trial, as it might have been by moving it in the alternative when the rule nisi was granted—could not now be made; and therefore they

Discharged the Rule.

[568] The defendant afterwards brought a writ of error on the second point, and being assigned as error, it now came on to be argued—by

Puller, for the plaintiff in error, who contended that the first count in the declara-

* Vide *Baskerville v. Cooper*, ante, vol. i. p. 374.

tion not having any allegation that the defendant had notice, was insufficient. That count stated the facts in the usual manner, but assigned the breach as follows:—Yet the defendant, then being sheriff &c. as aforesaid, well knowing the premises, but not regarding the duty of his said office, nor the statute &c. to deceive and defraud the plaintiffs, in this respect, of the said arrears of the said rent so due to them as aforesaid, and the remedy of the said plaintiffs for the recovery thereof, under colour and pretext of the said writ, on &c. wrongfully &c. and without the knowledge of the said plaintiffs, removed, drove, and carried away the said cattle &c. so taken as aforesaid, from and out of the said tenements and premises, immediately after the said goods &c. were seized and taken by the said defendant, the sheriff, in execution, and before the said plaintiffs could give notice to the said defendant of the said rent so being due and in arrear from the said tenant to the said plaintiffs as aforesaid, and without paying and satisfying the said plaintiffs the said arrears &c. contrary &c. (alleging that they had not since been paid any part thereof), although the said plaintiffs afterwards, and within a reasonable time after the said goods &c. were so seized &c. and before the said defendant had [569] sold or disposed of the same, and whilst they were in his possession, to wit, on &c. gave notice to the said defendant of the said rent being due and in arrear &c.

Upon this declaration, where there was not only no allegation of the defendant having had notice of the rent being in arrear before the removal of the goods, but an express negative of any notice till after such removal, it was urged, that the verdict could not be supported. *Waring v. Dewberry* (1 Str. 97).

ABBOTT, Lord Chief Justice. But the declaration also alleges, that he had knowledge of it. The words, "well knowing the premises," will be sufficient for the purpose of that allegation; for it must be remembered, that this is after verdict.

DALLAS, Lord Chief Justice, C. B. The statute does not in terms require notice to be given, and the sheriff may, and often does make himself a wrong-doer, where no notice has been given.

The case of *Palgrave v. Windham* (ib. 212) being mentioned,

ABBOTT, Lord Chief Justice, observed, that not fully understanding the statement of that case in the report, he had looked into the record, [570] and found that notice was in fact given to the sheriff, and that the want of notice there spoken of, meant want of notice to the plaintiff in the action on which the execution was sued out. But (observed his Lordship) the allegation of "the defendant well knowing the premises," is sufficient in this case: for it must refer to the whole subject-matter of the declaration. If the present objection could prevail, the object of the statute might often be entirely defeated.

The Court of Error now affirmed the judgment.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER. [ERROR FROM THE COURT OF EXCHEQUER.]

ARGUED AT SERJEANTS' INN, CORAM ABBOTT, Lord Chief Justice, and DALLAS, Lord Chief Justice, C. B.

RAMSBOTTOM AND OTHERS v. THE KING. Tuesday, 22d June; 14th May 1819.—

An inquisition taken on a writ of extent finding A. B. indebted to C. D. and the other partners and proprietors of a certain society or company called the Kent Insurance Company, is sufficiently certain, without naming the individual members of the company, and although they are not incorporated. Judgment of the Court of Exchequer in the case of *The King v. Ramsbottom* (ante, vol. v. p. 447), affirmed.

The plaintiffs having brought a writ of error from the judgment of the Court of Exchequer, [571] discharging the rule to shew cause why the judgment in the cause of *The King in Aid of the Kent Insurance Co. against Ramsbottom and Others**, should not be arrested upon certain errors assigned, which were in effect the same as the objec-

* Ante, vol. v. p. 447.

tions formerly taken to the record, and upon which the original motion was founded. The errors now came on for argument.

The inquisition, as far as is material, is already set out in the case of *The King v. Ramsbottom*.

Parke, for the plaintiffs, insisted, that for those errors upon the record, the judgment of the Court of Exchequer ought to be reversed. He contended, as before, 1st. That the inquisition was bad for uncertainty in not stating the names or other sufficient designation of the persons to whom the debt was found to be due.

2dly. That the writ of extent against Larking and Hougham was insufficient; because the recital does not agree with the mandatory part; and

3dly. That the inquisition was void as not being authorised by the writ, in substance directing such debts to be found as are legally due to Larking and Hougham, as trustees to the company, whereas the inquisition found the debt to be legally due to the company.

[572] On the first and principal error assigned—the uncertainty of the inquisition—in addition to the arguments urged on the occasion of the motion, and the authorities then referred to, the principle laid down in Coke upon Littleton, (page 303) was made the foundation of the argument now used, that “a count or declaration which anciently, and yet is called narratio, ought to contain two things, viz. certainty and verity, for that is the foundation of the suit whereunto the adverse party must answer, and whereupon the Court is to give his judgment. *Certa debet esse intentio & narratio, et certum fundamentum, & certa res que deducitur in judicium.* But it must be understood that there be three kinds of certainties, first, to a common intent, and that is sufficient in a barre which is to defend the party, and to excuse him. Secondly, a certain intent in general as in counts, replications, and other pleadings of the plaintiff, that is to convince the defendant, and so in indictments &c. Thirdly, a certain intent in every particular as in estoppels;” and to that doctrine was applied the reasoning of the Lord Chief Justice De Grey, in delivering the opinion of the Judges in the House of Lords, in the case of *The King v. Horne* (Cowp. 682).

The following cases were also cited on the part of the plaintiffs in error: *The Protector v. Cutler* (Hardr. 58), where it was contended, that an inquisition [573] ought to be as certain as an indictment or declaration, and that in an inquisition, finding a lease for sixty years, as the beginning and end of the term were not found, which it was said ought to be, the party grieved could have no remedy, because there was no certainty that he could plead to avoid it—(5 Rep. 120, c. 3. Hen. VII. 11, 12. Plowd. Com. 202. Co. Inst. 303, are there adverted to)—*The Protector v. Cory and Another* (Hardr. 59), where cases are mentioned of inquisitions being held ill for uncertainty in not having the particulars more fully set out; an *Anonymous case* in Moore (Moore, 8, c. 28), where the sheriff had returned that he had extended a tenement of twenty shillings value, and it was held, that “tenement” was not sufficiently certain; *Bateman v. Elman* (Cro. Eliz. 866), where the Court held, that a finding that the plaintiff had delivered divers parcels of plate, was error for uncertainty, because it could not be helped by intendment; *Fenn v. Duce* (1 Rol. Abr. 58), *Barnes v. Prullin* (Siderf. 396. 1 Ventr. 4, S. C. called *Barnes v. Braddel*), *Hunt v. Jones* (Cro. Jac. 499) in all of which cases the judgment was reversed, because the words in the declaration were held to be too general; and in *Hartley v. Herring* (8 T. R. 130), Lord Kenyon, when those cases were cited, observed, in deciding for the plaintiff there, that he did not wish to shake their authority. The other cases cited in the Court [574] of Exchequer, in arguing the motion in arrest of Judgment, were now also relied on*, and the same arguments in substance were again urged in support of the objection of the uncertainty of the inquisition.

The other objections were also put on the same grounds, and the same arguments

* *Rushton's case*, 2 Leon. 121. *Wint v. Essington*, 2 Ld. Raym. 1410. S. C. Str. 637; and Fort. 377. *Bertie v. Pickering*, 4 Burr. 2455. *Howd v. Reynolds*, 1 Ventr. 272 and 329. *Copleston v. Piper*, 1 Ld. Raym. 191. *Spalding v. Mace*, 6 T. R. 635. *The King v. Harrison and Co.*, 8 T. R. 508. *Cook v. Cor*, 3 M. & S. 110. *The King v. Patrick and Pepper*, 1 Leach, Cr. L. 287 (3d edit.). *The King v. Sherrington and Bulkley*, 2 Leach, Cr. L. 578.

were used : and the authorities † then cited were now again applied in support of the assignment of those errors also.

Denman, in support of the judgment, contended, as to the minor objections, that there was no substantial difference in the distinction which had been taken ; and that such a direction to find debts as was given by the writ would authorise the finding, which had been returned : and that the recital of the debt did not controul the mandatory part of the writ, and was not binding on the Sheriff or the Jury.

On the objection of the uncertainty he submitted that, in more modern times, and since [575] the old cases which had been cited in support of that error, a more liberal mode of pleading had been allowed, and the ancient strictness no longer prevailed, at least to a further extent than to require that there should be a sufficiently convenient certainty in the record, so that it may appear to the party and the Court, what the subject-matter of the proceeding is, to enable the one to defend himself, and the other to give judgment. Of the cases which had been cited where judgment had been set aside for want of sufficient particularity, he observed, that none of them were founded on the uncertainty of the parties, except those of *The King v. Patrick and Pepper*, and *The King v. Sherrington and Bulkley*, and those he distinguished as being criminal cases, and therefore not applying on a question of convenient certainty in a civil suit ; —and in this case there was such certainty, or at least as it was matter peculiarly within the knowledge of the plaintiffs in error, it lay with them to produce a greater degree of particularity upon the record, by pleading with proper averments as was done in the record of extent, in the case of *The King v. Sanderson* (Wightw. 54). In this case the plea admits the knowledge of the plaintiffs. The real question he submitted was, whether the Kent Insurance Company were recognizable in law as obligors.

Parke in reply, insisted that a party seeking to recover a demand was bound to put sufficient [576] matter upon the record, to enable the defendant to protect himself by the recovery from any future suit for the same debt : and that has not been done here, because, if any of the unknown members of this unincorporated company should hereafter sue the defendant, this recovery could not be pleaded in bar : and that was the true ground upon which the necessity of sufficient certainty was put in the cases of *Bertie v. Pickering*, and *Wiatl v. Essington*. In this case the Crown is the actor, and has no right to set up a vicious record, which may be productive of injury to third persons. He denied that the plea (the general issue) admitted a knowledge of the debt : on the contrary, it traverses the debt and all the allegations of the charge.

The case stood over for judgment till the first error day of this Term, when

The Lord Chancellor, attended by the Lords Chief Justices of the other Courts, and the Court of Exchequer, pronounced the Judgment affirmed.

[577] IN THE EXCHEQUER CHAMBER. [ERROR FROM THE COURT OF EXCHEQUER.]

ARGUED AT SERJEANTS' INN. Coram Abbott, Lord Chief Justice, and Dallas, Lord Chief Justice, C. B.

DURANT v. TITLEY. Tuesday, 22d June 1819.—A deed made between husband and wife, and a third person (a trustee) with a covenant by the husband to pay such third person an annuity, in case the wife should live separate and apart from her husband, and should take one of her children to reside with her, is (semble) void, as being a deed made in contemplation of a future separation at the pleasure of the wife, and therefore contrary to the policy of marriage.—Semble, a plea to an action of covenant on such a deed, that the wife afterwards lived and cohabited with the defendant for a long space of time, and then left him against his will and consent, and ceased to live or cohabit with him since, is a good plea.—Judgment

† 16 Vin. Abr. tit. Office or Inquisition, C. *Anon.*, 1 Ventr. 259. *Patten v. Perbeck*, Salk. 563. S. C. 1 Ld. Raym. 346, 718 ; and 12 Mod. 355.

for plaintiff, on a demurrer to such a plea, by the Court of Exchequer, reversed, on a writ of error.

[Referred to, *Scholey v. Goodman*, 1823, 8 Moore, C. P. 350; 1 C. & P. 36; 1 Bing. 349; *Hudley v. Westmeath (Marquis)*, 1827, 6 B. & C. 200; 9 D. & R. 351. Distinguished, *Jee v. Thurlow*, 1824, 2 B. & C. 547; 4 D. & R. 11.]

This was an action of covenant, on a deed of separation between the plaintiff in error and Mary Anne his wife, of the one part, and the defendant in error of the other part, bearing date the 22d November, 1809, whereby (reciting the marriage and subsisting differences) the plaintiff covenanted for himself, his executors and administrators, with the defendant, to pay him an annuity of 500l. during the joint lives of the plaintiff and his said wife, in case she should live separate and apart from her husband, and should take one of her children by her said husband to live with her: and it was also agreed between them, that it should be lawful for her, whenever she [578] should live apart from her husband, to take any one of her children by her husband which she should fix upon, to reside and live with her, except the eldest.

The declaration averred, that on the 8th May, 1817, the wife had discontinued to reside and live with her husband, and did live separate and apart from him, and had ever since continued to do so, and that she had at all times since she had so lived separate and apart from her husband, been ready and willing to take one of the children by her husband, not being the eldest, to live with her; and that she did afterwards fix upon one of such children, named Anguish, and did request her husband to permit the said child to reside and live with her, and that he refused to permit the said child so fixed upon by her, to reside and live with her.

The defendant pleaded (protesting that the said indenture and the said declaration were bad in law), that after the making of the said supposed indenture, in the said declaration mentioned, and before the commencement of this suit, the said Mary Anne lived and cohabited with the said George for a long space of time, to wit, for the space of seven years and upwards, from the time of the sealing and delivering of the said indenture, and afterwards, to wit, on the said 8th day of May, 1817, the said Mary Anne, without the consent, and against the will of the said George, quitted and left the said George, and had [579] ceased from thence thitherto to live or cohabit with the said George: and the defendant further pleaded, that the said Anguish, the said child in the said declaration mentioned, was not born at the time of the sealing and delivering of the said indenture, but long afterwards.

To that plea the plaintiff demurred.

28th Jan. 1818. Hilary Term.—The Court of Exchequer having given judgment for the plaintiff, the defendant brought a writ of error: and the case now came on for argument before Abbott, Lord Chief Justice and Dallas, Lord Chief Justice (C. B.), in Serjeants' Inn, at the Chambers of the Lord Chief Justice.

Peake, Serjeant, in support of the errors assigned, contended that the action could not be supported: or if it could, that the plea was a good defence: for that

1st. The deed being made in contemplation of a future separation of a husband and wife, at the pleasure of the wife, it was contrary to the policy of marriage, and void in law: and

2dly. That as the deed contemplated a separation in the state in which their family was at the time when it was made, and in such an event provided for the maintenance of the wife and one of the then existing children, it did not therefore apply to the event which had happened, of the wife leaving her husband, and taking with her an after-born child.

[580] The case of *Lord Rodney v. Chambers* (2 East, 283), he admitted, was an authority in some respects in favour of the validity of such a deed as this: but of the judgment of the Court in that case, he observed that it had been reluctantly given, professedly under the pressure of authority: and although this sort of contract was there stated to be against the policy of the law. Since that determination, he submitted the principle and the general application of it had been much narrowed, and first by what fell from Mr. Justice Lawrence, in the subsequent case of *Chambers v. Cudfield* (6 East, 252), who said, in allusion to *Rodney v. Chambers*, "In that case there was an averment that the separation was with the consent of the trustees. We thought there was nothing illegal in the parties agreeing to refer the question, what

was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. The Court therefore only decided in that case, that a covenant for separation, and separate maintenance, with the consent of the trustees, was good: not that a covenant was good generally, that a wife might separate herself from her husband whenever she pleased; for that would be to make a husband tenant at will to the wife, of his marital rights." So far that case is an authority in favour of the plaintiff in error. In *Marshall v. Rutton* (8 T. R. 545),—where it was held, that a married woman separated from her husband by deed, with separate maintenance, was not liable to be sued as a feme sole—Lord Kenyon, [581] delivering the opinion of the whole Court, said, "That (the agreement to live separate) is a contract supposed to be made between two parties, who, according to the text of Littleton, s. 168, being in law but one person, are on that account unable to contract with each other: and if the foundation fail, the consequence is, that the whole superstructure must also fail. This difficulty meets the plaintiff in limine. If it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact could be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve: and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them, in others, subject to the consequences of being married: and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument, some of those difficulties were pointed out, and it was asked, whether, after such an agreement as this, the Temporal Courts would prohibit, if either of the parties were to sue in the Ecclesiastical Court for the restitution of conjugal rights? Whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction? Whether they could be witnesses for and against each other? Whether they could sue and take each other in execution? And many other questions—[582]—tions will occur to every one, to which it will be impossible to give a satisfactory answer. For instance, it may be asked, How it can be in the power of any persons, by their private agreement, to alter the character and condition which by law results from the state of marriage, while it subsists, and from thence infer rights of action, and legal responsibilities, as consequences following from such alteration of character and condition? or how any power short of that of the Legislature, can change that which by the common law of the land is established as the course of judicial proceedings?" In *Beard v. Webb* (2 Bos. & Pul. 93), on a question whether a woman could be sued in the Courts of Westminster Hall, as a feme sole trader, on the custom of London, Lord Eldon adopted the same line of argument: and that case was decided before the determination of *Marshall v. Rutton*. In *Wilkes v. Wilkes* (2 Dick. 791), Sir Thomas Clarke, Master of the Rolls, refused to decree that the husband and wife should live separate, according to articles of separation, though he carried other parts of the deed into execution. In *Fletcher v. Fletcher* (3 Bro. C. C. 619, in notis), Mr. Justice Buller, sitting for the Chancellor, refused to decree a specific performance of articles of separation, where the wife had returned to her husband, and cohabited with him for some days, and (dismissing the original bill) upon a cross bill, ordered the articles to be delivered up and cancelled. The [583] reasoning of the Lord Chancellor (Lord Rosslyn), in pronouncing the decree in the case of *Legard v. Johnson* (3 Ves. 358), is in many respects very applicable to this case, and his comments on the various authorities, also tend to shew that, in his opinion, deeds of this nature are not to be encouraged, and that Courts of Equity are not competent to give effect to such deeds, as against the husband.

The doctrine upon which the decree in that case was founded, and all the cases are there brought under consideration, is very material as applying to the present. The Lord Chancellor observes, in delivering his reasons, "The first is a general question, whether, taking it in the largest extent, a suit in Equity is competent to give effect, by the aid of this Court, to a deed of separation between husband and wife? To state the case as a general question fairly, I must suppose articles of separation, from discordant tempers, without reproach either on the one side or the other. Can I, under such circumstances, find a case to entitle the wife to a personal decree against the husband? I cannot state the transaction to be higher in point of law than a personal contract *stante matrimonio* between the husband and wife; but I must go

farther, and consider that contract a separation by which they exclude and exonerate one another, as far as they can, from the rights and duties arising from matrimony. The common law will not entertain a suit upon contract by a wife against her husband. Such a [584] contract is incapable at law of producing any action. The Ecclesiastical Court, according to the jurisdiction of this country, has exclusive cognizance of the rights and duties arising from the state of marriage. Therefore I am completely at a loss to discover an Equity to control the common law, and admit a suit between husband and wife upon a personal contract (the case I am now putting) and supersede the exclusive jurisdiction of the Ecclesiastical Court by entering into the consideration of it. In looking through the cases from the time the reports commenced to be tolerably accurate, soon after the Restoration, when the jurisdictions were again established, I find that not an idea of that kind was entertained in that famous case of *Whorwood v. Whorwood* (a), in any account of it. Soon after the civil war there had been a decree by the Lords Commissioners. There being no Ecclesiastical Court, the jurisdiction by some way or other got here. After the Restoration, when the jurisdictions were established again, the decree of the Commissioners was to be reviewed. Lord Clarendon was assisted; and after great discussion, it ended in throwing the case back for the decision of the competent jurisdiction. The next case is *Mildmay v. Mildmay*, (1 Vern. 53. 2 Ch. Ca. 402) soon afterwards: Lord Nottingham would not entertain any jurisdiction upon a contract between husband and wife; and in *Hincks v. Nellthorpe* (1 Vern. 204) a demurrer was put in to the discovery, upon the [585] ground that it was not a matter properly examinable or relievable in this Court: and the demurrer was allowed, and the jurisdiction disaffirmed. In the opinion Lord Hardwicke gave in *Head v. Head* (3 Atk. 295, 517), there is the same opinion of the defect of jurisdiction in the general case in this Court: and he observed, that where the Court had interfered, they had very unwillingly acted at all. Those cases to which he alludes, where the Court had acted at all, stand under three heads: where a third party had intervened, and it was not only between the husband and wife. A third party binding himself to indemnify the husband against the debts of the wife, the interest of that party raises a consideration for that party, between whom and the husband there might be a contract, and with regard to whom he might bind that party to himself. That was the case of *Seeling v. Craven* (2 Vern. 386). The circumstances there were a little favorable. The third party was father to the wife. He bound himself to indemnify the husband. The next case, *Augier v. Augier* (1're. in Ch. 496), is governed by the same circumstance; but other circumstances were also interposed, which in point of expedience recommended the case considerably to the attention of the Court. A suit for separation had proceeded in the Ecclesiastical Court for bad usage &c. That depending, an interposition of friends had taken place. The suit was compromised in the Ecclesiastical Court; and upon the consideration of that com-[586] promise, there being also a third party there, the decree directed the husband to pay conditionally, and a full security was given to the husband. Certainly neither of these cases can be quoted as an authority that this Court, upon the general and simple question between husband and wife, can entertain a suit upon a contract in which the wife only claims a separate maintenance against the husband. The other cases which I do not state are, where a fortune accrued to the wife after separation, and an application was made to this Court upon a very plain ground, that some provision should be made for her out of a fortune coming under those circumstances. The principle is plain, if it happens from the situation of the parties that they cannot enjoy in common that which would maintain both: it would be very hard that the party from whom it moves should lose, and the other should gain the whole benefit. Another case, in which the Court may take into its consideration the rights and duties arising from the relation of marriage, is where the property is only to be sued in this jurisdiction—where a trust is created, and there is no coming at it by the common law. That was the case in *Sidney v. Sidney* (3 P. Wms. 269), and the other case quoted in the note upon that case, where, as a ground to give effect to articles made upon marriage, this Court considered the estate vested according to the articles; and the husband having used the estate as he ought not to have done, and as he could not have done in point of law, if the [587] articles had been completely executed prior to the marriage." His Lordship also observed in the same case, that

(a) 1 Rep. Ch. 118. 1 Ch. Cas. 250. Rep. Temp. Finch, 153

he had met with no case except that of *Guth v. Guth* to entitle the Court to hold such a jurisdiction: and that before he should decide according to that case, he should wish for a further account of it, as his opinion inclined against it. In the case of *Lord St. John v. Lady St. John* (11 Ves. 526), the Lord Chancellor disapproves of the cases of *The King v. Mord* (1 Burr. 542), *Guth v. Guth* (3 Bro. C. C. 614), and *Lord Rodney v. Chambers* (2 East, 283), and all the dicta favouring the result of those cases: and he considers those of *Beard v. Webb* (2 Bos. & Pul. 93) and *Marshall v. Rutton* (8 T. R. 545), as good law. His Lordship there gives a strong intimation of his opinion, that such contracts are not binding, because not permitted by the law, and that they ought not to be the foundation of an action or suit in Equity. In the recent case of *Worrall v. Jacob* (3 Meriv. 268), the Master of the Rolls declared that the Court would not carry into execution articles of separation. Upon all these authorities he submitted the deed of separation in this case was void. Then he contended that the cases, which appeared to support the decision in *Lord Rodney v. Chambers*, were distinguishable from the present. The case of *Seeling v. Crawley* (2 Vern. 386) was that of an agreement between the husband and the wife's father for returning the wife's portion (for a valuable consideration), moving from the father. In *Nicholls and Dancers v. Dancers* (2 Vern. 671) there was nothing applicable to the determination of a question, whether a deed of separation were valid: and in *Oreodon v. Oreodon* (ibid. 493) the decree was merely for maintenance out of the marriage portion, where the wife had been compelled by the husband's cruelty to separate from him, till cohabitation. The case of *Auger v. Auger* (Pre. in Ch. 496) was expressly denied by the Lord Chancellor, in making it, to be a decree of alimony and separation. He said it was merely to supersede the necessity of a suit for alimony—merely, in short, in furtherance of what the law would have compelled in case of ill treatment of the wife by the husband: and as to *Gawden v. Draper* (2 Ventr. 217) the Court said in the principal case (*Lord Rodney v. Chambers*), that that decision did not go the length contended for.

On the second point, he submitted, that if such a deed were valid, under any circumstances, it would not be so under those of this case, as children were born after the deed was made: which with the subsequent cohabitation would render the deed void: and that doctrine was deducible from the case of *Fletcher v. Fletcher*. Upon the whole therefore he submitted that this judgment ought to be reversed.

Puller, in support of the judgment, submitted, that this was a pure question of strict law: and that it was fully and solemnly settled by the case of *Lord Rodney v. Chambers*, after the most elaborate discussion, that the legality of such a deed had been long established by a series of authorities not to be shaken—that this sort of contract was in effect nothing more than a provision for any other separate property of the wife, to be exclusively enjoyed by her. Having very particularly adverted to the judgment of the Court in that case, he observed, that the legality of the sort of contract being there so completely recognized, the principle could not be impugned by any of the dicta which had been cited from some of the cases in the Court of Chancery. In this case it would be most material to keep in mind, that in the deed in question the parties treated, through the medium of a trustee, a circumstance which had been in all the cases considered as operating strongly in favour of its establishment: and the Courts of Equity have held themselves bound when a trustee had been made party, where otherwise they might not. The question however would depend upon the weight of authority on either side. There can be no doubt that this sort of contract was considered to be binding in law down to very recent time, and its legality was fully recognized in Courts of Equity. The case of *Guth v. Guth* is a very strong authority to shew that, as against the husband, a Court of Equity “will enforce an agreement for a separation upon a bill filed by the wife, though the husband has declared his readiness to take her home again.” The case of *Fletcher v. Fletcher* appears even by the very short note of it to have been one where the husband had made out a strong equitable case in his favor, which would be all ways a sufficient answer to a suit in a Court of Equity. In this case however the defendant in error stands on the covenant in the deed of the defendant in a Court of Law: and the equitable decisions which have been cited in opposition to this claim, do not affect the proposition on which it is founded, that such covenants may be recovered upon at law: and he relied upon the cases cited in that of *Lord Rodney v. Chambers*, as well as the principle case, from all of which, he contended, the authorities cited, as militating with that doctrine, were entirely distinguishable, not only as being cases proceeding

upon the equities of the parties, but in their facts and circumstances. He further urged, that it was incumbent on the plaintiff in error to shew that the contract was illegal, in order to avoid it; and that the question should be considered as if there had been a decree of the Ecclesiastical Court for separation propter sevitiam. In *Beard v. Webb* and *Marshall v. Rutton* the question was, whether the contract superseded the authority of the Ecclesiastical Court? And those cases could not be applied to a question of validity of the contract. He therefore submitted, that the judgment of the Court of Exchequer should be affirmed.

The opinions of the two learned Chief Justices, before whom the case was argued, having been in the mean time signified by them to the Lord Chancellor the Court of Error on this day

Reversed the Judgment.

[591] IN THE EXCHEQUER CHAMBER. [ERROR FROM THE COURT OF EXCHEQUER.]

ARGUED AT SERJEANTS' INN. Coram Abbott Lord Chief Justice, and Dallas, Lord Chief Justice, C. B.

COURT *v.* PARTRIDGE AND WIFE, Administratrix, &c. Tuesday, 22d June 1819.—

Counts on promises made to an intestate may be joined with counts on promissory notes, given to the administrator, as administrator, since the death of the intestate, because, where when recovered, the amount would be assets.—Judgment on that ground affirmed in error.

The defendant, in this case, against whom judgment was given on the demurrer, in the Court of Exchequer, brought a writ of error upon that judgment, which was argued by

Littledale, on the errors assigned, and by

Chitty, in support of the judgment of the Court below.

[The arguments and authorities relied upon on either side are fully stated in the report of the original discussion upon the demurrer.]

The Court now

Affirmed the Judgment.

[592] ROBINSON *v.* LYALL. Wednesday, 16th June, 1819.—The owner (in England) is liable for money advanced to the master at his request for the necessary use of the ship, after her arrival in an English port; nor is the consent of the owner necessary to establish his responsibility.—Nonsuit—on that ground of objection—set aside, and verdict entered for plaintiff, subject to an award of what should be found to be due for the necessary use of the vessel.

[Referred to, *Beldon v. Campbell*, 1851, 6 Ex. 886, 890; *The Karnak*, 1868, L. R. 2 Adm. & Eccl. 303; L. R. 2 P. C. 505.]

The plaintiff, a ship chandler at Portsmouth, brought the present action against the defendant, a ship owner in London, to recover a sum of money, furnished to the master to pay seamen's wages and other debts, contracted by the master for necessaries for the use of the ship, at the request of the master, whilst in the port of Portsmouth, upon her release from quarantine, on her return to England, after an absence of four years and a half, during which she had been hired in his Majesty's Transport Service. Some of the debts at Portsmouth so discharged by the plaintiff were contracted on the outward voyage.

It was in evidence on the trial of the cause, before Mr. Justice Holroyd and a special Jury, at the last Assizes for Hampshire, that the ship having received the orders of the Transport Board to proceed from Portsmouth to Deptford, the master was obliged to have recourse to the plaintiff for money to pay the seamen's wages &c., Portsmouth being a port of discharge, and to pay tradesmen's bills, and the plaintiff advanced the

* *Partridge and Wife v. Court*, ante, vol. v. p. 412.

money for which the action was brought : and it was proved by the master (who had been released) that it had been applied to the use of the ship.

It was objected at the trial that these were voluntary advances in England : and that the [593] master could not render the owner liable even for necessities without his consent : and upon that objection the learned Judge nonsuited the plaintiff, giving leave to move to set it aside and enter a verdict for the defendant, if wrong in point of law.

Cause was now shewn, against a rule which had been obtained for that purpose, by

Gaselee and Carter, who contended, that the money having been proved to have been advanced by the plaintiff for the use of the ship, and so applied, the plaintiff was entitled to recover : citing *Pecker v. Busher* (1 Stark. N. P. R. 27), in which Lord Ellenborough ruled that the owner is liable for goods and money supplied to the captain for the necessary use of the vessel, and that the master was a competent witness to prove the plaintiff's case (*Evans v. Williams*, 7 T. R. 481, n.), and he had besides been released.

Pell, Serjt. and E. Lawes, endeavoured to support the nonsuit, submitting, that although in a foreign port an owner would be liable for goods furnished for the use of the vessel through the master : yet if furnished in an English port he would not : the reason being that the liability in the former case was founded on the necessity of the thing : but that in the latter, where there was no such necessity, the owner should be applied to, and nothing but his orders or consent would make him liable.

[594] The Court, holding the owner liable for all such money as had been advanced necessarily, made the

Rule absolute—for setting aside the nonsuit :

The verdict to be entered for the plaintiff for such sum as should be awarded to be due for seamen's wages.

EX PARTE THE INHABITANTS OF THE PARISH OF HENLLAN (DENBIGHSHIRE), IN THE MATTER OF AN INSUPER, FOR ARREARS OF TAXES IN THE PARISH. Saturday, 19th June 1819.—If there be two collectors of taxes appointed under the 43d. Geo. III. c. 99, s. 13, for a single parish, by the Commissioners, one for one division of the parish, called the Upper Parish, and one for another, called the Lower Parish, and they accordingly collect the taxes separately from the several inhabitants of their respective divisions—in case of a deficiency in the amount of the taxes collected, through the misconduct of either, the whole parish must be re-assessed, and not the particular district the collector of which has misapplied the money, and from the collection of whose taxes the deficiency arises : although the taxes of other division have been collected and paid over to the receiver-general, the appointment being held by the Court to be considered as one appointment of two for the parish, which would be valid under the act, and not of one for each subdivision, which would be invalid—the converse of the decision in the case of *Barrs v. Dighm and Others*, 1 Bos. & Pul. N. R. 281.—If affidavits run to a very impertinent and unnecessary length, the Court will make the party filing them pay a proportionate part of the costs.

Clarke had obtained a rule calling on the Attorney-General to shew cause why the Commissioners for the affairs of Taxes, acting for the division of Isaled, in the county of Denbigh, in the said order mentioned, should not proceed to make a re-assessment upon the parish of Henllan Isaf, otherwise Lower Henllan, of the several sums of 39l. 19s. 8d. for land-tax for 1815 : 299l. 9s. 8d. assessed taxes for 1815 : 212l. 10s. 4d. for [595] property tax for 1815 : 47l. 7s. 10d. for land-tax for 1816 : and 267l. 17s. 4d. for assessed taxes for 1816, the amount of the deficiencies of Owen Owens, collector of Lower Henllan, of the several sums of money before-mentioned, in respect of the several taxes for the aforesaid : and why the assessment, by mistake called a re-assessment of the several sums made by the Commissioners, about the 25th of September last, upon the whole of the parish of Henllan, including the two parishes or places called Lower Henllan and Upper Henllan, should not be set aside and vacated : and it was ordered, that service of the said order on the clerks of the said Commissioners for the affairs of Taxes, acting for the said division of Isaled, in the county of Denbigh, and the solicitor to the Commissioners, for his Majesty's affairs of Taxes, should be deemed good service.

That order was obtained on various affidavits which had been filed for that purpose, the material substance of all which was, that the parish of Henllan, in the county of Denbigh, had always been divided, for the purpose of assessing and collecting the government taxes, into two divisions or districts, viz. Lower Henllan and Upper Henllan—that the accounts of such taxes had been kept separately from each other, and two collectors had been uniformly appointed, one for each district or parish—that the Commissioners for the affairs of Taxes, acting in and for the division of Isaled, in the county of Denbigh, within which the said parish of Henllan is situate, [596] made two separate assessments of property tax for the year 1815, one to be levied on the Lower Henllan, and the other to be levied on the Upper Henllan; and that they made further assessments for taxes for the year 1816, one to be levied on the said parish or districts of Lower Henllan, and the other to be levied on the said parish or district of Upper Henllan; and duplicates of the said assessments were accordingly delivered to the collectors of the said districts or parishes—that the duplicate for the parish of Lower Henllan was delivered to Owen Owens, who had been duly appointed collector of that district only, in these words, “Collector’s appointment. Isaled, to wit. To Owen Owens, of Fynnionfair, one of the inhabitants of the parish of Henllan, in the county of Denbigh. By virtue of and in pursuance of the powers and authorities of the Acts of Parliament relating to the duties of assessed taxes, we whose names are hereunto set, and seals affixed, being (amongst others) Commissioners for the execution of the said acts, for the said districts, do hereby nominate and appoint you Collector of the rates and duties charged and assessed by virtue of the said acts, for and upon the several inhabitants and others of the parish of Henllan Isaf, in the said district, for the year ending the 5th April, 1816. Given under our hands and seals, the 10th day of August, 1815. J. W. Griffith, E. C. Chambers, Commissioners.” That another such appointment was made out in the same terms, and addressed to another person, an inhabitant of the parish of Henllan Uchaf, or Upper Henllan—the [597] said collectors were appointed annually in the same manner; and that the said Owen Owens was approved by the inhabitants of Lower Henllan as their collector, without any reference to the inhabitants of Upper Henllan; and that the whole of the said several assessments before-mentioned, to be made on the said district of Upper Henllan, had been duly accounted for, and paid to the receiver-general by the said Robert Davis, the collector, appointed for the last mentioned parish or district as aforesaid—that about the year 1817 the said Owen Owens absconded, without accounting for about 1200*l.*, which he had collected officially, on account of the property and assessed taxes, in respect of the said several assessments so made on the said parish or district of Lower Henllan; and that about the 25th day of September last, the Commissioners made a re-assessment upon the inhabitants of the whole of the said parish of Henllan, including as in one the said two separate parishes or districts of Lower and Upper Henllan, for the purpose of making good the aforesaid deficiency in the account of the said Owen Owens as collector of Lower Henllan—that the said re-assessment of the 25th day of September was made in consequence of an opinion obtained from his Majesty’s principal Commissioners of Taxes, upon an incorrect statement of the facts and circumstances of the case; and that the present application for vacating the same was made upon the suggestion and with the approbation of the said principal Commissioners—that there are four over [598] seers of the poor appointed in the said parish of Henllan, two of whom act for the district of Upper Henllan, and the other two for the district of Lower Henllan; and separate assessments have also been made upon the inhabitants of each of the said two districts or parishes for levying the poor rates; and two churchwardens have always been appointed, one for the district or parish of Upper Henllan, and the other for the district or parish of Lower Henllan—that the inhabitants of Upper Henllan paid sixpence in the pound for church rates, while the inhabitants of Lower Henllan paid only threepence in the pound—that some time in or about the year 1787, William Pierce, who was at that time the collector of taxes for the said parish or district of Upper Henllan, was deficient in his accounts of the taxes assessed upon the district, and that the deficiency was made good by the said district of Upper Henllan only, the district of Lower Henllan, on being called upon, having actually refused to contribute—and that the inhabitants of Lower Henllan were more opulent than the inhabitants of Upper Henllan, and of sufficient ability to bear and pay the said deficiencies of their own assessments, occasioned by the default of the said Owen Owens, their own collector.

Peake, Serjt. and Parke, now shewed cause against the rule, upon several affidavits of considerable length, stating in effect, that the two portions of the parish of Henllan, known by the [599] distinction of the Upper and Lower End, constituted together one entire parish—that separate collectors were appointed, solely for the convenience of collecting, and not with any view to separate the interests of the parish—and that the Upper and Lower ends of the parish had never been called parishes, in any other documents than the collectors' appointments, or for any other purpose. They also stated, that there never had been separate vestries for parochial purposes—that whenever a general acting overseer was appointed, it was for the whole parish, and the accounts were not kept separately—that the parish was always treated as one entire parish, in all rates and militia ballots, and in inclosure acts, and that the churchwardens were appointed and sworn for the parish generally, though it was usual, for the sake of convenience, to appoint a resident in the Upper End of the parish to be one, and a resident of the Lower End to be the other. Some of the affidavits denied that the appointment of Owens was without reference to the inhabitants of Upper Henllan, and many instances were enumerated of Henllan being considered as one undivided parish, having common interests.

Clarke, on the behalf of that part of the parish called Upper Henllan, contended that as the Commissioners had appointed a distinct collector for that division, and had thereby made them separate districts or places for which collectors were [600] to be appointed under the act (43 Geo. III. ch. 99, s. 13), each must be answerable for its own collector: or that even supposing the two collectors were appointed for the whole parish, from the very terms of their several appointments, the responsibility of the separate districts was expressly kept distinct—and that in a case like this, the Court would entertain such an application as the present, and protect that division of the parish who had been more careful in the selection of a fit person to be collector, from the consequences of the negligence of the other division, the collectors of which must have been kept distinct for that sole purpose: for such a purpose was lawful, and within the authority of the Commissioners: and he cited the case of *Barrs v. Digby and Others* (1 Bos. & Pul. N. R. 281), where it was determined, that if a collector of one hamlet, in a constablewick consisting of several, fail to pay over the money collected, the particular hamlet whose collector is in default only is liable to a re-assessment, under the 20 Geo. II. ch. 3, and not the whole constablewick, notwithstanding any supposed hardship in the case.

On the other hand, it was contended that the Commissioners had no authority so to divide the parish, or to appoint two separate collectors to perform the duties of, and cast the responsibility upon, each pretended division—that the language of the statute did not warrant such a construc-[601]-tion, and that such an appointment, if it were in fact made, and there had been any known established division of this parish of Henllan, would therefore be void, because the Commissioners could not appoint more or less than two collectors for each district or place. They submitted, that the Court would rather give effect to the incongruous instrument of the appointment, rather than render it null: and they insisted that the case of *Barrs v. Digby and Others*, was an authority against the present application, as establishing that the Court may notice the circumstance of the local division of the parish or place, so as to give effect to the act of the Commissioners, notwithstanding any objection that might be made in point of form: and also that the Commissioners cannot appoint more or less than two collectors for any given place within their district, by the terms of the act of Parliament.

Having adverted very minutely to the facts and circumstances of the case, the words of the statute, and the terms of the appointment, as applicable adversely to the rule which had been obtained, they submitted that it ought therefore to be discharged.

Cur. adv. vult.

RICHARDS, Lord Chief Baron. The question in this case lies in a very narrow compass. The statute requires the Commissioners to appoint two persons to be collectors for the respective divisions and places within their district. Henllan [602] was one entire parish: although two divisions were made for certain purposes of convenience to the parish. Two collectors were appointed for the whole parish, and not four for the whole so as to afford two for one division, and two for the other. It was therefore said, that if they are to be considered as two divisions, the appointment would be void: and perhaps, if there were strictly and properly two divisions, con-

stituting two distinct parishes, that might be true. We are therefore called upon to see whether the appointment cannot be sustained, so as to make valid every thing which has been done, and which otherwise would be void. There are certainly two collectors appointed for what is really a single parish. And as we must presume that the Commissioners intended to make a good appointment, we must consider that they appointed both the collectors for the entire parish; although they have by mistake called each division of the whole a parish, those divisions having been merely made for the sake of convenience, that one collector might collect for one, and the other for the other division. Now, we find from the case in the Common Pleas (*a*), which was cited in the course of the argument, that the Court there thought they might give effect to the appointment of the Commissioners, although it was not strictly formal and regular, and they accordingly put a construction upon the appointment of sixteen col-[603]-lectors for a constablewick, consisting of eight different hamlets, which, with reference to the act of Parliament, made it valid and effectual, as being in fact substantially consistent with the law.

On the same principle as the Court proceeded on in that case, we think we may determine this; and as they held there, that where the statute had required the appointment of two collectors, and no more, it must be intended that the Commissioners had appointed two for each hamlet, and not sixteen for the constablewick; so here, where the act directs that two shall be appointed for every place, and not one, we must infer that the Commissioners meant to appoint two for the whole parish, as they might legally do, and not one for each division, which they could not legally do. Taking it therefore that the Commissioners, not meaning to make a void but a valid appointment, and that they constituted both the collectors as for the whole parish, but for the sake of convenience in the collection, directed that one should collect for one part and the other for the other, as mere matter of arrangement, in that view these Commissioners have made a good and legal appointment under the act. In the mode of doing this, their clerk made a formal mistake in the terms of the duplicate; but still, when we see what the intention of the Commissioners was, we must hold it to be in law but one appointment.

[604] The consequence of that is, that this Rule, which calls for a separate re-assessment on the lower part of the parish, must be discharged.

Rule discharged.

From the manner in which the Court adverted in this case to the unnecessary length and number of the affidavits filed in opposition to the Rule, it becomes proper to notice, that they intimated a determination that in any other such case they would make the party pay the costs occasioned by the obtruding so much useless matter upon the time of the Court and the suitors.

LOWE, SURVIVING PARTNER OF WYATT & EGINTON. Demurrer. Tuesday 22d June 1819.—Pleading. Plea to an action of covenant that plaintiff agreed with defendant and his other creditors to execute a composition deed, held ill on general demurrer.

The declaration (in covenant) stated that, by indenture of 25th March, 1796, defendant bargained, sold, assigned &c. certain premises to plaintiff and his partner for a term of years, for securing 400*l.* and interest on 25th September following, and such sums as should be paid by them in the mean time for insurance of the premises —Breach.

Defendant pleaded, 1st, payment—2dly, a set off—and 3dly, that being a trader within the [605] bankrupt laws, and insolvent, on the 31st May, 1815, he proposed to plaintiff and the rest of his creditors to execute a deed of composition, which was afterwards prepared and executed by the other creditors of the defendant—that it was understood arranged, and agreed between the defendant and the plaintiff, that the plaintiff, as one of the creditors of the defendant, should and would execute that deed in common with the defendant's other creditors—and that defendant, confiding in such agreement, executed the deed, as did all the other creditors except the plaintiff.

And 4thly, that in consideration of the premises &c. the plaintiff agreed with the defendant to accept and enter into the said arrangement, and take the benefit of the

same, and of the said indenture, in common with the other creditors: and also in consideration that defendant would also deliver to plaintiff a certain picture of great value (to wit, 500*l.*): and further, that confiding &c. defendant did deliver said picture to said plaintiff.

And 5thly, that after the said sum of money accrued due, and before the exhibiting the bill of plaintiff, on the 16th July, 1816, defendant delivered to plaintiff a certain picture &c. in full satisfaction and discharge of said sum of money &c., which said picture said plaintiff accepted and received in full satisfaction and discharge of the said sum &c.

[606] The plaintiff replied, joining issue on the first, second, and last pleas, and as to the third and fourth pleas demurred.

Campbell, in support of the demurrer, contended that unless this plea amounted to that of accord with satisfaction, it would not be a good plea to an action in covenant. In this case there had been no deed of composition entered into by the plaintiff, and as the duty accrued by deed, it could not be avoided but by matter of as high a nature—Com. Dig. tit. Accord (A. 2)—that nothing short of satisfaction could be pleaded in bar to this action, where the duty accrued by the deed: and he cited *Blake's case* (6 Co. 44), and *Kaye v. Waghorn* (1 Taunt. 428). The matter of this plea at the utmost would be but accord without satisfaction, as in the case of *Preston v. Christmas* (1 Wils. pt. 2, p. 86). In *Drake v. Mitchell and Others* (3 East, 251), it was held, that a plea to a declaration in covenant that a bill of exchange had been given in payment and satisfaction of the debt due by the deed, was not good; and in this case the agreement was not stated in the plea to have been under seal.

Chitty, in support of the plea, submitted, upon the authority of the case of *Steinman v. Magnus* (11 East, 390), that an agreement entered into by a creditor with a debtor and his other creditors to [607] accept a composition in satisfaction of their debts, was binding on the plaintiff so agreeing to compound, and therefore was a good plea to an action for recovery of his debt. In that case Lord Ellenborough said, "Still more [would such a composition be binding] when, in addition to that [a third person having become surety for the amount] other creditors have been lured to relinquish their further demands upon the same supposition: that makes all the difference in the case, and the agreement will be binding." The agreement in that case was not under seal, and if the ground of Lord Ellenborough's judgment be the reason of the decision, he contended the principle would apply equally to all pecuniary demands, however constituted. He also cited the cases of *Boothby v. Sowden* (3 Campb. 175), *Butler v. Rhodes* (1 Esp. 236), and *Bradley v. Gregory* (2 Campb. 383), to the same point, and he contended that under the circumstances disclosed in the pleas, the defendant had put a case upon the record which came within the reason and justice of those determinations, and therefore it might be well pleaded in bar of the present action.

Campbell, in reply, distinguished the cases which had been cited in support of the plea. In *Steinman v. Magnus*, the plaintiff's demand was simple contract, being founded on a bill of exchange, and not on a deed, and in that case the plaintiff had actually signed the agreement to [608] accept the composition. The other cases were also on simple contract demands, and as to that of *Boothby v. Sowden*, Lord Ellenborough, on its being cited in the recent case of *Cranley v. Hillary* (2 M. & S. 120), observed, that if any thing incorrect was there laid down, it was no reason why the Court should adhere to it; and he adds, that what was there said might, perhaps be right, as applied to the facts of that case—and it was held there, that it lay on the plaintiff, even under the circumstances before the Court, to shew that the notes to be given for payment of the composition money had been tendered. He therefore submitted that the plea which had been demurred to, could not be supported, and

The Court gave

Judgment for the plaintiff.

[609] IN THE EXCHEQUER CHAMBER.

[Crown Case Reserved for the Opinion of the Judges.]

THE KING v. FROUD. Saturday, 26th June 1819.—The making of a written instrument, purporting to be an order of a magistrate, and to be signed and sealed by

J. P. as such, under the 48th Geo. III. ch. 75, addressed to the Treasurer of the County Rates, requiring him to pay J. C. a sum of money which he had made oath that he had expended in removing and burying a dead body cast on shore, by means of which the maker obtained that sum of money from the treasurer, is forgery; although the prisoner did not obtain the money in character of any of the parochial officers named in the statute, and although there was no magistrate in the county of the name of J. P.

[S. C. 3 Moore, C. P. 645; 1 Br. & B. 300.]

The indictment on which the prisoner was tried at the last Assizes for Cornwall, before Mr. Justice Holroyd, charged him with forging and counterfeiting an order for payment of money, purporting to have been made by a magistrate of the county, under the 43d Geo. the III. ch. 75 *. [610] It was dated "Cornwall," and addressed "To the Treasurer of the County Rates" in the following terms:—"Whereas it appeareth to me, one of his Majesty's Justices of the Peace, acting in and for the said county, that on the 1st day of March now last past, a dead human body was cast on shore in the parish of Zenar, in the said county; and whereas John Cose, of the said parish, hath made oath before me, that he hath laid out the sum of 3l. 5s. in and about the removal and burial of the said corpse, and which I allow to be the reasonable charges thereof: I do therefore hereby authorize and require you to pay the said sum of 3l. 5s. out of the monies in your hands to the said John Cose or his order. (Given under my hand and seal this 21st day of March, 1818."

(Signed) "JOHN PERNOWN."

It was proved, that there was no magistrate acting for the county of Cornwall of the name of Pernown, nor any churchwarden, overseer, constable, or headborough, of the name of Cose, in the parish of Zenar. It was not in evidence that the prisoner had buried any dead body; but it was proved that he had received the sum mentioned in the order, and also other sums under similar orders.

It was objected at the trial that the charge in the indictment, as attempted to be supported by [611] the evidence did not amount to a forgery, inasmuch as the paper purporting to be an order of a magistrate, under the act of parliament, was so defective on the face of it, with reference to the terms of the statute, as to be a mere nullity, and that it ought to have been treated as such by the treasurer—that the order was not made for payment of the money to either of the parish officers named in the act, as the act requires; and that there was no magistrate of the name subscribed to the paper.

Those objections being reserved for the opinion of the twelve Judges, the question now came on to be argued at the bar.

Williams, C. F. for the prisoner, in support of the objections, contended that the plaintiff could not be held to have been guilty of the capital offence of forgery in the fraud which he had committed; because he had not fabricated the paper in character of either of the parish officers to whom the statute had directed the money to be paid

By that statute it is enacted that churchwardens and overseers of the poor, where dead human bodies shall be found cast ashore within their parishes, shall remove and bury them so that the expences do not exceed those of other parish burials; and in extra parochial places that duty is to be performed by the constable or headborough.

Sect. 5 enacts that all the expences are to be paid by such officers.

By sect. 6 it is enacted that, for the purpose of reimbursing them such payments, costs, charges, and expences, it shall and may be lawful to and for any one justice of the peace for the county or place within that part of the united kingdom called England, in which any such body or bodies shall have been so removed and buried as aforesaid, by any writing under his hand, to order and direct the treasurer for such county to pay such sum or sums of money to such churchwarden and churchwardens, overseer and overseers, constable or headborough, for his or their costs and expences in or about the execution of this act (after the same shall have been duly verified on oath), as to the said justice shall seem reasonable and necessary; and such treasurer shall, and he is hereby authorized and required forthwith to pay the sum or sums of money so ordered and directed to be paid to the person or persons empowered to receive the same; and such treasurer shall be allowed the same in his accounts.

for their remuneration in performing the duties imposed expressly and exclusively on those officers, and which were obviously so imposed on them, as being public responsible persons having official appointments, in order to secure a proper and economical performance of them by those whose general duty it was to serve the parish, in virtue of their situation—that any private individuals were not authorized by the act to bury drifted dead bodies; or if they did, magistrates [612] had no power to remunerate them, as none but the parish officers named in the act can bury such bodies: all that other persons can do is to give notice to them that such bodies are found cast ashore (sect. 3). The paper was therefore a mere nullity, the tenor of which the treasurer was not only not bound to obey, but was bound not to obey: and if it were such a document, as that being treated as it ought to have been, as a nullity, it would not have been a forgery; it could not be made so by its not having been so treated as a nullity but paid; for it is not the success of the transaction which constitutes the crime of forgery, but the nature of the act, although it should be unsuccessful. In this case the signature affixed to the paper was not the name of any magistrate; and even if it had been, the non-compliance by a magistrate, with the positive directions of the act, would have made a genuine order a nullity, and there could be no forgery of a null instrument.

In *Moffatt's case* (a), a bill of exchange not drawn in compliance with the statute (17 Geo. III. ch. 30, s. 1), for more than 20s. and less than 5l., without the place of abode of payee, and a subscribing witness, being a nullity, a fabricated acceptance of such a bill was held not to amount to forgery. So also in *Wall's case* (2 East, Pl. Cr. 953), where the fabricated will would have been void by the statute of frauds, it was held to be fatal to a conviction of [613] forgery; and in *The King v. Russel* (1 Leach, Cr. Ca. 10) a mere cash memorandum receipted, charged to have been forged, was held not to be a receipt or acquittance for money within the meaning of the statute (2 Geo. II. ch. 25). The case of *Re v. Rushworth* (1 Stark. N. P. R. 396), he submitted, was expressly in point: it was ruled in that case by Mr. Justice Bayley, that “to bring the case within the statute 7 Geo. II. ch. 22, the order (for forging of which the prosecution was instituted) must be such as, on the face of it, imports to be made by a person who has a disposing power over the funds. Mr. Taylor, in his character of a justice of the peace, had no authority to make such an order; if he had any, it was derived from the statute; but he had no power to make such an order as this; and if such a one had been made, the treasurer ought not to have obeyed it.” In the present case a magistrate, by a genuine order, had no right to order payment to any one but the official persons mentioned in the act; and if he should do so, the treasurer ought not to obey it: and that is the principle upon which this objection should prevail. On that ground too, he submitted, this case was distinguishable from that of *R. v. Lockett* (2 East, Pl. Cr. 740, and 1 Leach, Cr. Ca. 110); for there the fictitious instrument had nothing on the face of it which made it a nullity: and the same distinction applied to the cases of *The King v. Graham* (2 East, Pl. Cr. 945) and *M'Intosh's case* (2 East, Pl. Cr. 942).

[614] He also objected that the order did not state that the expences were verified on the oath of a parish officer, as required by the act, or that the expences were necessary.

Carter, contra, relied upon the writing having all the requisites of a valid order, and purporting to be such as, if genuine, would have been sufficient for the purpose of obtaining the money. The act requires no particular form of order, and the magistrate must be presumed to have investigated the claim of the party seeking the re-imbursement, and to have satisfied himself of the applicant's right to it, before he would make the order, which was in the nature of an adjudication, stating the necessary facts, the authenticity of which is sanctioned by the magistrates, hand and seal: and those have in the present instance been forged by the prisoner for the purpose of obtaining the remuneration. The order therefore requires no allegation or averment to render it effective; nor would the omission of any such allegation, as had been alluded to, vitiate it. But instruments forged (he submitted) have been held not to furnish objections to a conviction upon them, by defects apparent on inspection, as in the case of *Re v. Fitzgerald and Lee* (2 East, Pl. Cr. 953), where an objection taken on the ground of the forged will, having a name subscribed, differing from the name of the testator as set forth in the beginning, was held of no avail: and in *The King v.*

(a) 2 East, Pl. Cr. 954, and 2 Leach, Cr. Ca. 483 S. C.

[615] *Guid* (2 Leach, Cr. Ca. 847), where an indictment for forging a transfer of stock under the 33d Geo. III. ch. 30, s. 2, was held good, although the transfer was not witnessed according to the rules of the bank. He submitted therefore, that on these authorities the prisoner was properly convicted.

Williams replied, insisting on his former arguments, and the cases already cited.

[Abbott, Lord Chief Justice, observed towards the close of the argument, that the principal question in this case was, whether there was a jurisdiction in the magistrate to make such an order on the pretended occasion.]

The prisoner subsequently experienced the Royal Mercy upon the terms of submitting to transportation for life.

It is understood that seven of the twelve Judges were for supporting the conviction, *contra* five.

[616] IN THE EXCHEQUER CHAMBER.

[Questions on a Crown Case reserved for the Opinion of the Judges.]

THE KING v. PAGE. Saturday, 26th June 1819. —A bankrupt having surrendered in due time, refusing to answer certain questions of the Commissioners regarding the disposal of money assumed by them to have belonged to him, giving as his reason, that he means to contest the validity of the commission, is not guilty of felony within the 5th Geo. II. ch. 3, s. 1.—A trader by lying in prison for two months on an arrest for debt, commits an act of bankruptcy, although he may be confined originally, and during the same period under a magistrate's warrant, on the certificate of Commissioners of bankruptcy, on the criminal charge of refusing to submit to answer questions; because, as he may at any time be liberated by submission, the lying in prison is voluntary, and therefore within the 21st James, ch. 1, s. 2:—and more especially if his attorney have obtained a Judge's order for his release as to that warrant, upon the Commissioners certificate that they do not mean to examine him further, although the order be not made a rule of Court, or acted upon, and the trader knows nothing of it.

The indictment, which was framed on the 5th Geo. II. ch. 30, charged the prisoner [not being, &c.] with [feloniously] not submitting to be examined from time to time upon oath, by and before, &c., and with not in all things conforming to the several statutes in force (at the time of passing the act), and [that he did not] “fully and truly disclose and discover all his effects and estate, real and personal, and how and in what manner, &c., &c. (in the words of the statute*).”

* The material part of the first section of that act [to prevent frauds by bankrupts] on which this case turns, is as follows:—That if any person who shall be declared bankrupt shall not, within forty-two days after notice, &c., of such commission issued, &c., “surrender him, her, or themselves to the said Commissioners named in the said commission, or the major part of them, and sign or subscribe such surrender, and submit to be examined from time to time upon oath, or being of the people called quakers, upon the solemn affirmation by law appointed for such people, by and before such Commissioners, or the major part of them, by such commission authorised, and in all things conform to the several statutes already made and now in force concerning bankrupts; and also upon such his, her or their examination fully and truly disclose and discover all his, her or their effects and estate real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times he, she or they have or hath disposed of, assigned or transferred any of his, her or their goods, wares, merchandizes, monies or other estate and effects (and all books, papers and writings relating thereunto) of which he, she or they was or were possessed, or in or to which he, she or they was or were any ways interested or entitled, or which any person or persons had, or hath or have had, in trust for him, her, or them, or for his, her or their use, at any time before or after the issuing of the said commission, or whereby such person or persons, or his, her, or their family or families, hath or have, or may have or expect any profit, possibility of profit, benefit, or advantage whatsoever, except only such part of his, her, or their estate and effects, as shall have been really and bona fide before sold or disposed of in the way of his, her, or their trade and

[617] The prisoner was convicted on his trial at the Old Bailey, during the February Session, before Mr. Justice Best.

[618] It was in evidence that the bankrupt had surrendered himself on the last day for surrender and examination (3d October, 1818), and was sworn; but had refused to answer sundry interrogatories of the Commissioners respecting the disposal of certain sums of money, one of them amounting to 500l. He was thereupon committed by them; and being brought up again on the 7th and 28th November following (having been warned in the mean time), he persisted on both occasions in his refusal to answer the same questions, giving, as his reason, that he meant to contest the commission.

Under those circumstances it was objected by the counsel for the prisoner, that his case was not within the statute. The Judge however charged the Jury that, if they should be of opinion that in his refusal to answer the questions put to him by the Commissioners, he was clearly actuated by intention to defraud his creditors, they should find him guilty of the felony laid to his charge; but if not, and that he really declined, for the reason given by him, his conduct would not be within the statute. He was found guilty, and the learned Judge reserved the point.

There was also another question raised on the trial, as to whether, in point of law, an act of bankruptcy had been committed by the prisoner; [619] and that was founded on evidence of the following facts:—It appeared that, on the 14th April, 1818, the bankrupt had been committed to Newgate by a magistrate's warrant, on the certificate of Commissioners, under a commission afterwards superseded. From that time down to the 15th May, during which interval he was brought up several times by habeas corpus, to be rendered in discharge of his bail, and as often re-committed to Newgate till he should answer the questions of the Commissioners, he had been a prisoner in Newgate; but on that day the Commissioners certified that they did not intend to examine him further, and therefore consented to his discharge: he was then brought up to the King's Bench by habeas corpus, and committed to the prison of that Court, charged with various declarations, and with the warrant and rule of the Court. On the 14th of June the prisoner's attorney obtained Mr. Justice Abbott's order (of which the prisoner never had notice, as the attorney swore upon the trial) for his discharge from all the detainers against him, except the actions. That order however the prisoner did not avail himself of; and it was not made a rule of Court: and he remained in the King's Bench till the 15th August, 1818, when the last commission issued against him.

Under these circumstances it was insisted, that the trader's lying in prison, though under civil process for debt, whilst there was a magistrate's warrant in force against him on a criminal charge under which he was also in custody during all the time, was not a lying in prison two months [620] on an arrest, or other detention in prison for debt, within the meaning of the 21 Jac. 1. ch. 19, s. 2, upon the authority of the case *Ex parte Bowes* (4 Ves. 168), wherein the Lord Chancellor held, that it is not an act of bankruptcy where a trader, being in prison, committed upon a criminal sentence in execution, is, during that imprisonment, charged with debts.

The learned Judge however overruled that objection, holding, that a commitment for mere contumacy in not doing what by doing, he might be discharged immediately,

dealings, and except such sums of money as shall have been laid out in the ordinary expence of his, her, or their family or families; and also upon such examination deliver up unto the said Commissioners by the said commission authorized, or the major part of them, all such part of his, her, or their the said bankrupt's goods, wares, merchandizes, money, estate and effects, and all books, papers, and writings relating thereunto, as at the time of such examination shall be in his, her, or their possession, custody, or power (his, her, or their necessary wearing apparel, and the necessary wearing apparel of the wife and children of such bankrupt only excepted), then he, she, or they, the said bankrupt or bankrupts, in case of any default and wilful omission in not surrendering and submitting to be examined as aforesaid, or in case he, she, or they shall remove, conceal, or embezzle any part of such his, her, or their estate, real or personal, to the value of twenty pounds, or any books of account, papers, or writings relating thereto, with an intent to defraud his or their creditors (and being thereof lawfully convicted by judgment or information) shall be deemed and adjudged to be guilty of felony, and shall suffer as felons, without benefit of clergy, &c.

was a voluntary lying in prison as to the civil causes, and therefore not within the case of *Bowes*; who, being in prison under judgment, could not have procured his liberation by paying his debts, or any other means, till the period of his sentence should have expired. The case was now argued on both points.

Copley, Serjt. in support of the objections which had been taken on behalf of the prisoner, contended that his refusal to answer the particular questions which had been put to him, for the reason which he had given before the Commissioners, was not within the statute; for the statute has required merely, in the first instance, that the bankrupt shall surrender and submit to be examined; the surrender itself is a submitting to be examined, more particularly if any questions be answered by him. By the 16th section—which necessarily assumes that the bankrupt has [621] entirely conformed with that first requisition of the statute, and thereby discharged himself of the felony—it is enacted, that in case the bankrupt shall refuse to answer, or shall not satisfactorily answer, or shall refuse to sign his written examination, it shall be lawful for the Commissioners to commit him to prison, until he shall submit himself to the Commissioners &c. He contended, therefore, that it was quite obvious, from the terms of the statute, that all the legislature had contemplated, as constituting felony, was, the non-surrender and non-submission to examination; and that they have expressed in words. If however the bankrupt should (having surrendered and submitted to be examined) refuse to answer questions, or to submit to the Commissioners in that respect, they are given power to imprison him till he does; for it would be most absurd to enact that a man was to suffer death for refusing to answer questions, and also to be committed to prison till he does; whereas, if the true distinction be observed between refusing to surrender and submit to be examined, and a refusal afterwards to answer questions or subscribe his answers, the meaning is quite clear, and founded in reason and good sense. To submit to Commissioners in answering all questions put by them, is a very different thing from surrendering to be examined by them: the former, is accordingly made a misdemeanor—the latter, felony.

He then contended that the indictment was bad in having omitted to charge the prisoner (as it necessarily must where the fact does not admit [622] of it) with not surrendering, as well as not submitting to be examined, for both must be chargeable on a bankrupt to make him a felon: and certainly by far the most important branch of the offence, (for it necessarily includes the other) consists in the not surrendering, if indeed a surrender, and ought to be the most penal: for that purpose, be not ipso facto a submitting to be examined, with reference to the 16th section. It cannot be contended, that in this statute, creating a capital offence, the word “and” may be construed “or,” and unless it may, a very small proportion of the offence has been committed: according to the general purview of the act, it would be more proper to read the word “and” as meaning, “in order to,” or “for the purpose of” submitting to be examined, in which sense it is often used in common parlance, and then it would be quite intelligible and consistent. He contended also that there was in the language of the indictment a most material deviation from that of the statute, which was never allowed in criminal pleading in framing a charge of an offence created by statute, wherein the words must be strictly pursued, the felony being made to consist in not surrendering, and “not submitting to be examined from time to time,” and the charge being “not submitting from time to time to be examined.” The difference was quite obvious between a successive submission to examination, and a submitting to successive examinations.

Besides the absurdity which the construction contended for by the crown would give to the [623] effect of the 1st section, succeeded as it is by the 16th, this further incongruity (he urged) would also be found in the 1st section with itself: for if the property, which should be the subject matter of the question put by the Commissioners, and which the bankrupt had refused to answer for the purpose and with the intention of concealing that property from the Commissioners, turned out to be not of the value of 5s., a bankrupt would be capitally convicted for a concealment by means of a refusal to answer questions, although by the express provision of the statute a felony by actual embezzlement of his property cannot be committed, if the subject matter be of less value than 20l.

He observed that, in respect of the practice, there was no precedent to be found among the records of the Courts, of an indictment omitting the non-surrender, and that they all charged uniformly, not surrendering as well as not submitting to be

examined. As far therefore as precedent was authority, in the absence of decisions, it was in favour of the objection.

Upon the other point which was preliminary, and depended on the question of law arising upon the facts in evidence, he insisted that a trader who, having been put in prison, by coercion of criminal process should, during the period of his imprisonment under the warrant of the magistrate, be sued for debt, cannot, under such circumstances, be considered a trader, who "being arrested for debt, shall, after his arrest, [624] lie in prison two months or more upon that or any other arrest or detention in prison for debt," and he is therefore not within the 21st Jac. I. ch. 19, s. 2, which has made that an act of bankruptcy:—that it was quite clear that the Legislature contemplated a lying in prison from contumacy or inability to pay only: and a man cannot be said to lie in prison under arrest or detention for debt, who is actually all the time a prisoner under a warrant for a criminal offence, and who therefore could not get discharged if he should bail the actions in which he should have been arrested or detained. The arrest and detention under which the party remains in prison, must be for debt exclusively: and in this case the trader was neither arrested nor sent to prison for debt, nor even detained there for debt: because if he had procured his discharge from all the detainers for debt, he must still have remained in prison, and to have bailed the actions would therefore have been an unnecessary expence and a nugatory act. Upon that principle it must have been that the Lord Chancellor held in the case *Ex parte Bows* (4 Ves. 168), (where his Lordship, upon two distinct occasions so determines) that if a party lying in prison under a criminal charge be charged with debts during two months of the time, he does not thereby commit an act of bankruptcy, for the foundation of the enactment is the presumed insolvency which must arise from his being supposed not to have sufficient credit to procure bail for his liberation. The Lord Chancellor, in deli-[625]-vering his final judgment in that case, said that he had very considerable doubt "whether upon the construction of the bankrupt laws, it is not of essential necessity that the lying in prison should be upon a case of imprisonment founded in debt, and nothing else." That case, therefore, has established, that to make lying in prison for two months an act of bankruptcy, it must be under detention for debt alone: and that an imprisonment under criminal process, which should cover the time of detention for debt, would take the case out of the statute.

Bosanquet, Serjt. for the Crown, insisted—that the Legislature having expressly required that a party declared bankrupt shall, within forty-two days after notice, surrender himself to the Commissioners and sign and subscribe such surrender, and submit to be examined from time to time, and also upon such his examination shall fully and truly disclose and discover all his effects and estate &c.; and having also enacted that in case of any default and wilful omission in not surrendering and submitting to be examined as aforesaid, he shall be guilty of felony—a non-conformity with the enactments of the statute in any one material respect, would render him liable to be indicted capitally under this act of Parliament. He submitted that the act of surrender was not more material in its effects, or more important to the objects of the statute in the contemplation of the Legislature than the submission to be examined after the bankrupt should have surrendered. The surrender alone, without submitting to answer [626] the questions of the Commissioners, would be an evasion and a mockery of the statute, and would wholly frustrate its beneficial effects, rendering the whole of this statute imposing such important duties on bankrupts, the omission of any of which the Legislature considering as deserving of so high a penalty, quite nugatory. If it would be sufficient to satisfy the act, that the bankrupt should surrender, or if by surrender alone, he would be discharged from the guilt of the felony, he would have nothing more to do certainly than to surrender: but what then becomes of the more beneficial duty required of him of submitting to be examined, and yet it is contended that that branch of the sentence may be rejected as surplusage.

The word "and" is not used to superadd the necessity of surrendering to that of submitting to be examined, but to make the submitting to be examined a necessary result of the surrender, as otherwise the surrender would be useless, whereas there could be no examination without a previous surrender. If submitting to be examined were not necessary, a disclosure of his property might be contended to be equally unnecessary, and that he might withhold such discovery without being guilty of any offence under this statute. That part of the charge at least must be considered as constituting a substantive offence within the terms of this act of Parliament, particularly

when connected with a charge of not submitting to be examined with a fraudulent intention by withhold-[627]-ing such disclosure of concealing his property ; and that is made a distinct additional ground of offence by the connecting words "and also." It is to these material and essential enactments of the statute that the prisoner has refused to conform, and for the felony in so refusing, he has been properly indicted. The prisoner, having been convicted by the Jury of the offence laid to his charge, they have found by their verdict, in effect, that he being a bankrupt, refused to submit to be examined for a fraudulent purpose, namely, with intent to defraud his creditors by concealing the true state of his property ; and that therefore he is guilty of the felony created by this act of Parliament : and in point of law, according to reasonable construction of the statute, he has clearly been properly convicted.

He then submitted that the argument, founded on the 16th section empowering the Commissioners to commit to prison parties refusing to be examined, as shewing that the Legislature did not mean that refusal to be examined should be punished with death, was answered and destroyed by the obvious intention that that section was applied to cases of other persons than the bankrupt himself refusing to be examined generally, and also to that of the bankrupt himself refusing to answer, under the general head of "all lawful questions," other less important questions than those relating to the required disclosure of the state of his property which forms the basis of this charge : and that section, besides, provides [628] for many minor things clearly not before provided for by the first section.

So also, as to the inconsistency of the two parts of the first section, if it had been averred in the indictment that the refusal to answer tended to the concealment of property, it might have been necessary to have alleged and proved that the property meant to be concealed was of greater amount than 20*l.* : in point of fact, however, it was in evidence in this case that the property enquired of in this particular instance was infinitely greater than that amount : but it may be put, that the refusal to submit to be examined is alone an indictable offence under this statute, without regard to any concealment of property.

On the other point of the act of bankruptcy, the learned Serjeant contended that as the prisoner had, in fact, remained in prison two months under a detention for debt, he had thereby committed an act of bankruptcy, unless there were any thing in the circumstance of his having been originally sent there by a magistrate's warrant, to take this case out of the statute : and he submitted that there was not. In the case cited (*Ex parte Bowes*) the prisoner was confined under sentence of a Court, and was necessarily compelled to submit to imprisonment for the whole term of his sentence : but here he was not confined but until he should choose to be set at liberty : he was not therefore lying in prison under the warrant upon which he was sent there, and the warrant [629] was then *functus officio* ; for it did not require the detention of the prisoner. In all events he was lying in prison solely under the civil process in the actions for debt after the 4th of June, when he was discharged from all detainers except the civil actions. It would, besides, be contrary to all the principles of law to permit a party so to avail himself of a criminal act, as to be discharged from the consequences of the act of lying in prison under civil process, because he was also imprisoned on a warrant for an offence of a criminal nature.

The result of the deliberation of the Judges upon this case was, that the prisoner was ultimately pardoned.

Eleven of the Judges were present when this case was considered, the Lord Chief Baron (Richards) being absent, of whom eight, against the opinion of the other three, held that the offence, as charged and proved against the prisoner, was not a felony within the meaning of the act of Parliament : but they all were of opinion that the prisoner, by lying in prison under the circumstances, had committed an act of bankruptcy.

[630] GENERAL ORDER. [From the Exchequer Chamber Minute Book.] Monday, 28th June 1819.—Where causes are set down for further directions, a copy of the decree, and the Master's report, and the mandatory part of the decree, must be left at the Chief Baron's Chambers two days before the hearing.

Ordered, that in future, in all cases where a cause is set down for further directions on the Master's report, a copy of the mandatory part of the decree and the report

be left at the Chief Baron's Chambers two days before the day of hearing the said cause.

End of Trinity Term.

[631] SITTINGS AFTER TRINITY TERM, 59 GEO. III.

GRAY'S INN HALL. [Before the whole Court, except Mr. Baron Wood, who was absent during these Sittings.]

TOULMIN AND OTHERS v. COPELAND AND THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND. Thursday, 15th July 1819. —The Court will not entertain a motion for directing the Bank to remove a distringas from the stock belonging to a partnership firm, on the application of a defendant, the surviving partner, even after an answer has been filed by the defendant, denying all the charges of the bill.—Such an application refused, with costs.

Martin, on the part of the defendant Copeland, moved, pursuant to notice, that the Governor and Company of the Bank of England might be directed to remove the distringas heretofore granted in this cause, from the stock belonging to the partnership in the pleadings mentioned, the defendant Copeland's answer having been filed on the 28th June last.

This motion was made with the same view, and in substance on the same ground as that already reported in a former volume (a) under the same name, [632] and it was pressed upon nearly the same grounds: the only difference was in the terms in which the applications were made, the former having been made upon an affidavit before the defendant Copeland's answer was put in, whereas that answer had now been filed, and it denied all the facts charged by the bill; but

The Court refused to entertain the motion, observing that a distringas was merely quasi a subpoena, and the party against whom it should be issued must necessarily obey it—that they had no intermediate control over the process in such a case as this, more than in any other, and could not withdraw it, or prevent its effect—and that the Court had moreover no power to make any order on the Bank. They therefore

Refused the Motion, with Costs.

[633] THE KING (IN AID OF STUCKEY AND OTHERS) v. GIBBS. Friday, 16th July 1819.—Bankers having money in their house, arising from the assessed taxes, paid in for the purpose of being paid over to the Exchequer, on account of a Receiver General, for the due payment of which by him they have given bond to the Crown, are still entitled to sue out an extent in aid—and that upon affidavit stating generally their having received the money for that purpose; nor is it necessary that they should shew, by allegations in the affidavit made to obtain the fiat, that they are not precluded by the 57th Geo. III. from using the Crown process, as that, being sureties, they have been called upon by the Crown, on account of the default of their principal, or in any other respect.—The Court will not give a defendant leave to traverse an extent, who has let the time within which he ought to plead pass by without doing so, on the failure of a motion to set aside the proceedings.

Littledale moved, pursuant to notice on behalf of the assignees of the defendant, a bankrupt, that the writ of extent which had been issued in this matter, and all proceedings taken thereon, might be set aside for irregularity.

The affidavit on which the writ had issued stated in substance, that the deponent, together with several other persons, bankers and copartners, were indebted to his Majesty in 4000l. and upwards, arising from the land-tax, and the rates and duties on houses &c. and other assessed taxes paid into their banking house, for the purpose of being paid into the Exchequer, to his Majesty's use, on account of Jefferys Allen,

Esq. Receiver General, for part of the county of Somerset: and that the deponent and his said partners were bound to his Majesty by bond of record in this Court, as sureties for the said Jefferys Allen answering, securing, and paying over, on his Majesty's account, the said sum of 4000*l.* so in their hands, and due and owing from them.

[634] The affidavit then stated that Gibbs was indebted to them, in the usual terms, and the common fiat was obtained upon it, as of course.

To that affidavit, the three following objections were taken, founded on the 57th of Geo. III. ch. 117, sec. 4:—

First. That it did not appear from the affidavit, that the bankers were indebted to the King in the manner required by the act: for it only appeared that they were indebted to Allen.

2dly. That it did not appear from the extent, that any of the bankers were bound to the King for the payment of the duties. And,

3dly. That it did appear that they were only sureties, and it was not stated that any demand has been made on them by the Crown, in consequence of the default of the principal.

Upon these objections, he submitted that the foundation of the extent had failed from the insufficiency of the affidavit. As to the first, he admitted that he might be precluded from taking advantage of that, because it did not appear on the face of the proceedings. As to the second, that was founded on the case of the prosecutors of the extent not appearing on the face of the proceedings or being stated in the affidavit, and he contended that since the recent statute enough should be sworn to shew the Baron who grants the fiat, that the prosecutors are entitled to use the Crown process notwithstanding that statute.

[635] That objection the Court over ruled, saying that, as there was nothing in the act requiring such particularity, they saw no necessity for departing from the established form.

As to the third objection, he submitted that the inquisition should have found the debt from the prosecutors to be due to the Crown upon their bond, nor was any thing stated on the face of the proceedings to shew that they were within the proviso: and that, for the security of the subject, so much particularity at least was necessary since the statute, as should shew the title of the prosecutors to proceed in this extraordinary way, by means of the prerogative writ. They are not bound for the payment of the money, but generally, for the due execution of the office of Receiver General.

Per Curiam. We think none of the objections good. The bankers are security for the Receiver General paying the money, in effect, and this money in their hands is ear-marked as belonging to the Crown: and as to that, they stand in the situation of the Receiver General.

Nil.

Littledale then applied for leave to traverse the inquisition, but the Court refused it, because he had come too late, the inquisition having been taken on the 21st of May.

[636] THE KING (IN AID OF MYTTON) v. HILL AND OTHERS. Friday, 16th July 1819. Where the defendants, in an extent in aid, have withdrawn their plea, and suffered judgment to be entered up, upon an agreement to submit to arbitration the question of the amount of what is due to the prosecutor, provided the award be made by a given time, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendants having delayed to furnish him with the name of a trustee, which was required to make part of the award, and the defendants' solicitor afterwards wrote a letter, requiring that the arbitrator would take into consideration matters not before him during the reference, which was refused, as the reference was considered to be closed:—It was held by the Court, that under those circumstances the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority: for that the conduct of the defendants, and the solicitor's letter, was equivalent to a consent to extend the time; and therefore they refused to set aside the

judgment, and the proceedings thereon, and the award, and allow the defendants to plead to the extent.—A Rule to shew cause discharged; but without costs.

[For former proceedings see 6 Price, 19.]

A rule had been obtained, in the course of the last Term, by Chitty, on behalf of the defendants in this extent (wine merchants), calling on the prosecutor to shew cause why the judgment entered up against the defendants, and all proceedings thereon, and also the award made in this cause should not be set aside, and the defendants be allowed to plead again to the writ of extent.

The grounds furnished by the affidavits filed upon that motion were, that although the extent had issued for 7400*l.* the defendants were not indebted to the prosecutor in more than 900*l.* or thereabouts, subject however to a claim which one of the defendants had on the prosecutor of the extent for 4000*l.*—that the defendants had offered to pay 1900*l.* provided the prosecutor would refer all matters in dispute to arbitration, but that Mytton refused to accept the 1900*l.* on [637] such condition—that defendants therefore pleaded to the said extent, intending to try the question; but that after a considerable time spent in negotiation for a settlement, it was, on the 27th November, 1816, agreed to refer the matters in dispute to arbitration—that in order to bring the dispute to a termination, the defendants then having in the meantime suffered great loss and injury in their business in consequence of the extent, entered into a written agreement with the solicitors for the extent, to withdraw their plea, and suffer judgment, with a stay of execution until non-compliance with the award to be made by the arbitrator; and that the sheriff should retain possession of the effects which he then held for the same period, without sale, unless the value should be lodged in his hands—that there should be an immediate reference to an arbitrator, to take an account of what was *bonâ fide* due to Mytton from the defendants, on the balance of their accounts, and for interest up to September, 1815—that on non-payment of the balance to be awarded by the said arbitrator, within the period to be named in the award, execution was to issue on the judgment—that an order of reference was to be made in the cause, according to the terms of the agreement, and that no question of alleged injury sustained by the extent was to be admitted; and the arbitrator was to determine as to the costs and expences of the extent and reference; and the notice of the extent given to the Dock Company was to be [638] vacated, in order to enable the defendants to pursue their trade.

The affidavit also stated that various meetings took place before the arbitrator, up to the month of August, 1818, when it was agreed to extend the reference, and accordingly, by an agreement dated the 8th of that month, it was agreed, by consent of the parties, to extend and vary the order of reference, and heads thereof, as follows, viz. That the amount of principal and interest should be extended and made up to the date of the award—that the arbitrator should, from the balance to be found due to Mr. Mytton, deduct 4000*l.* to be settled for the benefit of defendant Richard Hill's children, in the manner therein mentioned—that it was further agreed, that the arbitrator should take into his consideration and award, the liability of Mr. Mytton, as surety for the defendants to the Bank of England:—and the arbitrator was to make his award on or before the 1st of September, 1818.

That a meeting took place before the arbitrator, after the signature of the said second agreement, but the said arbitrator did not make and publish any award on or before the said 1st day of September, 1818; and that defendant declined, and never did give any consent, upon application made, to any award being made after the expiration of the time so limited for making the same as aforesaid—that no award in this cause had been served upon defendants, or either of them, [639] nor had any demand been made on defendants, or either of them, to perform or abide by any award made in this cause, nor had defendants, or either of them, received any notice whatever of any such award having been published and declared in this cause, or of the trusts thereof, save and except, that the defendants solicitors received a letter from the solicitors prosecuting the extent, dated the 12th of January, 1819, stating “that by the award the defendants were directed to pay 915*l.* 10*s.* with interest thereon from the 16th September then last, in part satisfaction of the judgment on this extent: and that they (the solicitors) had to request the payment of it in the course of the then present week, or they must proceed to sell”—that notwithstanding notice was given to the solicitors for the extent, by defendants' solicitor, that pro-

ceedings under any alleged award would be resisted, and notwithstanding no notice or copy of any such award (save as aforesaid) had been served on or given to defendants, or either of them, the said solicitors for the said extent did direct the sheriff of Middlesex to sell the said defendants' property, and did actually sell the same, in March last, under a writ of venditioni exponas issued under and by virtue of the said judgment, conditionally suffered by defendants to be entered up against them, subject to the award so to be made as aforesaid.

On that statement of facts the Court granted the Rule.

[640] The affidavit of the solicitor for prosecuting the extent filed in answer to the application, stated that the prosecutor Mytton, in or about the month of June, 1818, on his return to England, appeared before the arbitrator, who proceeded in the reference, which, after several meetings, and examinations of many witnesses produced, and being attended by counsel on both sides, was considered as closed by the arbitrator, on or about the 8th day of August, 1818, for all the purposes of his award, which award the said arbitrator then expressed it to be his determination to make, and, as deponent is informed and believes, is still prepared and ready to make, should the same be considered necessary under existing circumstances—that on the earnest recommendation of the arbitrator to the prosecutor and the said Samuel Hill in the presence of deponent and the defendants' solicitor, to put an end to all differences, the parties consented to an agreement for the settlement of 4000*l.* in favour of Mr. Richard Hill's children, (to be appropriated and deducted from the debt under the said extent in aid) and to the further new terms of reference—that deponent and defendants' solicitor attended the arbitrator, and all the matters of inquiry were discussed and closed before him, and, as he expressed, to his satisfaction, before the said 1st day of September, and that the award was prepared on or before that day—that deponent had been informed by the arbitrator, and believed, that the reason why he did not then deliver his award was, that he had applied before [641] the said 1st day of September, to the said defendant Samuel Hill, or his then solicitor, for the name of a trustee on the part of the defendants, for the settlement provided for by the said further agreement of reference, and which he could not obtain—that deponent never heard of any objection whatever having been made by the defendants, or any of them, or any person on their behalf, to the arbitrator making his award after the said 1st day of September; on the contrary, the deponent, on or about the 8th of September, 1818, received from defendants' solicitor the copy of a letter of that date, which he had addressed to the arbitrator, at the request of Mr. Hill, urging him to reconsider the subject of his allowances; and the deponent was informed by the arbitrator, that he declined any further opening of the discussion, conceiving that all the claims of the defendants had been fully considered by him, and that he had informed defendants' solicitor to that effect; nor, to the best of deponent's recollection and belief, did he hear of any objection to the award, until the month of January following, when the present solicitor of defendants wrote the letter alluded to in defendant Samuel Hill's affidavit—that deponent, on his having been applied to by the arbitrator, before the said 1st of September, 1818, stating the difficulty he had had in obtaining the name of the trustee from the defendants' solicitor, then informed him that he should not object to the completion and delivery of the award after the 1st of September, and that he had not [642] any suspicion that the defendant or his solicitor would attempt to take any advantage on such ground—and that in the middle of the month of September, the deponent received the award from the arbitrator.

The Attorney General, Rose, and Parke, shewed cause, insisting that, if there had been in fact any grounds for the application at any time, it had been made too late, and that the Court could not now entertain any question respecting the validity of the award. And they submitted, that if the time of the arbitrator delivering the award in any way affected the original submission, it could not be taken advantage of by the defendants, because the delay had been caused by their own conduct in neglecting from time to time to furnish the arbitrator with the nomination of a trustee to effect the arrangement made for their advantage. Adverting to the letter of the defendants' solicitor, they submitted that it was equivalent to a *parol* agreement to an extension of the time for making the award which would be sufficient to prolong the period of the arbitrator's authority.

They distinguished this case from that of the common proceeding of moving for an attachment for non-performance of the award, as the only result of this arbitration

could be to ascertain for what sum the judgment ought to be entered up, and they urged that it would require a much stronger case than that of a mere delay in delivering the award, to set aside a regular judgment which had [643] been suspended wholly on the defendants' account, whatever weight such an objection might have in inducing the Court to refuse an attachment.

Roupeil for the defendants, contended that, as the judgment was merely conditional, and depended on the result of the award, it could not be regularly acted upon until the award should have been duly made. The award, however, he insisted, was completely invalid, because it had not been made within the stipulated time, nor had the submission ever been made a rule of Court, nor the terms of the agreement been complied with, as far as regarded the interest of the defendants, and therefore the judgment was irregularly proceeded upon, and the proceedings could not be supported.

As to the letter, he insisted that, having been written after the time when the arbitrator's authority had expired, it could not operate to revive it, or to make that a good and binding award which was at that instant nugatory.

On the point of the delay in making the application, he urged that the defendants knew nothing of the award, and had never been served with it, nor were they aware that any award had been made: and therefore he contended that it was altogether void, and the whole of the proceedings were irregular, and unwarranted.

RICHARDS, Lord Chief Baron, stopping the [644] Attorney General, about to reply. I think this case quite clear—stating the circumstances from the affidavits. The judgment and award must be taken together, or the judgment would not be regular. The question therefore is, whether this is a good award or not. It is said it is not, because not made in time, that is, not by the 1st of September. It certainly was not, in fact, and therefore *prima facie* it could not be good unless, by the conduct of the parties, they have made it effectual by giving it their assent. I think it is quite clear that they have done so in this instance under the circumstances of the case. Besides, the other conduct of the defendants, all of which speaks a full assent to all that had taken place, there is the letter of their solicitor, written seven days after the 1st of September, requiring further matters to be still considered by the arbitrator, which he refuses to do. It is impossible not to hold that letter to be an assent to the enlargement of the time, as it was written with a view to the award which the arbitrator was to make.

As to the statement in the affidavits, that the defendants did not know of the award having been made till January, 1819: that can hardly be correct. They say, also, that it was never served upon them. It is not the practice to do so, and it is unnecessary. It is the business of the parties to inform themselves of the making of the award, and to require it from the arbitrator. In March, the judgment, having been perfected by the award, was executed: but no application [645] is made to the Court till June. Under all these circumstances I cannot think myself at liberty to consider that the award was not assented to by the defendants.

GRAHAM, Baron, concurring. This would be an exceedingly clear case in my view of it if it stood upon the letter of the defendants' solicitor alone, for that was an express recognition and assent, applying to all that had then taken place, and no subsequent verbal dissent could destroy the effect of that letter. They were of course aware of all that had been then done before the arbitrator, and that they had no new evidence to produce. Beyond all doubt this amounted to an express consent to enlarge the time.

GARROW, Baron. I consider the letter an authority to the arbitrator, equal even to a rule of Court. If the defendants had meant to rely on the time being out, it was their duty to have refused to give the name of a trustee on that ground, and not to have delayed it from time to time. Instead of doing so, they write this letter, requiring the arbitrator to take into consideration new matters. If the prosecutor of this extent had come to set aside this award, would not his not having objected to this letter, on the ground that it was too late, have equally precluded him? This is an application to set aside the judgment, and the arbitrator had no power to vacate the judgment: he could only reduce the sum.

[646] Then can we overlook the delay which has taken place before the application was made, from January till June at least? It is quite impossible that we could comply with it.

Per Curiam. Rule discharged, but without Costs.

GEORGE AND WIFE v. HOWARD AND WIFE, AND THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND. Saturday, 17th July 1819.—A transfer of stock of an intestate into the name of himself jointly with that of the husband of one of his two nieces, accompanied by proof of his having said in his life-time that it was his intention to give the husband the stock at his death, in consideration of affection for him and his wife, and that he had transferred it for that purpose (if not repelled by counter testimony), held to be sufficient proof of a gift of such stock—and the Court will not continue an injunction granted to restrain the husband (who had administered) from disposing of it.—Such evidence is strong enough to destroy the otherwise equitable presumption, that the transferee is a mere trustee for the transferor, without the aid of a reference or an issue; for however weak the defendants' equity may be in such a case, yet where the plaintiff does not shew any, slight circumstances are sufficient to rebut the *prima facie* presumption.

[See further, 7 Price, 661, *infra*. Applied, *Balstone v. Salter*, 1874, L. R. 19 Eq. 250, 252; 1875, L. R. 10 Ch. 431.]

This bill prayed that the defendant Howard might be declared a trustee of a sum of 1300l. Navy 5l. per cent. Bank Annuities, and be directed to transfer the same into the name of the Deputy Remembrancer, to be sold, and the produce divided amongst the plaintiffs—and that he might be directed to deliver up to the plaintiffs all securities for money &c. in his possession which belonged to the intestate, and that if necessary an account might be taken of what should be due from defendant Howard to the estate of the in-[647] testate, and to be paid over &c.—and that he might be restrained from selling or transferring the said stock—and the Bank from permitting &c.

The facts charged by the bill were, that the wives of the plaintiff George and of defendant Howard, were nieces and only surviving next of kin of an intestate, of whose estate the wife of Howard procured letters of administration. The plaintiffs having discovered, since his death, that the sum in question stood solely in his name till about eighteen months before he died, and that then he had transferred it into the joint names of himself and defendant Howard, who was indebted to him at his death for money lent upon securities in Howard's possession.

The defendants Howard and wife, by their answer, stated that the stock in question had been transferred into the joint names of the intestate and defendant Howard, in pursuance of an intention of the former, frequently expressed in his life-time, to give the same to the latter at his death, in consequence of his marrying the intestate's niece, who had been brought up in his family, and treated as his own child, and who had been left a widow with three children, and had also had a large family by the defendant. They denied being indebted to the intestate at his death, or that defendant ever gave him any security for any money lent—submitting to account.

[648] The Governor and Company of the Bank, by their answer, stated that there was the said sum standing in the name of the intestate on the 26th November, 1816, which was transferred on the 5th August 1817, into, and is now standing in the joint names of the intestate and defendant Howard, and that the dividends due on the 5th January, and 5th July 1817, were received by the intestate, and that the subsequent dividends up to 5th July, 1819, were then unreceived.

The defendant proved by the depositions of witnesses, that the intestate had, in conversation upon several occasions, stated that he had given the stock in question, and all his property at his decease, to the defendant Howard, and that he had had the stock transferred into their joint names, with a view of securing it to him—that his reason for not transferring it into the name of Howard alone was, that it might not be liable to his debts in case of bankruptcy—that he had been informed by his stock broker, that the stock would survive to Howard.

The plaintiff furnished no evidence in support of his claim.

Roupell and Maddocks relied, at the hearing, on the invalidity of such a gift so said to be made by the intestate, without further disposition by will or other instrument, and the danger and mischief of permitting such a case to succeed, founded as it was on mere conjecture of an intention to do [649] what might have been so easily done in fact, and by regular means. They urged that a transfer of stock into another's name, particularly when jointly with that of the owner, could never be considered as

proof of gift, as such transfers were often made for various purposes of convenience, without any idea of giving an interest : nor could that notion be much assisted in law by proof of loose conversations of an intention expressed of a gift : or if any such intention had really existed at one time, it might have been changed at another, even up to the last moment : and if any surmise of intention could be admitted in a case of this nature, the more natural one would be, that a dying intestate was proof of an intention that both his nieces, who were his only next of kin, should take the personal property he might leave behind. There were, besides, in this case, debts due to the intestate, as to which he had made no disposition, probably for the same reason.

In Equity it has been established that a transfer of stock into the name of another not being a wife or child, without consideration, constituted the person into whose name it was transferred, a trustee for the person so transferring it. In the case of *Rider v. Kidder*, (10 Ves. 360) it was held, that a transfer of stock into the joint names of the owner and another person, for the benefit of the latter, who enjoyed it as a gift by receiving the dividends, was nothing more than a trust for the [650] owner and his legal personal representatives. They therefore submitted that this stock must be considered as held in trust for the next of kin of the intestate, and they observed, that on the motion for the injunction which had been granted on the merits, the Court were clearly of that opinion.

Wrottesley for the defendants contended, that having regard to the near relationship of the parties and the circumstances of the case, as stated in the answer and not contradicted by evidence, supported as it was by proof of the intention of the intestate, to give the stock to the defendant at his death, enough had been shewn to satisfy the Court that they ought not to interfere in a case of this nature to deprive the defendant of the stock in question and to give it to all the next of kin.

The case of *Rider v. Kidder*, he insisted, was altogether very different from the present in its circumstances, and there it was said by the Lord Chancellor, that any evidence of being beneficially entitled, would be sufficient to rebut the presumption of the holder of the stock being a mere trustee : and that case was determined upon the ground that there were no circumstances of any sort to rebut the *prima facie* presumption, and there the holder of the stock was an entire stranger in blood to the intestate. As, therefore, there was no authority in favor of the plaintiffs' claim, and the only case cited rather inclined the [651] other way, he submitted that no ground had been laid for the interference of the Court in the way required by the plaintiffs' bill.

RICHARDS, Lord Chief Baron. The case of *Rider v. Kidder* does not apply. That was argued on this ground, that the intestate having purchased the stock with his own money, and transferred it into his own name and that of another person, the presumption is that the other person, if a stranger, is merely a trustee for him whose money it was : and so it might have been presumed here, perhaps, if such were the facts, but in this case stock already purchased and invested was transferred into the name of the owner and the defendant : and if I deliver over money, or transfer stock to another, even although he should be a stranger, it would be *prima facie* a gift. This is a much stronger case than a transfer to a mere stranger, and it lies upon the party denying it to be a gift, to shew some reason for a Court decreeing it to be a trust. Here the mere presumption on which the plaintiffs rely, is rebutted by evidence explaining the purpose and object of the transfer, and there is no evidence offered on the other side to contradict it. As to the objection that this is an odd mode of making a gift, and therefore could not have been intended, that is still nothing more than presumption, and it is answered by the evidence. It certainly was not the best mode, or one which a man of more skill would have adopted in making a gift ; but when we have evidence of a reasonable motive for it [652] in the giver's regard for his niece, and approbation of her husband's conduct towards her, that is sufficient to check any interference on our part to take the stock from the defendant. If the husband had died in the life-time of the uncle, there might have been more difficulty in the matter : but a strong part of the defendants' case is, that the plaintiff has not made out any right, and whether this be a gift or a trust, either way the plaintiff is not entitled to take it away from the defendant.

GRAHAM, Baron, expressed himself of the same opinion for similar reasons. This bill seeks to take from the defendant a legal interest, and to do so the plaintiff must raise an equity, which he has not done. Then it is shewn, by evidence, that there

was a motive for the gift, and there must have been some intention in making the transfer. That intention is proved by the evidence, which is closely connected with the nature of the transaction, and the intestate's explicit declaration. He had been living in the house of the defendant, and all the circumstances are strongly in the defendant's favor, in whom it is quite clear the intestate had great confidence. On the other hand there is only the presumption that he was a trustee for the intestate's family, and that in order to have completed the supposed gift, it was necessary to do some further act. I am clearly of opinion that upon the evidence (of the sufficiency of which we can judge as well as the Master or a Jury, and therefore may decide with [653] out a reference or an issue) the plaintiff has not shewn any equity upon which we can act, to make any decree in his favor.

GARROW, Baron, concurred—observing, that a man purchasing stock may have reasons for its not standing in his own name, but where he transfers stock already in his name into that of another person, it is quite a different thing, and generally proceeds from an intention to benefit the person into whose name it is transferred. In this case it was evidently the intestate's intention to give the defendants the stock, and he has effectually done it, reserving a control over it during his life: and perhaps one object of not giving it by will, might have been to avoid the legacy duty.

Per Curiam. Declare the 1300l. Navy 5l. per cent. Bank Annuities, to be no part of the intestate's personal estate.

Injunction dissolved.

[654] FORMAN AND ANOTHER v. BLAKE AND OTHERS, and in Nine other Causes wherein the Same Parties were Plaintiffs. Saturday, 17th July 1819. — Causes in Equity cannot be consolidated.

[See further, *Foreman v. Southwood*, 1820, 8 Price, 572.]

Wray now moved, on the part of the defendants, in the above causes, that they might be consolidated; and that the depositions taken on the part of the defendants in a cause of *Wright v. Southwood and Others*, together with the documents proved therein as exhibits, on the part of the defendants, might be read and given in evidence in the said causes, when so consolidated.

The motion was made on the authority of a case of *Pyke, Widow, v. Brook* (1 Fowl. Prac. 214), wherein the Court are said to have ordered seven different bills by the executrix of a deceased vicar to be consolidated into one.

RICHARDS, Chief Baron.—I never heard of an order in the course of my experience for consolidating causes in Equity; nor can I conceive upon what principle it can be done. There are many reasons why it should not: and if it be the practice, it is extraordinary.

Referring to the Register as to the practice, he stated that there was a case wherein a similar application had been made about twenty-four years ago, when the Court refused the application on [655] account of the difficulties which it might place in the way of the defendants.

Dowdeswell opposed the motion, and

The Court refused the application, saying, that it would be necessary first to refer it to the Master to enquire if the causes could be consolidated.

Nil.

THE GOVERNOR AND TRUSTEES OF THE FREE GRAMMAR SCHOOL OF KING EDWARD VI. AT SHREWSBURY, v. MADDOCK AND OTHERS. Saturday, 17th July 1819. — The Court will not make an order on plaintiffs (where the cause has been by decree referred to Commissioners) to produce and leave documents &c. in their possession in the hands of their clerk in court for inspection by defendants.

Fonblanque moved, on the part of the defendants, that the plaintiffs might be ordered to produce and leave in the hands of their clerk in court, upon oath, all books, deeds, papers &c. in their possession, relating &c. with liberty for the defendants to inspect &c. upon an affidavit stating that the deponent had attended several meetings of the Commissioners named in a commission issued under a decree of the Court in this

cause, [a suit for tithes] at some of which the plaintiffs' solicitor had admitted that there were in his or their possession divers documents &c. relating &c. not produced before the Commissioners, which he had refused to permit the defendants to inspect.

[656] It was urged, that as the omission of the usual direction for the production of documents in the decree had created a difficulty in this respect to the disadvantage of the defendants, the Court would now supply that defect by making the order prayed, particularly as the Commissioners had refused to make any order on the plaintiffs for the production of documents required; but

The Court observed, that as Commissioners were an intermediate tribunal constituted for the purpose of making the inquiry referred to them, with competent authority to do all that should be necessary, and were for the time the sworn officers of the Court, as their Master himself was, they must be considered as intending to do all that was fairly necessary on behalf of either party—and that this was an application calling on the plaintiff to produce documents, and therefore unusual. They enquired if there were any precedent of a motion of this sort having been granted, and said, that unless there were, they would not make an order which was in substance an alteration of the original decree upon so novel an application.

Motion refused, without costs.

End of the Sittings after Trinity Term.

[657] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, MICHAELMAS TERM, 60 GEO. III.

MEMORANDA.

In the preceding Vacation, Sir Robert Gifford, Knight, His Majesty's Solicitor General, was appointed Attorney General, and

John Singleton Copley, one of His Majesty's Serjeants at Law, was promoted to be his Successor in the Office of Solicitor General, and was consequently knighted.

Robert Mathew Casberd, Esq. (having a Patent of Precedence, was appointed to succeed Abel Moysey, Esq. (who had resigned) as Justice of the Great Sessions for the several Counties of Glamorgan, Brecon, and Radnor, S. W.

[658] HODGSON AND OTHERS v. MEREST AND OTHERS. Saturday, 6th Nov. 1819.

—The Court will not dissolve an injunction (obtained to stay proceedings in ejectment), on motion—in favor of persons claiming under a child otherwise provided for by his father's will, on whom the legal estate in customary-hold lands intended to be devised for life or in tail to another child by the same will (subject to questions of law as to the operation of the devise) has descended for want of being surrendered to the use of the will—against parties claiming under the latter as remainder men or purchasers, notwithstanding the devisee have covenanted with the heir that he shall stand seized to the use of himself and his heirs and assigns in case of breach of covenants afterwards broken.

[For further proceedings see 9 Price, 556.]

Martin and Girdlestone now moved to dissolve the injunction which had been granted to restrain the defendants from proceeding in an action of ejectment.

The bill on which the injunction was obtained set up a claim to certain customary-hold lands alleged to have been devised to the plaintiffs' ancestor, a younger son of the testator, for life, with remainder to his issue; but that for want of a surrender and conveyance to the uses of the will, the legal estate therein had descended to the ancestor of the defendants, the testator's customary heir, who had also been amply provided for otherwise by the same will.

The answer of the defendants insisted on covenants entered into by the plaintiffs' ancestor in a deed of conveyance for valuable consideration of a freehold estate devised to him by the will, with the ancestor of the defendant, which deed recited the intention of the testator to devise the said customary lands according to the limitations set forth in the plaintiffs' bill, and that for want of surrender they had descended as alleged. Those covenants were that the former would do certain acts to make the latter a

perfect title, and that in case of eviction by the issue of the covenantor, the covenantee should stand seised of the said customary lands [659] to the use of himself and his heirs for ever : and it alleged breaches by plaintiffs and their ancestor.

Benyon, Shadwell, Spranger, and Mascall for the plaintiffs, opposed the motion, submitting, that the testator, by the will under which the plaintiffs claimed, having devised the customary lands in question to the plaintiffs' ancestor, the Court would declare the defendants trustees for the plaintiffs, and direct a surrender ; or hold the defendants' ancestor bound by having made his election to take under the same will, thereby giving effect to the plaintiffs' claim * : and they contended, that the ejectment must be continued, as the Court ought not to change the possession on motion.

On the part of the defendants it was insisted, that if the plaintiffs' ancestor had originally any legal or equitable claim to entitle him to a decree in his favor, he had precluded and bound himself by his covenant.

They also relied upon the failure of the devise in point of law, inasmuch as the estate in question being customary-hold, and having been given to the plaintiffs' ancestor by a devise of all the testator's lands, &c. at Aulby, (part of which was freehold, and part the customary-hold in ques-[660]-tion) it had operated only on the freehold, and the customary-hold had not passed, according to the doctrine established by all the decisions.

RICHARDS, Lord Chief Baron (stating the devises, the facts, and the circumstances of the family at the death of the testator). The testator, having both freehold and copyhold lands forming part of the estate devised, by name, to the plaintiffs' ancestor, or, at least, intended to be devised to him for life or in tail ; the devise gave him a claim *primâ facie*, in equity at least, to the whole. It appears that he afterwards entered into some arrangement respecting it, and whether a foolish one or not we cannot now consider ; but the plaintiffs being remainder-men, are not affected by the contract of their ancestor, and are not bound to make good his engagement : at least there is no equitable act which the Court can call upon them to do, and therefore we cannot interfere, and certainly not in this summary way.

A question has been raised whether the customary-hold part of the estate passed at all under the will. It does not, however, appear that it did not pass in Equity at least, and that would be necessary to be clearly shewn, to warrant our dissolving this injunction. Then it is also clear that the child under whom the defendants claim, was provided for by the same instrument ; and he is, therefore, within the rule of Equity, not entitled to the assistance of the Court. We are consequently compelled to stay the ejectment.

[661] GRAHAM, Baron, of the same opinion. The testator was the best judge of what was a proper provision for his several children. If the child under whom the defendants claim had not received any patrimony, this motion would have had a stronger claim to attention. As it is, the injunction must be continued till the hearing.

Per Curiam. Injunction continued.

GEORGE F. HOWARD. Saturday, 6th Nov. 1819.—The Court will order the minutes of a decree, declaring stock "not to be part of the personal estate of an intestate," on a general claim by some of the next of kin, against a particular claim by others, to be varied, by adding the words "together with the dividends which have accrued due thereon ;" on a special motion, without a rehearing, where the amount is small, and the alteration is reasonable and consonant with the tenor of the original decree.

Roupell moved, on the part of the defendant, to vary the minutes of the decree which had been made in this cause at the Sittings after last Trinity Term (*o*), by adding, after the words "navy 5l. per cents. in the pleadings mentioned" the words "together with the dividends which have accrued due thereon."

Wrottesley opposed it, submitting that the minutes could not be varied by so

* These important questions were very fully argued at the hearing ; therefore the argument upon this occasion, when the Court did not give any opinion on those points, is omitted, being reserved for the report of the final determination of the Court when the judgment was pronounced.

(*u*) Ante, page 646.

important an addition, on motion to vary a decree so long pronounced, and that it could only be done, if at all, on a re-hearing.

Roupell, suggesting that the expence of a re-hearing, where the subject-matter was of so small [662] amount, added to the obvious propriety of the proposed alteration, which accorded with the principle of the decree, urged that the practice in that respect was not so precise and inflexible as not to admit of its being done on special motion, if the circumstances of the case should warrant it.

RICHARDS, Lord Chief Baron. If the evidence shall be found to warrant the proposed variation, which seems reasonable, the Court, I think, may do it. The Court, on a subsequent day, the Chief Baron having been in the mean time furnished with the evidence in the cause, made the order, as prayed.

BOYD v. STRAKER. Saturday, 6th Nov. 1819.—An affidavit of justification of bail, in the jurat of which it was stated to have been “sworn at Beverley,” (omitting the county) rejected.

It was objected by Jones, D. F. to the affidavit of justification of bail in a country cause, that it was stated in the jurat to have been “sworn at Beverley” only, omitting the county, on which he submitted that it could not be received.

The Court held the objection fatal, and rejected the affidavit on that ground.

[663] JONES v. JONES AND OTHERS. Demurrer [Equity]. Monday, 8th Nov. 1819.—A Court of Equity will not entertain a bill by an heir at law for setting aside and declaring void an impeached will, alleged to have been procured to be made under circumstances of fraud charged, unless some obvious definite impediment, which the Court can see and reach, to proceeding at law by ejectment be shewn by the bill to obstruct the plaintiff in that his regular course; and that although the bill charge generally that the defendants have possessed themselves of all the papers and muniments of the deceased, and threaten to set up outstanding terms.—Taxed costs are given in this Court on allowing a demurrer to the whole bill.

[For earlier proceedings as to discovery, etc., see 1817, 3 Mer. 161.]

The plaintiff, as heir at law of his deceased ancestor, filed this bill for the purpose of establishing his title to the inheritance against a will, alleged to have been procured to be made by fraud and collusion, and to be void, for various other reasons particularly charged by the bill:

Praying that the defendants might set forth a schedule of all papers, &c., belonging to the deceased in their possession (the bill having charged that they had possessed themselves of, and withheld such papers, to prevent the plaintiff bringing ejectment, and that they threatened to set up outstanding terms, &c.), and leave them in the hands of their clerk in Court—that the writing purporting to be a will might be set aside, and declared null and void as to the real estates of the deceased—and that he might be declared to have died intestate: and for an account, &c., the appointment of a receiver, &c., and an injunction to restrain the defendants from receiving any further rents and profits, &c.

To that bill the defendants put in general demurrers; for that the complainant had not by his bill stated any matter of Equity, whereon, &c., and therefore, &c.

Martin and Barber, in support of the demurrer, contended, that the plaintiff could not pro-[664]-ceed by bill in Equity to effect the objects of the prayer. If the facts stated by the bill were true, the plaintiff's remedy would be by ejectment, as a Court of Equity cannot decide on the validity of a will^c. They observed that this experiment had been made before in the Court of Chancery, and failed there[†].

Jervis and Fisher for the bill, insisted that there were many parts of it which must be answered: and they contended that the facts stated had furnished sufficient ground for the interference of a Court of Equity, at least so far as to direct an issue. They urged that it had been determined, that a Court of Equity can relieve an heir at law,

* *Pemberton v. Pemberton*, 13 Ves. 297.

† See *Jones v. Frost and Others*, 3 Mad. 1.

in case of a will having been obtained by fraud, *Gosse and Another v. Tracy* (2 Vern. 699); and that although it might be good at law: same case in P. Wms. (1 P. Wms. 287)—and *Welby v. Thornough and Ur.* (Pr. Ch. 123)—and where there are obstacles to prevent an ejectment, the Court will grant an issue so shaped as to get at the justice of the case, by not permitting any undue obstruction, *Pemberton v. Pemberton* (13 Ves. 298); and will order a will rendered void by fraud to be delivered up, that it may not vex the heir's title.

The Court however determined, that the present bill could not be supported, giving, as the rea-[665]-sons, that parties can only proceed in the way now attempted, where they cannot proceed at law, in consequence of some obvious defined impediment, which clearly stands in the way of the plaintiff's pursuing the regular and usual course of proceeding by ejectment, and which it is in the power of the Court to remove or restrain, as where the legal estate is out of the plaintiff in consequence of outstanding incumbrances, and other cases of that nature; but they cannot interfere on a general allegation, that the plaintiff cannot proceed by ejectment.

In this case, said the Court, the real question is, whether the will, which is sought to be impeached, is valid or not! and that is a question which we cannot determine. Courts will sometimes grant perpetual injunctions after ejectments have been tried, and will interfere in other cases where the party requiring their interference, shews that it is necessary to his claim, and that the Court ought to interpose; but the plaintiff has not by this bill made out any such case. Some of the old decisions may imply a power in Courts of Equity to interfere in cases of wills procured to be made by fraud, but it is now well settled that they cannot. We must therefore allow this demurrer.

Per Curiam. Demurrer allowed.

The defendant applying to the Court for costs beyond the usual allowance of 5l., which had [666] been frequently granted of late in the Court of Chancery, they said, that in this Court the practice was always to give taxed costs on allowing a demurrer to the whole bill.

WARRINGTON, Clerk, v. MOTHERSILL AND OTHERS. Tuesday, 16th Nov. 1819.—To a bill against an occupier for an account of tithes arising from farms and lands, situate within the township of K. in the parish of L., a plea that the defendant did not occupy any farm or lands within the parish of L. or the titheable places thereof, allowed.

Bill by the vicar of the parish church of Leeke, for an account of the small tithes arising from the defendants' farms and lands, situate within the township of Kepewicks, in the parish of Leeke, or the titheable places thereof, charging that the defendants were all living and residing in the parish of Leeke since November, 1814, and were in the occupation of farms and lands, situate within the township of Kepewicks, within the said vicarage or parish of Leeke, from which they had taken titheable matters, &c.

Kidson, one of the defendants, by his answer stated, that he had paid the tithes by composition to an agent, appointed under a sequestration.

Mothersill and the other defendants pleaded severally the following plea in bar, as to the whole of the discovery and relief sought by the bill, that he was not in November, 1814, nor had he since, nor was he then in the possession or occupation of any farm or lands, which was or were situate, either wholly or in part, within the [667] vicarage or parish of Leeke, in the said bill mentioned, or the titheable places thereof, all which defendant averred to be true, and pleaded same in bar, humbly demanding, &c.

The plea having been set down for argument,

Spranger, in support of it, submitted, that although the present plea was negative in form, it had all the requisites of a good plea; and its effect was to bring the case to a single point, and obviate a suit: for which, if the plea shewed that there could be no foundation, which was the object and purpose of every plea in bar in Equity, it ought to be allowed.

Fonblanque and Raithby contended that, the plea being negative, denying what would be, if the denial were true, matter of defence to the bill, it could not be maintained as a plea. They submitted that perjury could not be assigned upon the affidavit verifying so general a negative, and that it would destroy the efficacy of most bills in Equity if defendants were allowed to get rid of them by a general negative plea, and

were not to be put to a more particular denial of the facts negatived, and of the collateral matter, by answer. It is stated in Lord Redesdale's *Treatise on Equity Pleading* (page 187, 3d edit.), that "It has been made a question how far a negative plea can be good:" and he refers to the case of *Newman v. Wallis* (2 Bro. C. C. 143), where [668] Lord Thurlow determined that a plea in abatement that the plaintiff was not heir could not be supported; and although his Lordship is said to have disapproved of what he there held in a subsequent case, yet, when it is considered that in that latter case (*Hall and Others v. Noyes and Others* (3 Bro. C. C. 483)) the question was, whether a plea, negativing the plaintiff's right to a discovery, by denying the title on which the plaintiff proceeded, was good, Lord Thurlow merely observed, that in such a case the plaintiff's title might have been met by a plea; the present case, where the defendant denied this fact upon which his own liability was founded, was not touched by that dictum, but was within the principle, that a general negative could not be pleaded; but the facts must be denied by answer*.

Another objection was, that the plea denied the occupation of lands in the titheable places of the parish, which was matter of law.

The Lord Chief Baron was absent, sitting in Equity in the Exchequer Chamber.

GRAHAM, Baron. It appears to me to be quite clear that this is a good plea; and whatever may have been formerly said of the invalidity of negative pleas, the more modern cases have established their propriety; and I cannot conceive how it could have occurred to Lord Thurlow's mind, that a negative plea could not be maintained; and indeed it appears that he himself afterwards, on further consideration, held his doubt, which proceeded on technical grounds, to have been unfounded, and that where the plaintiff stated his title as a partner, and the partnership was denied, it was good matter of plea. This is in substance the same thing; and in both cases the object is to protect the party from an account which the plaintiff has clearly no right to demand, and which may be shewn, as here, by a direct averment completely answering the whole case, and therefore precluding all further inquiry as to any collateral matter, which if the plea were true, the defendant would not be bound to answer. Nor can the plaintiff sustain any inconvenience from allowing such a plea; for, on proving the defendants occupation of any lands in the parish, he would be entitled to the account, or he might have had an opportunity of examining him before the Master. I am therefore clearly of opinion that these pleas are good, and must be allowed.

WOOD, Baron, of the same opinion. I have no doubt that these pleas are good on the plain principle of all pleas in Equity; that if true, they operate to put an end to the suit at once, by the short mode of putting a single fact in issue, instead of going on at great and unnecessary length to answer a bill which has been filed without any foundation. The truth of the plea may [670] be put in issue by a replication, or the defendant might be examined on interrogatories. There is no analogy between pleas in Equity and at Law.

GARROW, Baron, concurred.

Per Curiam. Pleas allowed.

LANGFORD v. WAGHORN AND ANOTHER. Wednesday, 17th Nov. 1819.—Replication de injuria to a plea of title in defendant, in an action of trespass, cannot be supported.—Where a defendant under terms of pleading issuably, &c. demurs specially to such a replication, because it traverses all the matters of the plea, whereas it should have traversed only one, upon which a proper issue might have been joined, if the plaintiff treat that demurrer as a nullity and sign judgment, and execute a writ of inquiry, the Court will set all the proceedings aside with costs, because the demurrer is fair and bonâ fide, and the defendant is not precluded by the terms of pleading issuably.

Comyn, on the part of the defendants, had obtained a rule, calling on the plaintiff to shew cause why the interlocutory judgment, which had been signed in this cause, and the writ of inquiry executed thereupon, should not be set aside for irregularity, with costs, and all proceedings in the mean time stayed.

Vide *Dolder v. Lord Huntingfield*, 11 Ves. 283, and the cases cited; *Faulder v. Stuart*, ib. 296; and *Shaw v. Ching*, ib. 303.

The affidavit stated that the action was commenced in Easter Term, and that the plaintiff delivered his declaration of that Term, to which the defendants pleaded—that in Trinity Term following the plaintiff delivered a replication to which the defendants demurred—that the demurrer was delivered on the 21st July, and that the defendants were not under terms.

The affidavit also stated that the plaintiff's attorney soon afterwards returned the demurrer, re-[671]-fusing to accept it, and threatening, that unless the defendants immediately rejoined, judgment would be signed—that the defendants' attorney sent back the demurrer, giving notice, that if judgment should be signed, the Court would be moved to set it aside, but that notwithstanding the plaintiff treated the demurrer as a nullity, and signed judgment and executed a writ of inquiry.

The declaration was in trespass for entering the plaintiff's apartments, and disturbing him therein, and taking away divers articles of his furniture. A second count for expelling the plaintiff, with a common count *de bonis asportatis*.

The defendants pleaded the general issue as to the first count; and as to the second, title to the dwelling house in which &c., by seisin in defendant Waghorn, a demise by him to a third person, and a justification of defendant Waghorn thereupon, and of the other defendant, as his bailiff or servant.

The plaintiff replied—as to the second plea of the defendants as to said trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, —*precludi non; quia de injuria sua propriâ, absque tali causâ, &c.*

To that replication the defendants demurred; for that the plaintiff had thereby traversed all the several matters contained in the defendants last plea, whereas he ought to have traversed one [672] single matter only, whereupon a proper issue might have been joined.

Jones, D. F. shewed cause. He submitted, that as the motion was founded upon an affidavit that the defendants were not under terms to plead issuably, yet, as that fact was denied by the affidavits on the part of the plaintiff, and the Court will not try it upon affidavits, it must therefore, for the present purpose, be taken that they were under such terms. The question then would be, whether the special demurrer was, in the present instance, within the meaning of an issuable plea? He admitted that a demurrer may be so, but then it ought to be a fair demurrer substantially applying itself to the validity of the action, and not founded on a mere technical objection to the pleadings. In *Gray v. Ashton* (3 Burr. 1788) and *Berry v. Anderson* (7 T. R. 530), it is distinctly laid down, that the defendant cannot put in a special demurrer when he is under the terms of pleading issuably. So *Stanchouse v. Powell* (Sayer, 88), *Wright v. Russell* (2 Bla. 923), *Cunning v. Sharland* (1 East, 411), and *Bell v. Da Costa* (2 Bos. & Pul. 446), where the Court held, that a defendant, who is under terms to plead issuably, is not at liberty to take advantage of any objections upon special demurrer, of which he could not have availed himself upon a general demurrer. Now here the objection to the replication is substantially this, that it puts in issue all the different material allegations of the plea, instead of taking issue [673] upon a single point. This objection can only be supported upon a special demurrer, *Collins v. Walker* (Sir T. Raym. 50), and *Banks v. Parker* (Hob. 76); and here the defendant has demurred specially.

Comyn, in support of the rule. The distinction always is, in these cases, not between a special and a general demurrer, but between a real and fair demurrer, and a demurrer without good cause: *Dewey v. Sopp* (2 Stra. 1185), *Nesbitt v. Farrar* (Barnes, 168). Now here the replication was substantially bad: it put in issue all the material allegations of the plea, and would have cast upon the defendant the necessity of proving them. Where a defendant insists upon a mere matter of excuse, the plaintiff may reply *de injuria*; but where the defendant by his plea insists on a right, such a replication cannot be supported: *Croft's case* (8 Co. 67), *Cooper v. Monke* (Willes, 52), *Cockrill v. Armstrong* (ib. 99). The demurrer therefore was a fair demurrer, and not without good cause; and it was in fact advised by counsel.

Per Curiam. The demurrer was a fair demurrer, from which the defendant is not precluded by the terms of pleading issuably. The plea is not an excuse, but insists upon title; and the replication of *de injuria* cannot be supported. They therefore made the

Rule absolute.

[674] SMITH v. BATTERSBY. Thursday, 18th Nov. 1819.—Production by plaintiff of a rule, obtained by defendant for payment of money into Court, and the Master's allocatur of a certain sum for costs is sufficient evidence of the plaintiff's election to take the sum paid into Court; and if he afterwards proceed for the costs taxed, and not paid, he need not prove a previous demand at the trial.—A nonsuit on that ground, set aside.

This cause was tried at the last Summer Assizes, at Lancaster, before Mr. Justice Bailey. The plaintiff on the trial merely gave in evidence a rule obtained by the defendant, for payment of money into Court, and the Master's allocatur of a certain sum for costs in pursuance of that rule. The learned Judge thought that evidence insufficient, and nonsuited the plaintiff, with liberty, however, to move to enter a verdict with nominal damages. A rule nisi having been obtained early in this Term to set aside the nonsuit, and enter a verdict accordingly;

Jones, D. F. now shewed cause, submitting that the evidence upon the trial was insufficient. The rule for payment of money into Court was, at the instance, and in favour of the defendant: and the plaintiff might still have proceeded, if he had chosen to take the chance of recovering a sum beyond the amount paid in by the defendant. There was nothing in the evidence upon the trial to shew that the plaintiff accepted the money paid into Court, instead of proceeding for an ulterior sum. It was not proved that the plaintiff ever served any notice to attend the taxation of costs, or that the defendant in fact ever attended such taxation. The allocatur only shews the [675] Master's judgment respecting the amount of costs, but that might have been upon an ex parte taxation.

[The Court here inquired whether, according to their practice, the taxation of costs under these circumstances ever took place ex parte, without the attendance of the defendant or his attorney, and without any notice to attend: and the Master certified that such taxation never took place without the attendance of the defendant's attorney, or proof of notice to him.]

It was then contended, that where the defendant's attorney had not attended, proof before the Master, to his satisfaction, was not sufficient, but regular proof should have been given at the trial. At all events there should have been a demand of the costs, in order to apprise the defendant that the plaintiff was proceeding in the action to recover the costs: and here there was no proof of any demand.

Starkie, in support of the rule, contended that the evidence given was sufficient. By the practice, as certified by the Master, the taxation could not have been ex parte, and without notice. Either the defendant's attorney attended, or he must have had notice to attend, of which the allocatur itself, coupled with the known practice of the Court, is sufficient proof: and therefore no demand was necessary. The taxation of the costs by the plaintiff shews his election to accept the [676] money paid into Court, with the costs up to that time. In the case of *Smith v. Smith* (2 Bos. & Pul. N. R. 473), the Court of Common Pleas held, that if a defendant pay a sum of money into Court, and obtain an order to stay proceedings, on payment of that sum and costs, and omit to pay the costs when taxed, the plaintiff, after taking the money out of Court, may proceed without a previous demand of the costs.

Per Curiam. The case of *Smith v. Smith* is an express authority in point, and appears to us to have been well decided. The proceeding to tax costs was a sufficient notice that the plaintiff elected to accept the sum paid into Court, and no demand was necessary.

Rule absolute.

[677] WEAK, ON THE DEMISE OF BURGE AND ANOTHER v. CALLOWAY AND OTHERS. Tuesday, 23d Nov. 1819.—The Court will in some cases grant a new trial of an ejectment, where a verdict has been found for the defendant—as where the lessors of the plaintiff have, since the trial, discovered that they had conclusive evidence of a material fact (the marriage of their ancestor) which they failed to prove at the trial, in consequence of mistaking the christian name of the person to whom the ancestor had been married, and where it is expected that they may be obliged to enter to avoid a fine intended to be levied before a new ejectment

can be brought.—But they will only do so on terms of the costs of the former trial, and the application for the new trial being first paid.

On the trial of this ejectment, the lessors of the plaintiff failed in proving their case: because, when they had shewn (it being necessary for them to prove that their grand-father had been married) that he was married to a woman of the name of Joanna Forrest, the defendants proved that Joanna Forrest had been married to another person. They afterwards discovered, by the register, which they had not been able to find before the trial, that the grand-father had been married to Ann Forrest, and upon that they moved for and obtained a rule to shew cause why there should not be a new trial, on an affidavit stating the above facts, and that if a new trial were not granted, the lessors of the plaintiff would be obliged to make an entry to avoid a fine intended to be levied.

Gaselee and Casberd, now shewed cause. They submitted that where a verdict had been found for the plaintiff, the Courts would grant a new trial, but not where the verdict was found for the defendant; *Dobbs v. Pusser* (2 Stra. 975), *Lesser of Clymer v. Littler* (1 Bl. 348), *Letton, d. Wheeler v. Pitt* (Barnes, 139), and that there was no instance where, in a case like [678] the present, the application had been granted on behalf of a plaintiff. The principle of the rule is, that the Courts will not change the possession, and the plaintiff is not concluded.

Pell, Serjt., C. F. Williams, and W. Adam, supported the rule.

The Court, saying that this was a case in which the making absolute the rule which had been granted for a new trial, could not operate to the injury of the defendant, and might assist the justice of the case, under the circumstances, made the

Rule absolute—for a new trial, on payment of the costs of the preceding trial, and of the present application.

[679] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

IN THE MATTER OF MARY AND ANN JANAWAY, Infants. Tuesday, 23d Nov. 1819.

—The Court refused to direct an infant customary heir to surrender copyhold premises to a purchaser, which had been sold and conveyed to him by the deceased ancestor of the infant, for valuable consideration, and for which the ancestor had received the purchase money in his lifetime, on a motion made to confirm a report, which found those facts, and that the infant was a trustee within the 7th of Ann. on the ground that it was an ex parte proceeding, and non constat that the ancestor was competent to sell; and therefore the Court would not declare the infant a trustee within the statute.

It was referred to the Deputy Remembrancer by order of the Court made on a petition for the purpose of compelling a surrender of copyhold premises by an infant heir, to a purchaser of his ancestor, to inquire and report whether Mary and Ann Janaway were infants, and if so, whether they were trustees within the 7 Ann. ch. 19.

The Deputy Remembrancer thereupon reported as follows:—That Mary Harris, spinster, being seised or possessed to her and her heirs, according to the custom of the manor of Chertsey Beomand, Surrey, of (inter alia) the hereditaments hereinafter mentioned held of the said manor, by her will, bearing date the 14th of December, 1788, gave and devised unto her nephew James Janaway, son of her sister Ann Janaway, and to his heirs and assigns, for ever, (inter alia) all and singular the said premises, subject to the payment of two annuities in the said will given by the said Mary Harris to her sisters Ann Janaway and Elizabeth Gubbings, for their respective lives; that at a general Court Baron, [680] held the 26th of January, 1790, for the said manor of Chertsey Beomand, presented, that the said Mary Harris died seised to her and her heirs of and in the said hereditaments, held of the said manor, and that having duly surrendered the same to the use of her said will, he, the said James Janaway thereupon came into Court, and was admitted to (inter alia) all the said premises, to hold to him, his heirs and assigns, for ever, (subject to the payment of the said annuities) at the will of the lords of the said manor, according to the custom thereof. That at another Court Baron, held the 24th of January, 1809, for the said manor, the homage presented a certain surrender taken out of Court, (to wit) on the 6th day of September, 1808, whereby the said James Janaway surrendered the afore-

said premises, with their appurtenances, whereto he was so admitted tenant at the aforesaid Court Baron, on the 26th of January, 1790, to the use and behoof of Abraham Holden Turner; and (stating a mortgage to him) that the annuitants were both since dead; and that by an indenture tripartite, dated the 6th of February, 1811, made between the said James Janaway of the first part, the mortgagee of the second part, and Mary Tippet of the third part—(after reciting the title of Janaway to the premises, and the mortgage surrender, and that the said Mary Tippet had contracted with the said James Janaway for the sale to her of the said pieces of land, at the sum of 426*l.*, and that the whole of the said mortgage debt, and some interest still remained due and owing, and that the mortgagee, [681] being satisfied with the security of the other premises, did, upon the request, and for the accommodation of him, the said James Janaway, thereby consent to his receiving from the said Mary Tippet the whole of her said purchase money of 426*l.*, and did further agree to receive the said lands sold to her from his said mortgage)—it was witnessed that in consideration of five shillings to the said Abraham Holden Turner, in hand, paid by the said Mary Tippet, he (the mortgagee) did remise, release, and for ever quit claim to the said Mary Tippet, her heirs and assigns, so much and such part of the said lands and hereditaments, thereinbefore mentioned to have been sold by the said James Janaway to the said Mary Tippet, her heirs and assigns, as aforesaid: to the intent that the same lands and hereditaments so agreed to be sold to the said Mary Tippet, her heirs and assigns, might be wholly and absolutely exonerated and discharged from the said mortgage so surrendered, and the principal and interest monies thereby secured, and all claims and demands in respect thereof. And it was by the said indenture further witnessed, that in consideration of 426*l.* paid by the said Mary Tippet to the said James Janaway, he did (&c.) covenant, promise, and agree with and to the said Mary Tippet, her heirs, executors, administrators and assigns, that he, the said James Janaway, his heirs, executors, administrators and assigns, should and would, at the then next general Court Baron to be holden in and for the said manor, in due form of law, surrender the last thereinbefore stated premises, with their ap-[682]-purtenances thereinbefore mentioned, and described to be sold as aforesaid: and which deed was duly executed by the said James Janaway and the mortgagee, with a receipt for the consideration, indorsed.

And the Deputy Remembrancers also found, that upon the execution of the said indenture of the 6th of February, 1811, the said Mary Tippet entered on the said copyhold hereditaments comprised therein and continued in the possession thereof as owner until the time of her decease: and that the said James Janaway departed this life intestate in or about the 3d day of October, 1818, having had only three children, one of whom died an infant at the age of three months, or thereabouts: and that the said Mary Janaway and Ann Janaway, which said Mary Janaway and Ann Janaway survived him, and then were his, the said James Janaway's co-heiresses at law, according to the custom of the said manor of Chertsey Beamand. That the said Mary Tippet, by her will, dated the 10th of July, 1814, duly executed as by law required to pass real estates of inheritance, gave and devised (inter alia) unto her son William Henry Tippet, the premises in question, to hold to him, his heirs and assigns, for ever. And he found that the said Mary Tippet died in June, 1814: and that the said James Janaway never having surrendered the copyhold hereditaments comprised in the said indenture of the 6th of February, 1811, to the use of the said Mary Tippet, her heirs and assigns, was, at his death, a trustee of the same for the said Mary Tippet, her heirs [683] and assigns; and that the said Mary Janaway and Ann Janaway, as his co-heiresses at law, were then co-trustees of the same for the said William Henry Tippet. And that the said Mary Janaway attained her age of twenty-one years, in the month of June last; but that the said Ann Janaway was still an infant, viz. of the age of sixteen years, or thereabouts; and that therefore the said Ann Janaway was such a co-trustee as aforesaid, within the statute of the 7th year of Ann.

Beames now moved to confirm the report, and that the infant trustee might be directed to convey accordingly.

He submitted that, although this precise question had never been expressly ruled, the authorities, as far as they went, were all in favor of the object of the petitioner: and in Watkins on Copyholds (vol. ii. p. 63, 191), cases are cited to shew that copyholds are within the statute.

In the special case drawn up for the opinion of the Court of King's Bench, in *Doe, d. Harman, v. Morgan* (7 T. R. 104), on a question of the descent of a copyhold estate, it is expressly stated that the infant customary heir of his ancestor (to whom the tenant in fee had mortgaged and surrendered the premises, and which had descended on the infant who had been admitted tenant), had, by virtue of an order of the Court of Chancery (the [684] mortgage money and interest having been paid to the mortgagor's executor), surrendered the premises into the hands of the lord, to the use of the mortgagor. It was also held, in an *Anonymous case* in Comyns's Reports (Com. Rep. 615), that an infant *fême covert*, being a trustee, might be ordered to levy a fine under the statute. In *Ex parte Smith* (Ambl. 624), and *Ex parte Johnson* (3 Atk. 559), the Court of Chancery directed the infants to convey by recovery; and in *Ex parte Anderson* (5 Ves. 240), the Master of the Rolls, on the authority of Lord Thurlow, who there professed to act on former decisions, directed an infant to convey an estate in Calcutta; and in those two last cases the orders were founded on the generality of the statute. In *Evelyn v. Forster*, the Lord Chancellor, being referred to *Ex parte Anderson*, agreed (although he refused on motion to grant an order, that an infant mortgagee, on the mortgagor's paying the money into Court, should reconvey lands in Ireland) that there would have been no objection to it on petition. So also in ——— v. *Hancock* (17 Ves. 383), an infant trustee was held to be within the statute, notwithstanding he had an interest as co-executor and co-residuary legatee: and in *Ex parte Bellamy* (2 Cox 422), an infant mortgagee was held to be within the statute, whether he were beneficially interested in the mortgage money or not; and in all those latter cases, the Court proceeded on the principle that the statute, being remedial, ought to be construed extensively and liberally.

[685] There are also cases where a constructive trustee has been held to be within the statute, as in *Holbeorth v. Lane* (Moseley, 197), where (a case of *Berte v. Vernon*, having been cited as establishing that the heir of a vendee was held to be within the act a trustee for a person who had paid the purchase money), it was determined, that the heir was a trustee for the executor of a mortgagee. He also cited a MS. case of *Ex parte Vernon (b)*, taken [686] from the Register's Book, as deciding, only two years

(b) 2 P. W. 549. That case, as cited at length upon the present occasion, is as follows:—

[Copied from the Register's Book, made by Mr. Bedwell, entering Register.
Reg. Lib. 8, 1728, fol. 423.]

Jane Vernon, Ex parte. Tuesday, 15th July 1729.

"Whereas by an order of the 6th of June last, it was referred to Mr. Thomas Bennett, one of the Masters of this Court, to examine and certify whether Henry Ellingham, the infant in the said order mentioned, was not a trustee of the premises in the said order likewise mentioned, within the intent and meaning of the statute of the 7th year of the reign of the late Queen Anne, entitled, "An act to enable infants who are seised of estates in fee in trust, or by way of mortgage, to make conveyances of such estates." Now, upon motion this day made into this Court by Mr. Williams, of counsel with the said Jane Vernon, it was alledged, that in pursuance of the said order, the said Master made his report, dated the 18th day of June last, and hath certified, that by indentures of lease and release, dated the 18th and 19th days of September, 9 Ann. nup. Regina, 1710, made between Miles Frearson, of London, Clothworker, of the one part, and W. Monk, citizen and draper, of London, of the other part, the said Miles Frearson, in consideration of 70*l.* to him paid, did grant, release, and convey to the said W. Monk and his heirs, all the messuages or tenements, with the appurtenances, in Whitechurch, in the county of Southampton, in Church-street, then or late in the tenure or occupation of Richard Smith, bricklayer, and Mary Skeat, widow, in the said indenture particularly mentioned. And the said Master found, that Joseph Lee, of London, merchant, by his affidavit, swore that he believed, that the name of the said W. Monk was made use of in the said conveyance in trust, for Thomas Vernon, then of London, merchant, since deceased; and that he believed the purchase money paid to the said Miles Frearson for the said premises, was the proper money of the said Thomas Vernon; for that the said Joseph Lee found an entry made in the cash book of the said Thomas Vernon by John Goodman,

after the passing of the act, that the infant [687] heir of a nominal vendee in trust being reported to be within the statute, might be ordered to convey [688] to the devisee of the real purchaser, as being the cestui que trust.

Upon those authorities, added to the equity of the case, where the ancestor had actually received the money, and conveyed, as far as he could convey, the inheritance of copyhold premises, he submitted that the present was a case fairly within the purview of the act, and the principle of all the authorities.

RICHARDS, Lord Chief Baron. This is quite a clear case upon the face of it, in my view of the facts. In the case of a mortgagee and the [689] executors of the mortgagor, the reason is quite plain and obvious. There is nothing in the infant mortgagee but the pure legal estate, in trust for the executors of the mortgagor, and on payment of the mortgage money and interest, he must undoubtedly re-convey. But do not let me be told, that because questions coming near this have been determined without opposition, that such determinations are authority binding on me. I know very well that extraordinary decrees are often made where no objection is taken; but there are many instances where purchasers have been ruined by taking estates

(who was, at the time the said deeds bore date, cashier to the said Thomas Vernon, and with whose hand-writing he was well acquainted,) purporting that there was paid by the said John Goodman, out of the said Thomas Vernon's cash, on or about the 27th of the same September, 1710, 71l 15s. for a house bought by William Monk, for his account, at Whitechurch, and for drawing of writings which he, the said Joseph Lee, believed was for the purchase of the said tenement in Whitechurch aforesaid. And he found, that by indentures of lease and release, dated the 21st and 22d of September, 1710, made between the said W. Monk of the one part, and the said Joseph Lee of the other part, the said W. Monk, in consideration of the sum of 70l. did grant and convey to the said Joseph Lee, his heirs and assigns, all the said premises, with the appurtenances; and it appeared by the said affidavit that the said Joseph Lee paid the said purchase money to the said Thomas Vernon. And the said Master further found, that by indenture of bargain and sale inrolled, bearing date the 11th October, 1721, made between the said Joseph Lee and his wife of the one part, and Henry Ellingham, citizen, and merchant taylor, of London, of the other part, and by a fine levied by the said Joseph Lee and his wife, in consideration of 100l. mentioned to be paid by the said Henry Ellingham to the said Joseph Lee, the said Joseph Lee did bargain, sell, and convey the said messuages or tenement and yard, with the appurtenances, to the said Henry Ellingham and his heirs: and he also found, that the said Joseph Lee, by his affidavit, swore, that the said Thomas Vernon made good to the said Joseph Lee the sum of 70l. for the purchase of the said premises, and that the 70l. was the real consideration made good to the said Joseph Lee for the said purchase: and that no part of the said 70l., or other money whatsoever, was paid by the said Henry Ellingham to the said Joseph Lee, for the said premises, or any part thereof; and that he believed the name of the said Henry Ellingham was made use of in the said conveyance, in trust for the said Thomas Vernon; and that the said conveyance so made by the said Joseph Lee and his wife to the said Henry Ellingham as aforesaid was, by the direction and nomination of the said Thomas Vernon. And he also found, that William Ellingham, the uncle, and Arthur Ellingham, the great uncle of the said Henry Ellingham, the infant, by their affidavit, swore, that the said Henry Ellingham, the infant's father, died about September, 1725, leaving the said Henry Ellingham his eldest son and heir, who was an infant, about the age of six years: and that they believed, that the name of the said Henry Ellingham (the father) being the said Thomas Vernon's particular acquaintance, and for many years employed by him as his packer in his trade to Turkey: and that the said Henry Ellingham, the father, never paid any money, or any other consideration, for the purchase of the said premises, nor ever was in possession, or received any rent for the same to his own use; but that the said Thomas Vernon was in possession thereof to the time of his death, and kept the deeds relating to the same: and that the said William Ellingham particularly said, that he had heard his said brother, Henry Ellingham (the father) declare, in his life-time, that he was only a trustee for the said Thomas Vernon: and that the said William Ellingham further swore, that after the death of the said Henry Ellingham, his brother, the said Thomas Vernon proposed that the said tenement should be conveyed to him, the said William Ellingham, as a trustee for the said

where the infant heirs have not been within the statute of Anne, and compellable to perfect their title.

I will ask, whether any one ever heard of an infant customary heir of a copyholder being considered a trustee within the statute, and therefore bound to surrender, because his ancestor may have conveyed the premises to a purchaser in his life time?

I am called upon by this petition to take an estate out of the hands of an infant at once, upon an *ex parte* proceeding, and compel him to surrender it, although it might turn out, after all, that the ancestor was insane, or otherwise incompetent to convey; and that in the absence of the infant. The same case was before the whole Court last summer. For myself, I have no hesitation in saying that I have not the least doubt upon the matter. The petitioner can apply elsewhere if he [690] thinks proper. I shall not make the order most certainly.

This, it must be considered, is always necessarily an *ex parte* proceeding, and if a conveyance were made by an infant even under the order of the Court, it would not be valid if he were not within the act of parliament.

These things, I am sorry to observe, pass too often entirely *sub silentio*.

HARRISON v. BARRY, Esq. Sheriff of Cheshire. Friday, 26th Nov. 1819.—In an action against the sheriff for removing goods taken in execution, without paying the landlord a year's rent, it is not necessary to prove that a year's rent is due. It is sufficient to prove the occupation by the tenant. —It lies on the defendant to shew that the rent has all been paid.—Such a claim may be supported for forehand rent, or rent stipulated by the lease to be paid in advance, as being rent due within the statute of Anne: and such rent may be distrained for by the landlord, although he is aware that an execution is about to be sent down at the suit of a judgment creditor.—If a landlord, who has distrained for rent, does not sell within the five days by arrangement between him and the tenant, that is no proof *per se* of collusion.—The Jury having found a verdict for the defendant under circumstances affording ground for the objections so over-ruled in this case, the Court ordered a new trial.

The declaration stated that one Thomas Shawcross held and occupied a certain farm and premises in the parish of Cheadle, in the county of Chester, at the yearly rent of 140*l*.—that on the 1st May, 1819, a large sum of money, to wit, 880*l*. for two years rent had become due, and was owing from Shawcross to the plaintiff: that the defendant, as sheriff of Cheshire, on the 17th May, 1819, by virtue of a writ of *fiery facias* issued at the suit of James Wright, upon a judgment obtained by him against

Thomas Vernon, in the same manner as the said Henry Ellingham, the father, was before a trustee for the said Thomas Vernon, in relation to the said message, to which he the said William Ellingham consented, but nothing was done in regard the said Thomas Vernon died soon after. And the said Master found that one John Hunt had, by his affidavit, sworn much to the same effect as the said Joseph Lee and William Ellingham had sworn; and particularly that the said estate was let for no more than 40*s*. per annum, and that the said Joseph Lee was servant and book keeper to the said Thomas Vernon, for several years; and that the said Thomas Vernon did often make use of the name of the said Joseph Lee, as a trustee for him in deeds, and other writings. And the said Master did further certify, that he found that the said Thomas Vernon, by his last will in writing, dated the 26th of June, 1723, proved, as well in this Court, as in the Spiritual Court, devised all his real estate unto his wife, the said Jane Vernon and her heirs, so that upon the whole matter, the said Master conceived the said infant, Henry Ellingham, had no interest in the premises, save only in trust for the said Thomas Vernon, and, as the said Master conceived, was within the intent and meaning of the said act of Parliament of the 7th year of the late Queen Anne, and that he ought to convey the said premises to the said Jane Vernon and her heirs, as being the devisee of the real estate of the said Thomas Vernon, deceased. It was therefore prayed, that the said Henry Ellingham, the infant, may convey the said premises to the said Jane Vernon, pursuant to the said act of Parliament and the said Master's report, which this Court, on hearing of Mr. Weldon, of counsel for the said infant, held reasonable, and did order the same accordingly.

Shawcross, [691] seized and took divers cattle, goods, and chattels of Shawcross upon the premises—that afterwards, but before the removal of the goods and chattels seized, the plaintiff gave notice to the defendant of the said rent due to him from Shawcross, yet that the said defendant contriving &c., removed the said cattle off the premises, without paying or satisfying to the said plaintiff his rent or any part thereof, contrary to the statute &c.

The second count stated that Shawcross, for a long time, to wit, three years, had held and enjoyed a certain farm and premises in the said parish of Cheadle, by virtue of a demise thereof, at the yearly rent of 440l.; and that on &c. a large sum of money, to wit, 880l. of the said rent being due and in arrear from Shawcross to the plaintiff, the said plaintiff, according to the form of the statute &c., had seized and taken divers goods and chattels (enumerating them) then being in and upon the premises, as for and in the name of a distress, for the said rent in arrear; and that whilst the said goods and chattels were in the possession of the bailiff of the plaintiff, and in and upon the premises, the defendant contriving &c., rescued, seized, took, and carried away, the said goods and chattels, contrary to the form of the statute &c., whereby the plaintiff was deprived of the means of obtaining satisfaction of his rent, and of the costs and charges of the distress. The third count was in trover. The plea was the general issue.

[692] The cause was tried at the Chester Summer Assizes, 1819, before Warren, Ch. J. and Marshall, J. The evidence given on the trial was of very considerable length; but the only facts material to the points of law, which were ultimately raised, were these: The plaintiff proved a demise of the farm in question to Shawcross, and contented himself with shewing the occupation by Shawcross, without giving any explanation of the state of accounts between Shawcross and him, and declined calling Shawcross to state whether any and what rent was in arrear, although he was in Court. It was admitted that part of the rent claimed was a forehand rent. It further appeared that the plaintiff was aware of the judgment having been obtained against the tenant, and that execution was about to be sent down against Shawcross—that he distrained a few days before the fieri facias could be sued out according to the practice of the Court—that he did not sell at the end of five days, but obtained from the tenant a consent to extend the time for selling for an indefinite period, and that he left the distress with the tenant's wife for the purpose of her keeping nominal possession, there were other circumstances of suspicion. Objections were made in point of law by the defendant's counsel, which were over-ruled by the Court. They were principally those which were afterwards discussed on the motion for the new trial. The case then went to the Jury, and the two following questions of fact were left to them. First, whether they were satisfied that the rent was justly due from Shawcross to the plaintiff? Secondly, whether the possession under the distress was bona fide, or whether it was colourable and collusive, and for the purpose of delaying creditors? The Jury found a general verdict for the defendant.

Evans, W. D. early in this Term moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted. He insisted that the verdict was contrary to all the weight of evidence in the cause—and that the plaintiff having shewn the demise by him, and the occupation by Shawcross, it lay upon the defendant to prove that the rent was paid, in the absence of evidence of which the inference was, that it still remained due.

With respect to the forehand rent, he contended that it might as well be distrained for as rent in respect of a by-gone occupation. As to the possession, he urged that there was by no means sufficient evidence to support the conclusion that it was fraudulent: that though the landlord continuing in possession after the five days without selling, was *prima facie* a trespasser, as was held in *Winterbourne v. Morgan* (11 East, 395), yet that it was competent to the tenant to consent to an enlargement of the time, which consent was valid, not only as against the tenant, but also as against any party claiming under him, or under any execution against his property. A rule having been obtained,

[694] Jones, D. F. and Law, W. J. now shewed cause. They contended that the two questions of fact were properly left to the Jury, and being decided by them, there was no reason to disturb the verdict. It was consistent with the evidence given in the cause, that every shilling of the rent might have been paid; for no

explanation was given of the state of the accounts between the landlord and the tenant; and it is observable that Shaweross, the tenant, was in Court: but the plaintiff did not venture to call him. It is true, that where an action is brought by a landlord against a tenant after proof of a demise and of occupation under it, the burthen is cast upon the tenant of discharging himself by proving the payment of rent: the reason of which is, that the tenant, if he has paid, must be expected either to have witnesses to prove the fact of payment, or a written receipt to shew it. But the same rule ought not to hold in an action between the landlord and a third person, who is not privy to the transactions between the landlord and the tenant, and has no means of knowing what payments were made, what witnesses were present, or what receipts were given. It is not too much to expect that as against a *bonâ fide* creditor, enforcing his execution, the landlord should give reasonable evidence of rent being due, and not cast the proof of the negative upon a stranger. As to the question of fraudulent possession, that was peculiarly a question for the Jury.

[695] Secondly, the distress at all events could not be maintained in respect of the *forehand* rent. The general rule is, that a landlord cannot distress till after the efflux of the time, in respect of which the rent arises. It is true that it was held in the case of *Buckley v. Taylor* (2 T. R. 600), that the landlord might, under certain circumstances, distress for *forehand* rent; but that case has been considerably shaken by that of *Lee v. Lopez* (15 East, 230). Supposing however that case to have been well decided, the Court there proceeded on the ground of a peculiar custom of the country; whereas, in the present case, no such custom was either proved or pretended. But further, even supposing that a distress might be maintained for a *forehand* rent, as between landlord and the tenant, it remains to be shewn that such a distress can be maintained as against a third person, being a judgment creditor. The extraordinary remedy by distress is given to the landlord in respect of the actual occupation by the tenant and perception of the profits of the land. But the landlord's right to anticipate the rent cannot be superior or even equal to the right of a creditor to enforce his execution upon a judgment already recovered. If a landlord and tenant may thus stipulate for an anticipation of rent for half a year, they may equally do so for a whole year, or for five or any indefinite number of years; and thus by a collusive understanding between them, the claims of creditors may not only be delayed but defeated.

[696] The plaintiff therefore ought not to recover upon the count which is founded upon the distress. Then as to the count which proceeds upon the statute 8 Anne, c. 14, the plaintiff's claim cannot be supported upon that; for here he had distrained before the execution, and when the execution, came in, he claimed under the distress. The sheriff was not bound to provide for his rent, for which he was pursuing and insisting upon a remedy, distinct from and in opposition to the execution. But further, in order to charge the sheriff under the statute of Anne, there must be notice from the landlord to the sheriff, and also a demand, *Waring v. Darbary* (1 Stra. 97), *Palgrave v. Wyndham* (ibid. 212), *Henchett v. Kimpson* (2 Wils. 140), *Smith v. Russell* (3 Taunt. 400); and here there was no sufficient evidence of any notice or demand. Lastly, the count in *trover* cannot be maintained. A landlord who has distrained goods cannot maintain *trover* for them; for he had at common law only a power to detain the goods as a pledge; and although by statute he is authorized to sell, yet he has not any property in them: *Moneux v. Goreham* (2 Selw. N. P. 1271, (2d edit.)).

Evans, W. D., in support of the rule, was stopped by the Court.

The Lord Chief Baron was sitting in Equity in the Exchequer Chamber.

GRAHAM, Baron. I confess, it seems to me, [697] that this case ought to be sent down to be reconsidered upon a second trial. It has been contended that the landlord should have shewn the state of accounts between him and his tenant; but I cannot think so. He proved the demise and the occupation; and the defendant should have shewn that the rent had all been paid. Occupation is *prima facie* evidence against a tenant generally; and I do not see why it should not be so equally against this defendant. Then, as to the objection respecting *forehand* rent, I see no reason why it was not competent to include that in the distress. The anticipation of rent was a matter of express stipulation in the deed: it is admitted by the defendant's counsel, that an action of debt or covenant might have been maintained for such *forehand* rent against the tenant; and it seems to me that the remedy by distress may equally be supported in respect of it, either as against the tenant or as against the judgment creditor, who makes title under an execution against the tenant's effects. Then, as

to the possession under the distress being collusive, without at all wishing to prejudice the question upon the second trial, I cannot help saying, that I am not able at present to see from what circumstances the Jury drew the conclusion which they formed. There is, at least, sufficient in the case to call upon us to send it down to be reviewed. This being my opinion respecting the count founded upon the distress, it becomes unnecessary to decide the objections that have been raised upon the other counts of the declaration.

[698] WOOD, Baron. I agree with my Brother Graham that there ought to be a new trial; and in thinking so I proceed entirely upon the count which is founded upon the distress. It is contended, that the landlord should not only have shewn the demise and the occupation, but also the arrear of rent. But this was not necessary; and it would be a great hardship upon landlords if it were. The defendant might have called the tenant if he chose. Then, it is said, that the distress was suspicious; for that the landlord knew that the execution was coming, and sent in the distress just in time to be before the execution. If the landlord knew that there was an execution coming, he did very right to secure himself. But then again it is objected, that he could not distrain for forehand rent. If this objection, which is now raised for the first time, could be sustained, it would make a very serious change in the rights of landlords in general. Such a right of distraining was probably one of the principal objects for introducing that provision into the deed; it is a very proper provision to be introduced; and it would be very unjust if the landlord could not enforce it either against the tenant, or against any one else.

GARROW, Baron, concurred—saying, that he thought the verdict ought to have been for the plaintiff.

Rule absolute for a new trial, upon payment of costs.

[699] RICKETTS AND OTHERS v. GURNEY. Saturday, 27th Nov. 1819.—G. being a party in a suit referred to arbitration, having been also required to attend at Exeter as a witness before the arbitrator, and to bring with him certain papers in his possession, to be read on the reference, which was appointed for the 20th September, left London on the 16th, for the purpose of going thither, and pursued his journey by way of Clifton, in order to procure the necessary papers which had been left there during a previous visit, in custody of his wife, who had continued and was still remaining there, and arriving on the 17th, employed himself in assorting his papers, and selecting such as were necessary to take with him, which occupied him, and the professional person whom he had procured to accompany him to assist in so doing, all that day, and the next; and at five o'clock of the latter day, and whilst he was so busied, he was arrested at the suit of a creditor: Held, that he was privileged during the journey, including his stay at Clifton, on the ground of the deviation being for a necessary purpose, and the delay no more than reasonable for the accomplishment of it, according to the facts stated to the Court by the affidavits.—Garrow, Baron, dissentiente; absente Richards, Lord Chief Baron.

[S. C. 1 Chit. 682.]

Wilde, on the 10th November, had obtained a rule, calling on the plaintiffs to shew cause why the bail-bond given in this cause should not be delivered up to be cancelled: and that in the mean time all proceedings should be stayed.

The affidavit of the defendant, on which the rule was granted, stated in substance, that the deponent had filed a bill in Chancery against two persons, claiming certain property in their possession, and that the suit was referred by the Vice-Chancellor, by an order of the 16th March last, to an arbitrator, residing at Plymouth Dock, who was to make his award on or before the 1st of June then next, with power to enlarge the time till not exceeding the 1st January next. Witnesses were to be examined by the arbitrator, and the parties were to produce before him all deeds, writings, books, &c. in their possession—that the arbitrator enlarged the time for making his award till some day subsequent to the 20th September last. The deponent further swore that he had been for some time past resident at Bristol, and having left that city for London in August last, he had caused [700] to be packed up the whole of the

papers and documents relating to the said suit, together with various others, all of which were left in the care of the defendant's wife, who afterwards went on a visit to Clifton, taking the whole of such papers with her: and the deponent stated that late on the evening of the 14th September, whilst resident in London, he was personally served with an order of the arbitrator to attend the reference at the hotel in Exeter, on the 20th, at twelve o'clock at noon—that the deponent left London to attend such appointment on the night of the 16th of September, accompanied by a professional person to assist him—that many papers and documents relating to the matter of the arbitration, and necessary to be produced in evidence, being then amongst those left at Clifton, it became necessary to take that place in his way to Exeter—that they arrived at Clifton in the evening of the 17th: and that they were busily occupied during a part of that evening, and nearly the whole of the following day in unpacking, perusing, examining, separating, and arranging the said papers, &c.: and that whilst they were so employed, about five o'clock in the afternoon the deponent was arrested at the suit of the plaintiffs in this action, and that the sheriff's officer, notwithstanding the defendant shewed him the order of the arbitrator, and claimed to be discharged, would not release him till he had given bail. The affidavit also added, that the papers, &c. were necessary to the matter of the reference, and that Clifton is distant from Bristol, through which [701] the London and Exeter mail passes, only one mile; and that the deponent went there with the professional person alluded to, for the sole purpose of procuring such papers, and that on the following day (the 19th), the deponent having given bail, they pursued their journey to Exeter to attend the reference.

The affidavit of the person who accompanied him corroborated that of the defendant.

Jones, D. F. and Platt, now shewed cause against the rule, upon an affidavit made by the sheriff's officer, who made the arrest, stating that he had been employed to arrest the defendant, and endeavoured to do so during the month of August, and until the 18th of September, but could not meet with him before: although he knew he was dwelling in the parish of St. Mary Redcliffe, in the city of Bristol: and that he had been informed and believed that the defendant had lodgings, or was residing or attending in the day time at Clifton.

Upon these facts they submitted that this was a case of unwarranted deviation and unnecessary delay on the part of the defendant in performing the journey. It did not appear that there was any necessity for his being personally at Clifton to procure the papers in question: his wife was there at the time, and might have sent him what he wanted; and he must have known what those were. But, admitting he had a right to go to [702] Clifton for his papers, he had no right to cover a stay of two days there under pretext of his privilege: if he had, he might by swearing that twenty days were necessary, have procured protection for that or any longer period which might suit his convenience: and if he were allowed to go to Clifton, which is admitted to be out of the road, he must be protected if he should go for the same purpose to any other part of the kingdom; for it would be impossible to draw a line.

Having cited an *Anonymous case* from Smith's N. P. Rep. (1 Smith's N. P. Rep. 355), determining that a witness who lived twelve miles from the place of trial was not protected by his subpoena till twelve o'clock the next day, they adverted to the decision of the Court of King's Bench only two days before in a case of *Randall v. Gurney* (3 Barn. & Ald. 252), wherein this same defendant had made a similar application upon similar grounds: and the Court held, that he was not protected, on the ground that even if he had made out a case of necessity for going to Clifton, he had not for staying there; and therefore they discharged a similar rule.

Chitty and Wilde, in support of the rule, contended that the affidavit had shewn that the deviation was necessary, and the time bona fide employed in the purpose which made it so. The Vice Chancellor's order was imperative on the defendant, and was in the nature of a subpoena [703] duces tecum; and if an attachment had been applied for to the Court of Chancery for not bringing his papers with him, it would have been no excuse to say, that he was deterred from procuring them by apprehension of an arrest. It is quite clear that a party attending an arbitrator under an order of the Court of Chancery, is privileged from arrest, *Moore v. Booth* (3 Ves. 350): and the Court of Common Pleas have held, that as to what is the nearest and direct road,

a witness is not bound to go what others may consider the nearest, and the construction should be fair and liberal, *Willingham v. Matthews* (2 Marsh. 57): and a man cannot be fairly expected to travel two hundred miles direct, so as to be fit for business on his arrival without taking rest on the road.

As to the decision in the case of *Randall v. Gurney*, they urged that in a determination, proceeding on a view of the bonâ fide conduct of a party, a decision, in which the Lord Chief Justice differed, ought not to conclude the party or the Court. In that case the Lord Chief Justice held, that the deviation was not unreasonable, or the delay too great; and he observed, that taking the defendant's attorney with him was a mark of bona fides; and in this case the affidavits are, in many respects, much stronger than those upon which that rule was obtained.

The Lord Chief Baron was absent at Guildhall.

[704] GRAHAM, Baron, having expressed his regret that the Court was not full, as there was a difference of opinion on the Bench, and he had himself had doubts of the opinion which he had ultimately formed, stated his inclination to be, that the rule should be made absolute.

The general rule (observed his Lordship) is quite clear and well understood; and it is also reasonable that immaterial deviation and accidental delay in eundo et redeundo should not deprive a party of his very useful privilege. The morando also should include purposes of natural rest and necessary refreshment, and ought to be construed with liberality. I do not rely on the particular circumstances of this case, as I think there can be no doubt that the defendant was keeping aloof from his creditors; but I found my opinion on general grounds, and I think in a general way the defendant's reasons for taking Clifton in his road, where he had left his papers, and where his wife and family resided, was an unobjectionable one; and if it was, he must be allowed a reasonable time for their selection, and the preparation for taking them with him. In that case the question here will be simply, whether they were necessary; and whether their assortment required so much delay.

His Lordship then adverted to the material facts detailed in the affidavits and the dates, and observed that if the facts stated were true, the de-[705]-viation was by no means unreasonable, and the occasion well warranted it, and accounted also satisfactorily for the delay. I may indeed have certain impressions unfavourable to the present application, under the circumstances of suspicion which surround the particular case; but they are not sufficient to counterbalance the positive affidavits on which this rule was obtained, of the necessity of the papers, and the time required to procure them: although, as a Juryman, I might not be disposed to give credit to all that has been stated: but I am bound here by what is so sworn and not contradicted; and I think, that if it were true, it would be enough to privilege the defendant; and therefore the arrest was a breach of that privilege, and the defendant is entitled to have this rule made absolute.

Woolf, Baron. There are two questions in this case for the consideration of the Court. One is whether it was necessary for the defendant to go to Clifton: the other, whether, if it were, he staid there longer than was necessary for the purpose which required his going there. Those are the two points.

As to the first, it is quite clear that the journey to Clifton was necessary, for it is not denied that there were material papers there which it was material that he should produce before the arbitrator.

[706] Then arises the other question, as to the time of his staying there, or whether he was arrested before he had finished the business which took him to Clifton. It is positively sworn that after his arrival on the 17th, he immediately set about the business, and was employed during part of that day, and nearly the whole of the next, in examining and arranging the necessary papers, and that before he had finished he was arrested. No part of that statement is contradicted; and against the positive affidavit can we say, that under such circumstances the defendant was not within the protection of the privilege? I agree that the protection is not to be abused, and if the morando were shewn to be wanton and unnecessary, we should discharge this rule. Under the circumstances, however, I am of opinion that it should be made absolute.

GARROW, Baron. As the majority of the Court entertain a different opinion from that which I have formed upon this case, I am bound by their decision, and it is of little consequence in this instance what my opinion may be. On general grounds,

however, I will state my reasons. I should be disposed to go as far as any one in protecting, in all its facilities, the due administration of justice, but I must be satisfied, before I hold a party to be protected by the rule which privileges witnesses from arrest, that the conduct of the party claiming the privilege is such as brings him within that rule, before I can consider him entitled to the protection.

[707] I should have been better satisfied if the defendant had gone with this application, or with that of which he before tried the experiment in the Court of King's Bench, before the Lord Chancellor, upon the intimation of my Brother Bayley * : for if his Lordship should be of opinion that the Court of King's Bench were right in their view of the case two days ago, we shall, by our determination of to-day, have deprived the present plaintiff of the advantage of that decision in this particular instance.

I admit that there should be time allowed for rest and refreshment to witnesses *bonâ fide* proceeding on the business from which their protection arises : but what I object to in the present case, is the manner in which the party makes out his claim to protection, and which is done entirely upon his own *ex parte* statement ; and I am not at all satisfied with his case, even upon his own shewing. He states matters, which cannot well be contradicted, in a very general way without any particulars. He does not tell us what papers were necessary, or in any way account for the length of time which he says was consumed in seeking for them : and how can it be contradicted that he was necessarily employed, as he says he was, unless he shews what they were about during the two days ? I think he should have gone on to say what progress they had made, and what still remained to be done, and what time it took them [708] afterwards to finish the task. He was clearly not entitled to read all the papers through, which however might have been done for the very purpose of delaying the period of his protection.

For these reasons my mind is not at all satisfied by the affidavits that have been put in in support of this rule : and in a case of this sort, attended with so many circumstances of suspicion, I should expect to be informed of all the facts with great minuteness and particularity. The rule, however, must be made absolute.

Rule absolute.

Jones then applied for suspension of the rule until an application should be made to the Court of Chancery, for the purpose of obtaining an order to release him from the arrest, as had been suggested by Mr. Justice Bayley, and approved by Mr. Baron Garrow : and that it might be ordered to await the result : but that the Court (as the point had been argued and determined) refused.

[709] SHAW, calling himself Executor of the last Will and Testament of William Shaw Deceased, *v.* MANSFIELD. Saturday, 27th Nov. 1815. — A plaintiff suing as executor, having been appointed under a former will which the testator had afterwards revoked, and having obtained probate surreptitiously of the first will which was soon after annulled by the prerogative Court who also revoked the probate, on that ground, after the action commenced, held liable to the costs of the cause. — A rule obtained by the plaintiff for judgment, as in a case of a non-suit being made absolute, generally, without costs, applies only to the costs of the motion—not to the costs of the suit.—The Court, on a rule to shew cause, will not hear affidavits in reply.

In Trinity Term last, a motion had been made by D. F. Jones, for judgment, as in a case of a nonsuit, for not proceeding to trial according to the practice of the Court. The affidavit on which the motion was made, stated merely the proceedings with their dates, and the plaintiff's default in not going on trial.

Jervis, in the same Term, had shewn cause against that rule, upon an affidavit that the plaintiff had brought his action in the character of executor, having duly obtained probate, but that the probate having been revoked by the Ecclesiastical Court, the plaintiff had been unable to proceed—Jones, D. F. for the defendant, had tendered affidavits in reply, explaining the circumstances under which the plaintiff had obtained

probate, and the reasons for which it had been revoked : but the Court, having refused to receive any affidavit in reply, the rule was made absolute, for judgment, as in case of a nonsuit "without Costs."

Jones, for the defendant, early in this Term, moved for and obtained a rule to shew cause why the plaintiff should not pay him his costs of the [710] cause, to be taxed by the Master. The affidavit in support of this motion, admitted that Shaw, the plaintiff, had been appointed executor by a former will of William Shaw, the deceased, bearing date January 1st, 1818, but alleged that the deceased had made a subsequent will, bearing date the 16th February, 1817, and thereof appointed the defendant Mansfield executor—that after the death of the testator, and immediately after his funeral, the last will, of the date of the 16th February, was read over to the relations, amongst whom was Shaw, the plaintiff—that upon that occasion the plaintiff neither disputed the will of the 16th February, nor insisted upon, or even alluded to the will of the 1st of January—but that immediately afterwards he surreptitiously obtained probate of the will of the first of January, and under that probate possessed himself of the estate and effects of the testator—that he shortly afterwards held the defendant to bail for a sum which the defendant had owed to the testator at the time of his death—that whilst the defendant was taking measures in the Ecclesiastical Court to annul the probate, and to establish the subsequent will, the plaintiff was urging the proceedings at law to recover judgment in the action against the defendant before the decree of the Prerogative Court could be obtained—that in order to prevent the proceedings in the action at law, outstripping the proceedings in the Prerogative Court, an injunction from the Court of Chancery had been obtained—and, lastly, that the Prerogative Court had revoked the probate granted to the [711] plaintiff, and pronounced for the force and validity of the subsequent will, and had condemned the plaintiff in costs.

Against that rule for payment by the plaintiff of the defendant's costs of the cause in the action at law,

Jervis now shewed cause, contending that the present motion was an experiment not warranted by any authorities, nor supported by any known principle of law. In the first place, it is an attempt to overturn what the Court has already decided in the present suit : for, upon the former motion, for judgment as in case of a nonsuit, the Court, upon the ground of the plaintiff having sued as executor, made the rule absolute, "without costs," which must have been meant to comprise not merely the costs of the motion, but also the costs of the cause. But, secondly, independently of the former adjudication, there is no pretence for charging the plaintiff with the costs of the cause ; because the plaintiff sued as executor. At the time of the action brought, the probate was unrevoked ; and it would be contrary to the policy of the rule of law to charge with costs a party who sues in a representative character on account of the subsequent revocation of his authority, which revocation may have been founded on reasons of which he had no knowledge, or over which he had no controul. But the present point has been expressly ruled, for in *Howard, Executor, &c. v. Ratborne* (Willes, 316), it was held, that an executor shall [712] not pay costs under the statute 14 Geo. II. c. 17, for not proceeding to trial according to the course and practice of the Court in which the suit was instituted. The cases of *Bonnet, Administrator, v. Coker* (4 Burr. 1927), *Booth v. Holt* (2 H. Bla. 277), *Cooke v. Lucas* (2 East, 395), are to the same effect.

Jones, D. F., in support of the rule. As to the first point, the Court did not, upon the former motion, decide the question which is now brought before them. Upon the motion for judgment, as in case of a nonsuit, by the terms "without costs," the Court could only have intended the costs of the motion, and not the general costs of the cause. That is the ordinary meaning of the term "costs," on motions of that kind. Besides, the Court had then no materials before them to enable them to decide as to the right to costs of the cause, for the defendant's affidavit, according to the ordinary course, related only to the dates of the proceedings, with a view to shew the plaintiff's default : and no affidavits in reply could be received as to the merits which were partially and colourably introduced by the plaintiff's affidavit. Then, as to the second point, there is no doubt as to the cases that have been cited. Where a plaintiff sues as executor, having obtained probate without fraud, and prosecutes a claim which he has no reason to believe to be unfounded, he is not to be charged with costs under statute 14 Geo. II. c. 17, for not proceeding to trial, unless he has been [713] guilty

of laches, or wilful delay. Such is the general rule. But the present is the case of a plaintiff, who fraudulently and surreptitiously obtains probate, knowing of the existence of a subsequent will, and who sues and holds to bail the executor appointed by the rightful will. This is therefore a gross abuse of the process of the Court. Executors are not excepted in the statute 23 Hen. VIII. c. 15, or in the statute 4 Jac. I. c. 3, which enact, that costs shall be yielded to defendants in the cases therein mentioned "by the discretion of the Justices." But those statutes having been passed for the purpose of preventing groundless and malicious suits, the construction put upon them has, under the terms "by the discretion of the Justices," exempted from costs persons fairly and bonâ fide prosecuting claims as executors. This exemption proceeds upon the presumption that the executor is unacquainted with the transactions of his testator, and upon the ground that it would be an unreasonable exercise of the discretion of the Court to render the executor responsible for any infirmity in claims as to the validity of which he had no knowledge. But here the plaintiff not only knew that his claim against the defendant was not founded in legal right, but he also assumed a character to which he knew that he was not entitled. It would therefore be absurd to include him in a constructive exemption that was intended only to extend to persons bonâ fide promoting claims in *auter droit*, which they believed to be just. Where an executor, being plaintiff, is guilty of laches, or [714] wilful delay in the progress of a cause, he must pay costs. *Harris v. Jones* (1 Bla. Rep. 451), *Hawes v. Saunders* (3 Burr. 1584), *Higgs v. Warry* (6 Term Rep. 654), *Booth v. Holt* (2 H. Bla. 277), *Anon.*, (7 Mod. 98), *Eaves v. Mocata* (1 Salk. 314, S. C. 2 Ld. Raym. 866, called *Eaves*, *Eccentric of Eaves v. Mocata*), *Rea v. Powell* (Stra. 33). A fortiori where an executor is not merely guilty of misconduct in the progress of the cause, but is from the very beginning culpable in commencing it, he ought to be liable to costs. *Comber v. Hardcastle* (3 Bos. & Pul. 115), *Melluish v. Maunder* (2 New Rep. 72), *Zachariah v. Page* (1 Barn. & Ald. 386).

Per Curiam. Upon the former motion, our decision could have related to no costs but the costs of the motion. We had no materials for any adjudication as to the costs of the cause. And as to the principal question, it is clear, upon the authorities stated at the bar, that the plaintiff is not, under the circumstances, within the exemption which ordinarily attaches to the case of executors.

Rule absolute.

End of Michaelmas Term.

REPORTS of CASES ARGUED and DETERMINED
in the COURT of EXCHEQUER, at Law and in
Equity, and in the EXCHEQUER CHAMBER,
in Equity and in Error, from the Sittings after
Michaelmas Term, 60 GEO. III. to the Sittings
after Michaelmas Term, 1 GEO. IV., both in-
clusive. Vol. VIII. By GEORGE PRICE, Esq.,
of the Middle Temple, Barrister-at-Law. London,
1822.

- [1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER. SITTINGS AFTER MICHAELMAS TERM, 60 GEORGE III. GRAY'S INN HALL. CORAM RICHARDS, LORD CHIEF BARON.

WHISTLER, Clerk, *v.* WIGNEY. Tuesday, 14th Dec. 1819.—A defendant in his answer to a bill for an account of tithes in kind, must set forth an account of titheable matters taken by him, although he relies on a defence of composition or modus, or it will be good ground of exception.

Exceptions were taken to the defendant's answer. One of them was, that the defendant had not set forth an account of the titheable matters taken by him, the tithes of which were sought to be recovered by the plaintiff's bill.

[2] Hone, in support of the answer submitted, that where the defendant resisted the plaintiff's claim to the tithes in kind, by setting up, as in the present case, a defence of composition, the effect of which, if proved, would be, to shew that the plaintiff was not entitled to an account, it was not a ground of exception to the answer, that it did not in the first instance, set forth an account of titheable matters.

THE LORD CHIEF BARON. It is a general rule of equity, that if a defendant answer at all, he must answer fully. It has been frequently held, that defendants must set forth an account in their answers, notwithstanding they set up a defence of composition or modus.

Exception allowed.

- [3] EX PARTE WILLIAMS AND OTHERS (his Sureties). [In the Matter of the Estreat of a Recognizance.] Tuesday, 14th Dec. 1819.—This Court has jurisdiction over recognizances entered into under the 28th Geo. III. c. 52 (providing for petitions against undue returns of members of Parliament), upon their being certified into the Exchequer by the Speaker of the House of Commons, upon the report of the Select Committee: and in a case of sufficient merits they will interfere to discharge such recognizances so estreated, upon a summary application by rule to

shew cause.—The parties entering into the recognizance, are not bound to attend the Committee to the last moment, or to appear to hear the determination of the Committee, as to whether the petition be frivolous or vexatious.

Littledale now shewed cause against a rule which had been obtained in Michaelmas Term, calling upon Lord Viscount Deerhurst, (the rule being directed to be served upon the Attorney-General) to shew cause why the recognizance of the applicants, which had been certified into this Court by the Speaker of the House of Commons, should not be vacated.

The facts, as collected from the affidavits, were that Williams, on the part of himself and other freemen of the city of Worcester, complaining of the undue election and return of Lord Deerhurst, as member for that city, petitioned the House of Commons against such return, and entered into the recognizances required by the 28th Geo. III. c. 52*, himself in 200*l.* and two sureties in [4] 100*l.* each: conditioned that the principal should appear, &c. (in the words of the act) at the time fixed by the House for the trial of the petition, and in the mean time should renew the same at each succeeding session, until it should be heard before a Select Committee of the House, or be withdrawn by permission.

The petitioners duly attended the Select Committee on the day appointed (the 17th of March) and the three following days, on the last of which the petitioner's counsel stated to the Committee the substance of the case, and informed them, that it was not intended by the petitioners, to bring forward any evidence in support of the petition, and Lord Deerhurst was heard in answer. A question then arose, as to the petition being declared frivolous and vexatious, and on that point the Committee postponed the decision to a further day, when (23d of March,) they determined that the petition was frivolous and vexatious. The parties petitioning were, on the same day, called in to hear the decision, but did not appear, whereupon the Committee entered upon their minutes the following resolution: "that when the case of the freemen [5] of the city of Worcester petitioners, against the return of Lord Viscount Deerhurst, came before the said Select Committee for the purpose of decision, the said petitioners did not appear by themselves, their counsel, or agents." The applicants disclaimed any intention of disrespectful demeanour towards the Committee: and stated that they had acted solely from not considering themselves bound by the recognizance, to attend the decision, as well as the trial of the petition.

The Speaker, having certified the recognizance into this Court upon that report, as required by the Act of Parliament,

Richards, upon this statement of facts, moved for, and obtained the present order, upon the ground, that the parties petitioning were not bound, by the terms of the statute, to attend the decision of the question reserved for the consideration of the Committee; and that having attended the hearing, they had satisfied the condition of their recognizances.

The substance of the cause now shewn was, that in a case of this sort, where by the statute, the Speaker's certificate was declared to be conclusive evidence of the forfeiture of the recognizance by breach of the condition, the Court had no jurisdiction to entertain any enquiry respecting it upon affidavits, the Select Committee having been constituted the sole and exclusive judges of that question by the Act of Parliament: [6] and that the party's only remedy was by an action at law.

* By the 9th section of that Act, which requires parties to enter into a recognizance to appear before the House, at the time fixed for taking into consideration the petition, and to appear before any Select Committee appointed by the House for the trial of the same; it is enacted, "that if the petitioner who shall have entered into such recognizance, shall not appear before the House, within one hour after the time fixed for appearing before a Select Committee, or if the Select Committee appointed for the trial of such petition shall inform the House that such person or persons did not appear before the said Committee by himself or themselves, or by his or their counsel or agents, to prosecute their said petition, in every such case, such person or persons shall be held to have made default in his or their said recognizance, and the Speaker of the House of Commons shall thereupon certify the same into the Court of Exchequer, and such certificate shall be conclusive evidence of such default, and the said recognizance shall then have the same effect, as if estreated from a court of law."

It was also contended, that by this statute and the 53 Geo. III. c. 71, the petitioners were bound to be in attendance on the Select Committee from the beginning of the proceedings to the end, as they had a responsible duty to perform, and had subjected themselves to liabilities from which they could not otherwise be discharged—referring to the 12th section of the act, and the form of the recognizance prescribed at the end of the statute, one of the terms of which is, that the costs are to be paid to the opposite party in case the Committee should report the petition frivolous or vexatious.

RICHARDS, Lord Chief Baron. The question of this Court having jurisdiction in the present case, depends entirely on the language of the act of Parliament. The general jurisdiction of this Court in cases of this sort, is founded on the 33 Hen. VIII. c. 39, and unless there be any thing in the 28 Geo. III. c. 52, or the 53 Geo. III. c. 71, which takes away that jurisdiction, there is no doubt that the Court may interfere in this case, if satisfied that the application is founded upon sufficient merits—(his Lordship read the 9th section of the former act). The practice under that section is for the Speaker of the House of Commons to certify the default into this Court upon the Report of the Select Committee. The recognizance then comes here estreated, and being [7] here, it is, according to the terms of the statute, to be dealt with by “as if estreated from a court of law,” and that would be sufficient to bring it within the ordinary jurisdiction of the Court.

The next question then is, whether this be a proper case in point of merits for our exercising that jurisdiction in favour of these parties; and on that part of the case, I confess, it appears to me, that this is a proper case for the interference of the Court, and that the applicants have good ground for seeking relief here.

GRAHAM, Baron. Independently of our ordinary jurisdiction, I think this act of Parliament expressly gives us the power of judging whether we should not interfere in a case of this sort, and the recognizance being once brought here, the jurisdiction of the Court over it attaches. We are in no danger in this case, as I had at first feared that our judgment might conflict with that of the House of Commons, for the Speaker acts wholly ministerially in this proceeding.

Upon the present application, additional information is given to this Court of which the Committee could not have been apprised (his Lordship stated the circumstances). There appears to have been no contempt of the authority of the Committee, and the petitioners may have had good ground for abandoning the petition with the least possible expence, and they seem to have appeared and to have acted *bonâ fide* throughout. [8] I therefore think the Court has jurisdiction to interfere, and that this recognizance ought not to be enforced.

WOOD, Baron. I am of the same opinion. The question is not, whether this recognizance has been forfeited or not; but whether we have a right to relieve the party? I think we have that right under the 33 Hen. VIII. and that the 28 Geo. III. does not affect it.

Then arises the question, whether the circumstances disclosed by the affidavits, furnish a sufficient equitable ground for our interference, and I am of opinion that they do.

GARROW, Baron. I entirely concur. I do not think the party is bound to attend the Committee down to the last moment, but only, by analogy to other courts, so long as his attendance should be necessary for the dispatch of the particular business. The Speaker is obliged to return the recognizance here, and if this Court had not jurisdiction to relieve the party in a fit case it would be a lamentable thing, as a man might, in consequence, be imprisoned for life: and to tell him he might bring an action would be absurd.

I am of opinion that we have jurisdiction to relieve him, and that the circumstances of this case furnish ample grounds for discharging this recognizance.

Per Curiam. Rule absolute.

[9] CORAM RICHARDS, LORD CHIEF BARON.

PETCH, Clerk, v. DALTON, STATHER, WOOD AND BURTON. Friday, 17th Dec. 1819.—

An impropiator, who, not being an occupier, is made a party to a bill for tithes. is not liable to costs on a decree in favour of the plaintiff generally: nor is he in a case where, in consequence of the occupiers having set up a defence of payment

of some of the tithes demanded, to the impropiator, he also is therefore made a party defendant by amendment, and he asserts upon the record his title to receive the tithes so alleged to have been paid to him. —Although it may be sometimes proper for a plaintiff to bring the impropriate rector before the Court, e majori cautela, and for the sake of security, yet it must be at the peril of paying him his costs. If, however, a party so made a defendant, put the plaintiff to unnecessary expence, the Court will order him to pay costs.

[Referred to, *Leathes v. Hewitt*, 1820, 8 Price, 566.]

Barber moved that the minutes of the decree pronounced on this case, in May last ^{*1}, might be amended, —by confining the direction for payment of costs to the three first defendants only.

This was a bill by a vicar for tithes ^{†1}, and was originally filed against the three first defendants, who were occupiers. As to several of the titheable matters they set up a defence of moduses, but as to the tithes of agistment and turnips, they pleaded that they were payable to the impropriate rector, who was their landlord. The plaintiff then amended his bill, making him also a party; and he adopted the defence of the occupiers and asserted his claim on the record.

On the hearing, issues were ordered to try some of the moduses: but an account was decreed against the defendants, generally, as to the tithes of turnips and agistment.

[10] The minutes of that decree were entered as follows:

“An account of the tithe agistment, and of turnips claimed by the bill, with costs to be taxed and paid by the defendants to the plaintiff, except so far as relates to the costs of the depositions on the part of the defendant aftermentioned and provided for.” (Then follows the direction of issues) “Refer it to the Deputy Remembrancer to tax the costs occasioned by the depositions of the defendants (except as to three of the witnesses), separate and distinct from the general costs to be taxed as afore said; such costs to be paid by the occupiers to the plaintiff. Reserve further directions.”

The motion was grounded on the principle that the land owner had been unnecessarily made a party, inasmuch as he occupied no part of the lands, and that he was therefore not liable to pay any part of the costs.

Martin and Roupell opposed it; submitting, that this motion, although in form appearing to involve only a question of costs, would, in fact, necessarily induce a re-hearing of the cause —and also that the defendant now applying was concluded by the length of time which had elapsed since the decree was pronounced ^{**}. And they contended, besides, that the land owner having [11] been properly made a party by amendment, in consequence of the occupiers having relied on a defence of title in him, which he had adopted by putting his claim on the record by his answer, and insisting on it till the hearing, and had gone even further than usual, by stating that in consideration of his right, the occupiers had paid him the tithe; he had made himself liable for the costs of which he had thus been the occasion: whereas, if the owner had not been made a party under such circumstances, the Court would have asked —how any decree could be made for a plaintiff, behind the back of a party stated to be so materially interested?

Barber in reply, adverted to the case of *Armstrong v. Howdell* ^{**}, where on its being put by the counsel for the defendants, as an objection of want of proper parties, that the impropriate rector there, who was similarly situated with the person claiming under that character here, had not been made a defendant; the Court said, if he had been made a party, the other defendants (the occupiers) would, most probably, have been ordered to pay his costs ^{†3}.

RICHARDS, Lord Chief Baron. I believe it has been in some instances ordered, that an impropriate rector should pay costs, but I confess I could never tell how, or on what principle, in some cases, that was done. In [12] one particular case, indeed,

^{*1} The Deputy Remembrancer had not yet passed the decree.

^{†1} Vide ante, vol. vi. p. 232.

^{**} Sittings after Michaelmas Term, 59 Geo. III.

^{**} Ante, vol. iv. p. 216.

^{†2} In this case the impropiator examined no witnesses.

I recollect that a party, who was improperly made a defendant, was, and I think properly, ordered to pay costs, but that was where he had put the plaintiff to considerable expence by examining witnesses who could not furnish any material testimony in his favour, and that was of course a matter of special circumstances. My general notion is this, -you have no right in any case to make any man a party to a suit unless you can obtain a decree against him. Now, here there could be no decree against Burton, for he is not called on by the bill to do any thing. I remember Lord Chief Baron Eyre used to say that it was frequently a prudent course to bring a party before the Court, for the sake of security, by a prayer in aid, but I confess I do not understand what praying in aid means in a Court of Equity. I am aware that it may often be useful to an owner to procure himself to be made a party, lest the occupier should neglect his rights, but I could make no decree against him. On the other hand, there is sometimes this difficulty on the plaintiff, that in certain cases, as here, an owner who may be considered as a defendant behind the other defendants may be necessarily made a party, lest the Court should not be able to decree against the occupiers in his absence. It may, therefore, be in such cases, useful to a plaintiff to make the owner a party, but it must always be done at the peril of the plaintiff; and there may be cases of special circumstances, certainly, wherein the Court might not [13] give costs against him. In the present, I am of opinion that the impropiator is not liable.

Ordered that the Bill be dismissed, without Costs, as to defendant Burton.

CORAM RICHARDS, LORD CHIEF BARON.

KEMPSON v. YORKE AND OTHERS. Friday, 17th Dec. 1819.—If a modus be laid, in an answer to a case resting on endowment, as covering several titheable articles, it must be proved to be payable for all, and if it be not, or the witnesses state it to be in lieu of some of the articles, but whether it covers others they do not know, the modus is not proved as laid, and cannot be therefore acted upon: nor is the doubt a ground whereon the Court will direct an issue, but an account will be decreed of all the titheable matters said to be covered by the modus.—Nor is it at all a matter in aid of such a defence as removing the above objection, that the answers allege that the defendants have been informed and believe that the payment is a modus covering all the articles (*speciatim*), and the plaintiff reads that allegation on the hearing; because a plaintiff is not bound and concluded by reading out of answers allegations which he must necessarily read in order to furnish the Court with the question at issue; and still less is the Court bound by the plaintiff reading such passages.

[Referred to, *Oliver v. Court*, 1840, 8 Price, 145.]

The plaintiff who was vicar of Long Preston, York, claimed by the present bill an amount of all tithes within the parish, except corn and wool, and some other tithes, with respect to which the parties had, since the commencement of the suit, come to an arrangement.

The principal defence, as far as it relates to the present question, was moduses.

The plaintiff rested his case entirely upon certain specific endowments produced by him in support of his title.

[14] The defendants relied upon the effect of subsequent usage having been contrary to the tenor of those endowments, as being destructive of their authority in sustaining the plaintiff's claim; and that usage they proved by the production of the books of tithe collectors, which carried the evidence of the money payments that they relied upon as being moduses, as far back as fifty years, and also by the parol testimony of the tithe collectors.

The whole point of the cause turned upon the effect of the evidence tendered in support of a modus for grass, hay, hemp and flax, agistment, and other things, proving the money payment to have been made and received in satisfaction of the tithe of grass and hay, as the witnesses had been informed and believed: but they severally added, that they did not know whether they were payable in satisfaction of the other titheable matters or not. It was also proved that hemp and flax had not been grown in the parish as far as any of them could remember.

On the part of the defendants it was submitted, in substance, that as there had been no hemp and flax grown in the parish during the memory of the witnesses, and the proof of the money payment being so completely established by the evidence; it was no answer on the part of the plaintiff claiming the tithes in kind, to say, that because the witnesses could not speak to the fact of their being payable for all the articles enumerated as being covered by the modus, and particularly in a [15] case where many of such articles had not been within their memory produced in the titheable places of the parish; and where the plaintiff had read out of the defendants answer their allegation, that the payment was a modus payable in lieu of those articles, *speciatim*, by which allegation, they urged, the plaintiff, having read it and therefore made it a part of his case, was bound and concluded, according to the established practice of Courts of Equity, the defence on the record was well supported: or that if the Court should not dismiss the bill they could not decree an account, but must grant an issue: for if there was any doubt in the mind of the Court, it must be as to the fact, which, in a case of this sort, could only be determined by the usual course of a trial at law, by which alone it could be ascertained for what specific matters the payment was made,—for, that it was a modus had been proved by all the evidence in the cause, as far as in this Court such a defence could be proved.

The plaintiff's counsel relied on the topics upon which the judgment of the Court is principally founded, contending that the defence, as pleaded, was not sustained by the evidence in the cause; and that, therefore, the plaintiff was entitled to a decree upon the *primâ facie* title of his endowment.

Fonblanque and Roupell were of counsel with the plaintiff, and Martin and Dowdeswell for the defendants.

[16] RICHARDS, Lord Chief Baron,—now delivered judgment,—having first strongly recommended, in vain, an arrangement between the parties, in consideration of the forcible testimony in favour of the long-continued money payment.

After stating the usual preliminary matters, his Lordship proceeded thus, The plaintiff, in the course of his case, at the hearing, having read the answer of the defendants, in order to shew their admissions of the plaintiff being vicar, and of the defendants being occupiers and having titheable matters, afterwards read a passage, which is entered as read, from the answers of all the defendants (for I believe they jointly averred what was read): wherein, after admitting the title of the vicar, they say, “they do not know or believe that the said plaintiff did, as such vicar, become, or that he is by immemorial usage or prescription, or by any other lawful ways and means entitled to have, receive, or take all and singular the tithes of the titheable matters yearly arising, growing, and renewing, in and throughout the said parish, or the titheable places thereof, other than the tithe of corn and wool. On the contrary, defendants say they have been informed and believe that the said plaintiff, as such vicar as aforesaid, is entitled to, and that the vicars of the said parish for the time being, the predecessors of the said plaintiff, have, from the time of the endowment of the said vicarage; and that the rectors of the said parish for the time being, from the time whereof the memory of man is not to the contrary, up to the [17] endowment of the said vicarage, were and have been entitled to, and have received and taken certain moduses or pecuniary payments, in lieu of the tithes of agistment, and for the tithes of hay, hemp, flax, and garden fruits, yearly arising, growing, renewing, or increasing in the said parish, and the titheable places thereof, and in lieu of the tithes of foals dropped, and of milk yielded in the said parish, or the titheable places thereof, as hereinafter mentioned, and defendants crave leave to refer to such proofs of the said plaintiff's title to such tithes as the said plaintiff shall be able to produce.” That was certainly read by the plaintiff in the course of showing his title by the admission of the defendants: and there is no doubt but that the plaintiff is entitled to read out of the answer that which shews what the issue is, for otherwise the Court would never understand what it is. The defendants may also, in opening their answer, read every word that is material: and here they certainly say, that they have heard and believe that there is a modus.

Then it was said, on the part of the defendants, that the plaintiff having read this passage out of the answer, is concluded by it, unless he proves by evidence of his own, that the belief formed by the defendants is not a correct belief. Now, I am of opinion, that I am bound to look at and estimate all the evidence produced by the defendants, and that I cannot say, because one party says he has heard and believes a thing, that

therefore such belief is conclusive against the [18] other in a Court of Equity. I know, on the contrary, that where a party professes himself to believe an allegation, that the Court is bound to see if it may not believe against him: but if the defendants say we believe so and so, there is no doubt but that if the plaintiff gives evidence on the other side to shew the belief ill-founded, that the plaintiff must succeed against that belief. If, therefore, I see evidence aliunde in this case, and I must judicially look at all the evidence to see if the belief is ill-founded, whether it appear from what is read by the plaintiff to shew what the issues are between the parties which he is entitled and obliged to do, or from the evidence of the defendant, I must take the whole together and decide upon the whole case. I do not therefore hold myself bound to think that what was read from the answer is conclusive of all the facts upon which the defendants found their belief; or that it is therefore to be considered as supported by evidence. In either way I take it to be a matter which, in the first instance, does not bind the plaintiff: and if the defendants give evidence proper to be admitted, we must then see how it is met: and whether, where there is other evidence in the cause, that is sufficient to contradict it.

Then let us see what the defendants' evidence in this case is. The first modus is laid by Mr. Yorke, who occupies land, and is a defendant for all the land within the division of Halton West, and it is a payment of 14s. 2d. in lieu of all tithes [19] of hay, hemp, flax, agistment, the fruits of gardens, and the fruits of trees, and of all small tithes whatsoever, except the tithes of calves, lambs, goslings, chickens, ducklings, pigs, eggs, bees, honey, and wax, which are payable in kind to the vicar, and except the tithes of foals and milk, for which separate moduses are payable. I believe the other defendants state the same modus to the same effect; and this is what Mr. Yorke and the other defendants tender in issue by their answer, as one of these moduses. But how have they gone on to prove these moduses? I am in possession of the evidence, and I am bound to act upon it; and if they do not prove these moduses, is the plaintiff to be concluded, because they say by their answer, that they believe there are such moduses, although they fail to prove them, or even if they prove by their depositions that there are no such moduses? Certainly not. The proof they offer is this—Stephen Camm their first witness says, that a modus of 14s. 2d. has been paid by the township of Halton West for the tithes of grass and hay, that is, for agistment; but whether for any thing else he knows not; and that is the case with all the other witnesses except one: for William Robinson says, the modus is payable for grass, but not for hay, as far as he knows. Now the question is, whether the defendants have proved that this modus, set up, covers hemp and flax? It cannot be considered that they have. But then they say that they have not proved it in respect of hemp and flax, because hemp and flax have not been sown [20] on these lands during the time to which the witnesses speak. They however lay the modus as covering hemp and flax, and to say that there would be evidence to shew those articles covered by the modus, if they grew there, is nothing; because what they call a modus is taken to cover a great deal more, namely, all small tithes, except so and so. It is not pretended to shew, even according to their own way of putting it, that no other titheable matter professed to be covered was grown in the parish, though hemp and flax was not. That modus might perhaps be sufficiently proved if it had been confined to hay and agistment; but when the defendants tender in issue a modus, covering a great many other things, some of which of course they had in the parish, because it is not alleged that they had not, there is a variance between the allegation and the proof which I consider destroys the defence.

In that view of the case, it seems to me, I confess, that I am not at liberty, not to say that there is no such modus proved here as that which they allege covers hay and agistment; for that is the effect of the evidence of their witnesses; they know that it covers, and believe it has been always paid for grass and hay; but they do not know that it extends to any thing else. I am bound to say, and I think every body will agree with me, that if this matter were tried in an issue, a Jury must declare that if the defendants do not prove that it covers any thing more, they disprove the modus as laid. If I [21] assert that a modus covers hay and agistment and other things, and my witnesses prove that it covers hay and agistment, but whether any thing else they know not, a Judge would be bound to direct the Jury that the modus in issue was not proved; and that being the case here, as it seems to me, I am under the necessity, though with great reluctance, to direct the account to be taken of all the titheable matters which are said to be covered by the general modus. With respect to milk

and foals it will not then be necessary for me to direct an account: and even in directing an account of the other articles, it will only, as I fear, be the beginning of a new suit. Yet when I see the probable result of this, and when I recollect that the plaintiff is only vicar of the parish, and no one knows how long he may remain so, I cannot but lament the consequence, particularly when I find that a sum of money has been payable so constantly for the tithes of hay and agistment. It was under these impressions that I was induced to throw out a question, whether you might not in some way or other arrange, so as to do justice to both parties, without going to any further expenses, or being involved in other suits.

On that part of the case therefore, his Lordship decreed
An Account.

[22] CORAM RICHARDS, LORD CHIEF BARON.

EVANS AND OTHERS v. MASSEY, Esq. Friday, 17th Dec. 1819.—A bequest to a child *en ventre sa mere*—introduced by reciting that the testator, “having two natural children, and the mother supposed to be now carrying a third child” in these words—“I do will and bequeath” &c. (as in the words marked by inverted commas, between brackets, in p. 23) is a good bequest, although in the immediately subsequent parts of the will, the testator, referring to the previous bequest to the three children, call them indiscriminately my children, and my natural children as aforesaid; because it is not a bequest to one not otherwise described than as the unborn illegitimate child of the testator, but the object of it is pointed out with sufficient certainty; for he has not merely called the legatee his child, but has much more particularly designated it by the introductory part of the bequest, so as to obviate the necessity for shewing that the offspring of the woman was the child of the testator: or, in the comprehensive language of the judgment, it is not by such a bequest made a condition precedent, that, to enable the child to take, it must be ascertained to be the child of the testator.—The essence of the rule is, that in all such cases there should be sufficient certainty in describing the object of the testator’s bounty, to preclude the necessity of having recourse to proof aliunde.

The questions in this case arose out of the following facts stated on the record by the bill and answer, and found by the Deputy Remembrancer’s report, the result of a reference to him to take an account, and enquire of the necessary matters to form the foundation of further directions.

Bills had been filed by the two nephews, the residuary legatees of Henry Evans, and two of his illegitimate children, against his executor, for the purpose of obtaining a declaration by the Court, whether the child mentioned to be unborn at the time of the making of his will by the testator, was or was not entitled to take any benefit under it.

The testator, who resided in India, had, at the time of his making his will, two natural children by a woman with whom he was then cohabiting, and who was then pregnant with another child. [23] The will was dated the 14th of August, 1810, the material part of which, as far as relates to the points now brought under discussion, was in these words, “Having two natural children, and the mother supposed to be now carrying a third child, I do will and bequeath [the whole of my property in England at this time, or now on the seas proceeding to England, to be divided equally between them, that is to say, if another child should be born by the mother of the other two, in the proper time, that such child is to have one third of such property in England, or proceeding to England, this property to be laid out in the funds, or other public securities, and allowed to accumulate till the children shall respectively attain the age of twenty one years, deducting annually from the interest such proportion as may be necessary for their education and their other expenses: should either of the children die, the property to be divided between the other two, and in that case the survivor to be the heir of the other two, provided one shall live to be of the age of twenty-one years].—If they all die previously to their reaching that age, then my property to go to my two nephews, Richard Evans and Lucy Evans, as hereinafter mentioned. It is to be understood, that each child attaining the age of twenty one years, is entitled to his or her third or half share, as the case may be. I request my

dear friend J. H. D. Ogilvie, of Madras, and John Binney, Esq. agent at Madras, to be my executors in India, and my friend Colonel Massey to be my executor in England, [24] and guardian to my children jointly, with Richard Evans and Lacy Evans, my two nephews. I bequeath the whole of my remaining property, after paying my natural children as aforesaid, to (the said nephews, describing them) with the deductions hereafter mentioned, and also leave them my residuary legatees. The deductions will be mentioned hereinafter in a codicil."

The testator died on the 16th of the same month. The mother of the children was enseint at the time of the date of the will, and in about seven months after the testator's decease was delivered of a female child, which died shortly after its birth.

The cause was first heard in December, 1814, when, on a reference to the Deputy Remembrancer being ordered, the report found in substance the facts above stated, and upon that report, it was now again brought on for further directions.

Jervis and Bligh for the plaintiffs, contended, that the bequest in this case to the unborn child was void, upon the authority of all the dicta and decisions which they adverted to, in the following order. In Co. Litt.(a) it is said to be a principle of law, that a bastard cannot take till after he hath gained a name by reputation. The case of *Methum* [25] v. *The Duke of Devon* (1 P. Wms. 529) has conclusively established, that a bequest to an illegitimate child not in esse cannot take effect. There a devise to all the Duke's natural children by a particular woman, was held to extend only to children who had at the time of making the will not only been born, but had acquired the reputation of being his children; and in that case Lord Macclesfield founds his judgment upon the regard due to the policy of the law, in discouraging illicit intercourse in favour of marriage. In *Wilkinson v. Adam* (1 Ves. & Bea. 446), it was held, that a devise to the children of a particular man by a woman, to whom he was not married, could not take effect; and the Lord Chancellor, in commenting upon that determination in the subsequent case of *Gordon v. Gordon* (1 Meriv. 152) says, that the difficulty there (in *Wilkinson v. Adam*) was, that there was no mode of trying the question upon grounds of evident policy; because the law will not permit you to prove who is the real father of the child, but only who is reputed to be the father: "and then," observes his Lordship, "it follows that the child must be born; for, until born, it has no reputation."

In this case they submitted, whatever argument might be founded on the bequest, having in the first instance been given to the child to be born of the mother, and which she was then supposed to be carrying, as making good the bequest, on [26] the ground of its being given to the child of a particular woman,—yet the introductory words of the bequest, "having two natural children, and the mother supposed to be now carrying a third child," the subsequent distinct recognition by the testator of its being his intention to bequeath the property to his own child, and his having so designated the objects of his intended bounty by afterwards calling them his children, and his natural children as aforesaid, shewed that the testator considered that child his own, and that therefore he had given to it the property bequeathed, were circumstances in this case which brought this bequest precisely within the principle of *Earle v. Wilson* (17 Ves. 528), where the Master of the Rolls expressly adopts the principle laid down by Lord Coke, and the recognition of it by Lord Macclesfield, that a bastard cannot take as the issue of a particular person until it has acquired the reputation of being the child of that person, which cannot be before its birth; and his Honor acts upon it accordingly.—"If the bequest (observes his Honor, pursuing his train of reasoning) had been to the natural child of which a particular woman was enseint, without reference to any person as the father, there would be no uncertainty in that bequest, and probably it would be held good; but here there is no gift to the child of which Mary Mackarel might be enseint, except as the child of the testator." In this case it is obvious there is an express reference by the testator to the unborn offspring as his child, and to himself as [27] the father, and that brings it under the succeeding observations of the Master of the Rolls, in delivering his judgment; and those observations are so precisely applicable to this particular case, that unless that decision be an authority governing this case, the doctrine established by it can be no longer considered law; and that

(a) Co. Litt. 36, referring to *Blodwell v. Edwards*, Moor, 430. 2 Roll. Abr. 43. Cro. Eliz. 509. Noy, 355.

case must, by a decision against the plaintiffs in this suit, be consequently over-ruled. The Master of the Rolls there says (having previously observed that the language of the will clearly shewed it was not matter of indifference to the testator whether the child, to whom he had bequeathed the property, should have been begotten by him or by another) "I cannot therefore do what is required, that is, reject the words 'by me' as superfluous;"—and if he could not reject the words 'by me' in that case, on what distinction can the word 'my' in this case be rejected as superfluous!—"Supposing the words (he continues) 'as she may happen to be enseint of by me' could be taken to mean 'as she is now enseint of by me,' in which there is considerable difficulty; yet if the rule of law does not acknowledge a natural child to have any father before its birth, that mere change of phrase could not have the effect of making the bequest good. He means to give to an unborn bastard by a description which by law such person cannot answer; and if you take away that part of the description non constat that the gift would ever have been made." His Honor concludes by saying, that therefore, without breaking in upon the rule [28] laid down by Lord Coke, and considered by Lord Macclesfield as established, I cannot hold that there is a sufficient certainty in this legatee."

In that case then it must be taken to have been decided, that a designation of the person to whom a bequest were made by the description of a child en ventre sa mere, as being the child of the testator, though by reference only, was not such a description as would effectuate the bequest.

On the same point of the necessity of a clear description being furnished, in order to enable an illegitimate child to take, they also cited the cases of *Cartwright v. Fawcley* (5 Ves. 530), and *Godfrey v. Davis* (6 *ibid.* 43).

In the recent case of *Gordon v. Gordon* (1 Meriv. 141) the Lord Chancellor recognizes the principle of the decision in *Earle v. Wilson*, and declares that that latter case is not to be considered as in any degree affecting the former. At the conclusion of his judgment, so anxious is his Lordship to preserve the authority of *Earle v. Wilson*, he says, "I repeat that this is not to be taken as governing either the question of what would be my decision if the words were, 'to my only unborn, but not in esse,' even though it may be sufficiently pointed out as the child of a particular mother." In that case certainly the decision was in favor of the unborn [29] illegitimate child; but there was nothing in the will indicating that the bequest was founded on a supposition that it was the child of the testator.

On the words of this will therefore, they submitted, it was quite manifest that the testator gave the bequest to the unborn illegitimate child as being his; for so he has expressed himself, by calling that as well as the other offspring of the same mother his children: and they contended, that on the authorities such a bequest cannot take effect, on the grounds of being an encouragement to immorality—contrary to the policy of the law—and affording a description of the person intended to take so ineffectual, as that under it he would be incapable of being ascertained.

Martin and Richards for the defendants, submitted that, inasmuch as in that part of the will which creates the bequest in question, there was nothing which asserted or assumed that the child, for whose benefit it was given, was or was even supposed to be the child of the testator, it was not within the principle of the cases which had been cited to shew that in law the bequest was void, or could not take effect; and they contended, that there was nothing in any of those cases from which it could be collected that the Judges, by whom they had been determined, would have decided the present question as the plaintiffs insist it ought to be decided. All those cases, they observed, had proceeded upon an admission, that a bequest might be effectually made to an unborn illegitimate child, if the description with reference to the mother or otherwise were sufficiently certain to mark clearly the object of the testator's bounty. The case of *Gordon v. Gordon* was decided in favor of a child so situated and so described, and expressly on that ground; and although the doctrine in *Earle v. Wilson* has never been decisively contradicted, yet the case itself was not cordially determined as it was; and that appears plainly from the language of the Master of the Rolls at the very commencement of his judgment, where holding himself reluctantly bound to submit to the authority of the case of *Methuen v. The Duke of Devon*, he yet forbears, as he says, to examine the reasons upon which it stands. In *Wilkinson v. Adam* the decision turns upon the testator's having expressed his belief, that the unborn child to whom the bequest was made was

his, and having made that the motive and foundation of the legacy. In that case therefore the bequest was held ineffectual, because that was a matter which, as it did not admit of proof, could not be ascertained. Yet again, in *Gordon v. Gordon*, on the contrary, it was considered that an unborn natural child might take, although it was obvious that the foundation of the gift was the testator's supposition that it was his child. The Lord Chancellor however certainly does draw a very nice distinction between that case and the case of *Earle v. Wilson*, a distinction so very laboured, as hardly to be sufficient to save the authority of the decision.

[31] [RICHARDS, Lord Chief Baron. The distinction is certainly very refined. The difference between "my child" and the child which "I believe to be mine," I confess I can hardly perceive in the case of a natural father; for, at the utmost, such a father can but believe the child to be his. I have no hesitation in saying candidly, that considerable doubt was entertained of the law of the case of *Earle v. Wilson* at the bar at the time.]

They then submitted that the words "my children," used after the absolute devise to the unborn child, could not affect the previous bequest. In *Gordon v. Gordon* it was as evidently to be collected from the will, that the testator considered the child his own, as it was in the present instance, if indeed it was not much more obvious, and therefore the same argument would have applied; and yet the Lord Chancellor, notwithstanding that palpable objection, if it were so, held the legacy good. In the present case, therefore, they contended that the legacy was well given, and to an object properly described, and consequently ought to be carried into effect.

Jervis having replied,

The Lord Chief Baron observed, that this case was not within the letter of any other which had been hitherto decided—that he found very considerable difficulty in distinguishing *Earle v. Wilson* from *Gordon v. Gordon*—and that he could not help thinking, from having attentively consi-[32]-dered the language used by the Lord Chancellor in delivering judgment in the latter case, that his Lordship was not prepared to go the length of the former, if he had been necessarily called upon to give a decisive opinion upon that decision.

Adv. vult.

17th Dec.—The Lord Chief Baron now delivered judgment.

The question in this case is, whether the two illegitimate children of the testator by the female to whom he has alluded in his will, are entitled to the interest which they claim in the bequest to the posthumous child of which she was pregnant at the time of making the will. Here his Lordship read the words of the bequest.

In point of fact that person was then with child, and that appears by her having been afterwards delivered in due course of time. The questions which have arisen in this case have been already much considered in two recent cases (a), one before the then Master of the Rolls, and the other before the Lord Chancellor, each of which have been much relied upon, on either side, in the course of the present argument. There was also another case of *Wilkinson v. Adam* cited: but that was rather adverted to for the purpose of introducing this proposition, which has been admitted, that as the Courts will not, on grounds of public policy, and for preserving the interests of morality, per-[33]-mit proof to be given of an illegitimate child being the child of a particular individual as the father, the difficulty arising from the consequent uncertainty of the object of a bequest of property to the unborn child of such individual, described only as his child, has in law the effect of rendering such a bequest wholly ineffectual for want of a sufficiently precise description of the person intended to take the interest, there being no admissible means of supplying the deficiency aliunde so as to make it effectual. If, however, a legacy be given to an unborn natural child of a woman, and the description be so certain as distinctly to point out the object of it, there can be no doubt that such a bequest would be valid, and may take effect. The dictum of Lord Coke and the decision of Lord Macclesfield, proceed upon the ground I have adverted to, of uncertainty in the person of the intended legatee, in the case of a bequest to an unborn natural child, described solely as the child of the testator. It is therefore now become an established rule of construction in such cases, that the person of a legatee must be certainly described, or be capable of being clearly ascertained.

(a) *Earle v. Wilson*, and *Gordon v. Gordon*.

This case has been very well argued here on its own circumstances. I will shortly review the authorities which were mentioned on both sides. The case of *Earle v. Wilson* was the first cited on the part of the plaintiffs (his Lordship went very minutely into the particulars of that case). If the bequest there, had been worded in such a manner as to have obviated all uncertainty, it would undoubtedly have been held good. It is quite clear that Sir William Grant founded his decision in that case upon the ground of the uncertainty in the description, wholly, and not as Lord Maclesfield is said to have done, on any principle or policy of the law, tending, or having for object merely, to discourage the immorality of illicit intercourse.

It was contended that it is clearly manifest from the tenor of this will, that the testator contemplated, as the object of the bequest, his own child; and that it more plainly appears in this case that he did than it does in the case of *Earle v. Wilson*. Now, I confess, that if this bequest had been in precisely the same words as the bequest there, I should have had infinite reluctance in departing from the construction put upon it by the Master of the Rolls. At the same time I must say (meaning no disrespect to the very learned Judge who decided that case) that I do not understand the grounds upon which it proceeds, and therefore cannot entirely accede to it. I well remember that the decision excited surprise at the time; and I know that some of the Judges have intimated upon several occasions dissatisfaction with it. I should therefore be very sorry if I could not distinguish this case by the different circumstances under which it is brought before me, so as, without combating that authority, to decree in favor of the bequest to this child. What Sir William Grant threw out incidentally, [35] in the course of his judgment, in the case of *Earle v. Wilson*, the Lord Chancellor afterwards acted upon, as being sound law, in the subsequent case of *Gordon v. Gordon*. In that last case the Lord Chancellor held, that a legacy given to an unborn illegitimate child was good; and so far he agrees with the Master of the Rolls. [His Lordship here read the words of the codicil in the case of *Gordon v. Gordon*, and the Chancellor's judgment (p. 150, 151, 152).] So that the Lord Chancellor takes the Master of the Rolls to have admitted, that a legacy might be effectually given to a child with which an unmarried woman was pregnant, unless it were made a condition precedent to the gift, that the child should actually be the child of a particular individual, as the father. That is the express ground of distinction, in substance, which the Chancellor takes between the case of *Earle v. Wilson*, and the one then before him; and he says, that in order to shew that objection to exist, "you must establish that it could not be the testator's intention that the child in question should take at all, unless it were his child;" and his Lordship held, that in that case such a construction was not necessary. On the 6th of February following the Chancellor pronounced final judgment, adhering to his former opinion, and declaring that it was consistent with the doctrine of Lord Coke, that an illegitimate child en ventre sa mere might take a legacy bequeathed to it if described with sufficient certainty. His Lordship says, "I studiously abstain from expressing any [36] opinion as to what it would be if the words were 'to my child,' while I decide, that the words being only 'the child with which A. B. is now pregnant,' those words will do so as to give effect to the intention in its favor."

We have therefore only to enquire, in this case, whether there be in the terms of the present bequest, worded as it is, such a condition precedent annexed to it by the testator as by necessary construction requires that in order to give effect to the bequest, the child must be shewn to be the testator's child, and that he meant to give it only in case the child should be his; and that not only by matter of implication or argument, but of clear illustration. The testator's words are, "having two natural children, and the mother supposed to be now carrying a third child." Now he does not say with which she is pregnant by me, but merely that she is supposed to be pregnant generally, and the time of her delivery would prove that fact—then he bequeaths to such child the legacy in question. It is quite clear that there is nothing in the words of that bequest, so far, asserting that the child was his, or that he thought so; for, although there can be no doubt that he did think so, yet he does not in terms make such supposition the obvious and sole motive of the bequest. The words are quite general, merely particularizing the child which she was then supposed to be carrying, and that would certainly have excluded an after-begotten child, if his then [37] supposition should turn out to have been incorrect. (His Lordship read the whole of the bequest as set out in this case.) Now the only difficulty in these words in which the bequest is

expressed, arises from the testator having afterwards, in alluding to the children, called them his: and upon that it has been contended, that this case is within the reasoning and the principle of the decision in *Earle v. Wilson*; because the testator, it is said, plainly means to assert that the children are his, and that the legacy is given to the unborn child, as one of his children: and that it is given to it entirely on that consideration, as the basis and condition precedent of the gift. I do not, however, think that those subsequent words can be considered as so applying to the bequest itself as to modify and controul it: they are merely a reference to it, and were not intended to have any effect upon it. The allusion does not shew that he meant the child to take only in case of its being his, nor does it amount to an assertion that the child was his, or that the testator considered that he was giving to it the legacy solely as his child. I think, therefore, that this bequest falls within the principle adopted by the Master of the Rolls, and recognized and acted upon by the Lord Chancellor; and that as it has been described with sufficient certainty what child it was whom the testator meant as the object of the bequest, it took an equal share with each of the other two natural children of the testator. I hardly need say that I do not consider the event of the child dying so soon after its birth, as [38] making any sort of difference in this case. I feel quite satisfied with being able to decide in this manner, without opposing my opinion to any of the authorities.

DECREE.

Declare that the infant plaintiffs, Ann Evans and Henry Evans, are entitled to have the whole of the Bank 3 per cent. Annuities, standing &c. accumulated for their benefit during their respective lives, or until they or one of them shall attain the age of twenty-one years—with liberty to the parties interested to apply to the Court in case of the said infants dying under that age. Costs of all parties to be paid out of the surplus of the cash in Court.

[39] CORAM RICHARDS, LORD CHIEF BARON.

THE ATTORNEY-GENERAL v. LORD EARDLEY AND OTHERS. Monday, 17th Jan. 1820.

—The tithes of all extra-parochial lands belong jure coronæ to the King; and the title of the Crown is not confined to such extra-parochial lands only, as were forest or parts of forest land.—Where in a grant (ex mero motu, &c.) by the Crown, of extra-parochial lands, the words “tithes, oblations, and obventions,” were found to have been introduced amongst the general words, they were held not to pass the tithes of such lands, in a case where it was in evidence that the tithes were in lease at the time of the grant, and that the Crown had continued to demise them whenever they had reverted: the Court determining that the continued exercise of such strong acts of ownership, was sufficient to countervail the slight effect of such words, even if where so introduced they were of any force at all, and were not rather attributable to mistake.—Returns of any particular subject-matter by the Auditors in their accounts of the Crown revenue, are sufficient proof of its having been kept in charge to protect the claim of the Crown from the operation of the Nullum Tempus Act (9 Geo. III. c. 16), although they have returned “Nil,” and the claim have not been put in suit thereon for more than sixty years.—A decoy in the hands of the owner, who remunerates the person employed by him to manage it, by allowing him half the profits, is not liable to tithes. Ordered, therefore, as to him, that he go without day.

[S. C. Dan. 271.]

The Attorney-General filed this information against the defendant Lord Eardley, as owner and occupier: and against the other defendants as occupiers for an account of the titheable matters taken by them upon the lands in their occupation within a certain fen, forming part of the Bedford Level called Borough Fen, which, having been drained in the time of Cha. II., had ever since yielded titheable matters.

It stated that the lands were extra-parochial, and paid no tithes to any church; and that the King was therefore entitled to them, in right of his Crown of England.

Then—suggesting that the defendants pretended title under a former grant of the Crown, and insisted that his Majesty was barred of his [40] right to the tithes, by the

non-enjoyment thereof for sixty years—it charged, that the tithes were not only not included in that grant of the lands by the Crown, but were then and often afterwards actually demised by the Crown to other persons; and that since the expiration of those leases, the tithes had been duly in charge to his Majesty, and had stood insuper of record; and that, therefore, the King's right had been saved from the operation of the statute.

The defendant, Lord Eardley, admitted his ownership of the lands, but denied occupation of any part of them otherwise than by employing a person to manage a decoy, covering about forty acres of the said lands, to whom, in respect of such management, he allowed one half of the clear profits: and he insisted that no tithes were payable in respect thereof.

The other defendants, not admitting the right of the Crown as insisted on, to the tithes of all extra-parochial lands, claimed title under a grant of the lands in question and the tithes thereof: and submitted (if his Majesty ever had any title to the tithes) that by the length of time, during which the Crown had been out of possession, and the operation of the statute (9 Geo. III.), his Majesty had lost his right and was barred of all remedy.

The short statement of the subject-matter of the suit, as already transcribed in substance from the record of the pleadings, shewing at one [41] view the points raised in argument, it will only be necessary further to state, that the defendant having set up a title by virtue of a royal grant of these lands (forming part of the Bedford Level); the Crown, in support of its claim, produced, as evidence that the tithes were not intended to pass by the grant and did not pass, various Crown leases of the tithes of the lands in question to different successive lessees, as well previous as subsequent to the grant to Lord Torrington, under whom Lord Eardley claimed, and, amongst others, to the Earl of Lincoln, one of the former proprietors of those very lands, who had purchased under Lord Torrington's grant. He, however, was only tenant for life, having suffered a recovery, under which he had limited to himself a life interest only. The counsel for the Crown also put in a decree of this Court, of an account, in favour of the then complainant, a Crown lessee, in a suit against occupiers for tithes, who had set up a defence of modus.

There were also given in evidence, accounts of successive auditors, relating to extra-parochial tithes of the Level, from the year 1729 down to the institution of this suit, in order to shew that those tithes, as part of the casual revenue, had been constantly kept in charge. They had, as it appeared, in all the later, for more than sixty years returned, "Nil."

The Solicitor-General, at the hearing, rested the case of the Crown, upon the *prima facie* [42] title of the King, *jure corone*, to the tithes of the lands in question, founding it on the proposition, that it was the acknowledged law, as applied to extra-parochial lands, which the fen had been admitted to be, that the Crown was entitled to the tithes of all the lands in the kingdom which were not situate within any parish.

Shadwell, Sugden and Sidebottom, for the defendants, contested the universality of that proposition, now for the first time so broadly laid down, founded, as they submitted, wholly upon dicta attempted to be applied to furnish a principle, for which they urged, that no direct legal authority could be cited. On the contrary, they insisted that all the cases upon that point confined the right of the Crown to tithes of extra-parochial forest lands.

They also contended, that if the Crown had been at any time entitled to the tithes of the lands in question, they had been granted away by the Crown from time to time, and ultimately to Lord Torrington, under whom the defendants claimed by a grant in the 2 W. & M. (14th May, 1669) by which grant of the Crown the defendants insisted that the tithes had been expressly and *eo nomine* granted together with the lands in question.

And they urged, finally, that if by that grant, the tithes did not pass, the right of the Crown [43] was now barred by the provisions of the Nullum Tempus Act (9 Geo. III. c. 16).

On the first point, they submitted that the authorities cited in favour of the position, did not extend to establish that a general right existed in the Crown to the tithes of all extra-parochial lands but confined it to forests; and they adverted to the passage in Rolle's Abr. 657, pl. 4 and 5, (which they anticipated the counsel for the Crown would cite as stating that to be the law) to shew that Rolle founds that dictum upon

22 Ass. 75, and the case of *The Bishop of Carlisle*, which do not establish the proposition universally, but confine it to the case of forests. They also laid much stress upon the reason given, as shewing that the right was confined to forests, in exclusion of other extra-parochial lands, to which the reason would not apply: which was, “quod ipse Dominus Rex in foresta sua prædicta * villas edificare, ecclesias construere terras assurtare, et ecclesias illas cum decimis terrarum illarum pro voluntate sua cuiunque voluerit conferre potest:”—and the same proposition and reason are found in the 2d Institute 647; and therefore they contended that the point of law was still open to consideration, never having been judicially determined or recognized, at least to the extent contended for by the counsel for the Crown. As to the case of *Banister v. Wright* (Style, 137, 2 Gw. 501), they submitted, [44] that very little reliance was to be placed on that as an authority, where the point is so shortly stated, and the determination so loosely noted, without any argument at the Bar, or any reason from the Bench. The case of *Wright v. Wright* (Cro. Eliz. 512, 1 Gw. 167) also, they urged, was equally unsatisfactory: for there the principle is only stated as a proposition of counsel, and it is not sanctioned by any thing said by the Court.

If, however, the Court should be of opinion, that the law on that point was in favour of the present claim of the Crown, they submitted, that in this case, the defendants could establish a title in themselves to the tithes of these lands, founded upon the original grant by the Crown of the lands from which the tithes were now sought by the information.

That was a grant by William and Mary to the Earl of Torrington, of the lands in question, of the contents of which, all that it is material to state for the present purpose is, that it contained the words usual in Royal grants, which have been much commented on, as to their effect in reducing Royal grants to the rule of construction put on those of subjects “of our special grace, certain knowledge, and mere motion” and that it granted the lands, with all the accustomed general words, and amongst them particularly were the following, “and all and singular mes-[45]-suages mills houses edifices sheds and buildings whatsoever in or upon the premises or any of them heretofore erected and built and all gardens orchards tofts crofts cottages lands tenements meadows pastures feedings commons demesne lands wastes tithes oblations obventions waters watercourses, &c. &c.” and all profits, &c. &c. with all their appurtenances, &c. situate, lying, and being, or at any time reputed, &c. (in the usual terms). There was an exception of Royal mines, and mines of lead and tin. The habendum was, of “all the said several pieces and parcels of ground edifices buildings woods underwoods rents reversions liberties lands tenements and hereditaments above therein granted in fee:” and it contained the usual non obstante clause, protecting the intended subject matters of the grant from the effect of misnomer or omission of any thing meant to be granted, and it had also the customary adeo plenè clause.

Under the terms of that grant, then, they contended that the King (if there was any general right in the Crown to the tithes of extra-parochial lands) had expressly granted them out to the grantee of the lands in question, from whom the present defendant Lord Eardley derived title, and that the tithes had passed thereby with the land. They much pressed the fact of the introduction of the exception of mines, as shewing that where subject-matters of exception had been contemplated or intended, they were expressly excepted. They urged, therefore, that the word [46] “tithes,” having been so expressed and used in the grant, was an operative word, and must be construed to have the effect of passing them to the grantee: for that the Crown was bound by the general words of a grant, as much as a subject would be.

On that last point they cited the following cases to shew how far, where the Crown used certain words in grants, they operated, and were accordingly to be construed in favour of the grantee. In *Bronker and Robotham*, cited in *The Queen v. Lewis and Others* (1 Leon. 120), general words in a preceding clause, were held to extend a subsequent more restricted clause, so as to pass under a grant of a manor (“nec non omnia terras et tenementa dicto manerio pertinent.”) lands, in the former part of the instrument, recited to belong to the manor: and that doctrine being approved by the Court, in the principal case, which was to the same effect, judgment was given against the Queen. One of the grounds of the judgment in that case was distinctly declared by Wray to be, because “against express words no favour shall be given to the King;”

and that is more particularly so when the grant contains the words *ex certa scientia et mero motu*, as was held in *The Lord Chaudes's case* (6 Co. 56). In 2 Roll. Abr. 185, tit. (K.), *Grants del Roy*, pl. 2, it is said to have been held, that by a grant in fee of the glebe and tithes of a rectory, to which the advow-[47] son of a vicarage was appendant, the advowson passed under the general words. (Same book and page (L.), pl. 2, to the same effect, and *ibid.* 184 (L.), pl. 1, *ibid.* 194 (B.), pl. 2). In the case of *Down Demandant, and Reeve Vouchee* (2 Bos. & Pul. 578), the Court of Common Pleas allowed the writ of entry in a recovery to be amended, by inserting the words "all and all manner of tithes" (&c.) on an affidavit stating the vouchee's intention to have passed all his interest in the premises, the word *hereditaments* having been inserted in the deed to lead the uses. They therefore submitted, that the tithes passed by the words of the grant—that it was not competent to the Crown to defeat that grant by any such act of ownership as the granting subsequent leases of the tithes of the fen, even if it should be proved that the demise applied to the particular tithes of that part of the Level which the lands in question are—and that if any such demise had been accepted heretofore by one of the persons through whom the defendants claim, yet as he was only tenant for life, it could only operate as against him individually, and that merely by estoppel, and would not bind the inheritance, for the estoppel would expire with the expiration of the term.

On the point of defence afforded by the provisions and operation of the statute of 9 Geo. III. c. 16, they submitted, that there was no evi-[48] dence of the Crown having been in possession or permanency of the tithes of that specific part of the 10,000 acres over which these defendants claim title, as set out in the schedule to the answer; that it was not even so charged in this information, and that the leases of tithes produced by the Crown were not of the tithes of those lands, but of other parts of the Level; and that they could not be shewn to have been in charge to his Majesty within sixty years before the filing of the information:—for, as to the Auditors accounts, they had all returned "Nil," and no proceeding thereon had ever been resorted to. But if they were to be considered as put and kept in charge; still, they contended, that the mere standing in charge would not be sufficient to defeat the remedial provisions of the act; unless it were acted upon according to the provision of the last section of the act by which it was declared what should be deemed a putting in charge within the statute. It is thereby enacted, that no putting in charge, nor standing insuper, nor taking or answering the farm-rents, revenues, or profits, of the said manors, (&c.) by force, colour or pretext of any letters patent, or grants of concealments, or defective titles, or of manors (&c.) out of charge, or by force of any proceeding to find out concealments (&c.) shall be deemed to be a putting in charge (&c.) unless, thereupon, such manors (&c.) have been, or shall be, upon some information or suit upon a lawful verdict given, demurrer adjudged, or hearing decreed for his Majesty, within sixty years before [49] the institution of the suit or proceeding; so that unless the reservation of the King's right by putting it in charge to stand insuper of record be followed up by some proceeding of law to be founded upon it, the simple putting in charge must be considered as a mere formality and treated as a nullity. Under the circumstances in evidence, therefore, they insisted that the right of the Crown was barred by the statute.

23d and 28th June, 1819. —The Solicitor-General, Clarke, Roupell, and Pemberton, supported the claim of the Crown.

[The arguments, urged in support of the claim sought to be established by the information, having been for the most part adopted, or fully repeated and commented on by the Lord Chief Baron in delivering the judgment of the Court, amongst the other reasons and authorities upon which it is founded, are omitted for the sake of conciseness. On the last point relied upon in the defence, a recent case, determined at *Nisi Prius*, was cited, as establishing what was a sufficient standing insuper of record to take the right of the Crown out of the operation of the statute. A succinct statement of the circumstances of that case will be found subjoined, by way of note, to that part of the judgment which adverts to the authority of that decision.]

Shadwell replied, the substance of which has been already attempted to be incorporated in the principal argument for the same reason.

[50] Monday, Jan. 17, 1820. The Lord Chief Baron, now delivered judgment.

This is an information filed by his Majesty's Attorney General against Lord Eardley and other persons occupying lands as his tenants and the representatives of a deceased

occupier. Lord Eardley does not appear to have occupied any part of the land himself ; and, I believe, there is no account prayed against him : but it is said, that having received the value of the tithes from his tenants, he therefore ought to pay them over to the Crown. The information is, however, very properly filed directly against the tenants of Lord Eardley, as occupiers, for an account of the titheable matters taken by them from the lands in question.

It is stated, and admitted, that the lands of the tithes from which the plaintiff by the present information seeks a decree for an account, are not situate within any parish,—in other words, that they are extra-parochial. And it is therefore contended that the King is *jure coronæ*, entitled to the tithes of those lands, on the general principle, that he is entitled to the tithes of all lands which are situate in extra-parochial places.

On the part of the defendants it is urged, first, that (admitting these lands to be extra-parochial) the King is not, in point of law, entitled, universally, to the tithes of all extra-parochial lands.

[51] They also contend, secondly, that if he be, they have, in this instance, a right to the tithes of the lands in question, by virtue of a title derived from the Crown, by a grant to Lord Torrington, under whom Lord Eardley claims.

And they submit, as a third ground of defence, that if the Court should be of opinion that that claim cannot be supported ; yet the common law right of the Crown is barred in this case by the operation of the statute 9 Geo. III., or, as it is commonly called, the Nullum Tempus Act.

Now, as to the first ground of defence—that the Crown is not, by virtue of the royal prerogative, entitled to the tithes of extra-parochial lands generally—I consider any enquiries respecting that, in the present case, to be rather matter of curiosity than necessary research,—matter which may serve, perhaps, to elucidate, but is not at all essential to the decision of this case, as I shall presently shew. Out of respect, however, to the ability with which that point was argued, I have consulted the authorities cited, and am prepared to say, the result is that I am of opinion that the King is by law entitled to the tithe of the produce of all lands that are extra-parochial. It follows, therefore, that the King is entitled to the tithes of the lands in question, unless the defendants can establish a specific title founded upon some grant of the Crown, or otherwise.

[52] Tithes, as we all know, are a property of a very special nature. They do not belong to the owner of the land or of the animals in respect of which they arise ; nor, at the time of their origin, were they appropriated to any particular persons, so as to give them a right to demand them : for, as far as we have any traces of their history, it appears to have been left to the election of the owner of the other nine parts of the titheable matters, to dispose of the tenth in distribution amongst the clergy, and sometimes amongst the clergy and objects of charity. The first institution of the payment of tithes in this country, as rendered in latter days, no where clearly appears ; and, I apprehend, it has not hitherto been ascertained, at least to the satisfaction of any of the learned persons who have made it the object of their research. Tithes, indeed, were probably introduced into this country as early as Christianity itself, but as to the circumstances, in what manner, and under what regulations, we have so far no authentic records. It is said, and perhaps correctly, that in the earlier ages, the owners of property yielding titheable articles could not use the whole for their own benefit, but were obliged to render the tenth part to some of the officiating clergy as their preference should direct them, or, as others say, to the Bishop, to be applied by him for the use of the clergy, or to be administered in charity. In progress of time, (but when does not clearly appear,) a decree was made for the appropriation of the tithes, whereby it was ordained, and thereupon it became part of the [53] common law, that the tithes should be paid in the different parishes wherein they accrued, to the parson of the particular parish. When parishes were first established in this kingdom is not with any degree of certainty known, but after they were established, whether it were by common law or by statute, for writers differ upon that, the clear result of all the enquiries seems to be, that the tithes were appropriated to the parsons of the several parishes in which the titheable matters were produced, and their right to demand and enforce the render of them became part of the general law of the land.

According to the doctrine prevailing under the feudal system, the title to all the land of the kingdom being supposed to have proceeded originally from the Crown, if any parcel of it had never been granted out by the Crown, it was considered, and by

law it is assumed, to be still in the Crown. It does not appear, from any thing we are able to find in the result of the researches of learned men upon this subject, that in ancient time the Crown had a greater interest in tithes than any other owner of land, except that the King, as being *mixta persona*, might hold tithes for his own benefit, as ecclesiastical persons may, which the subject could not do.

It may be necessary to observe here, with respect to Forests, that some of them were of a date to which we cannot assign any time: some forests, or parts of forests, were in parishes, and [54] other forests were not. Some parts of those tracts called forests did not belong to the Crown. It was admitted by the Counsel for the defendants to be quite clear, that the tithes of forests, if they were extra parochial, have, for that reason, always been held to belong to the Crown. But there is, perhaps, some difficulty in furnishing the reason why the tithes of forests which are extra parochial, should belong to the Crown, when tithes arising from forests, which are in parishes, belong to the parson of the parish; and that is part of the distinction which is taken on behalf of the defendants here. For that purpose we must look into the cases, such as they are, to be found in the books. I am not ashamed to own, that when this line of argument was first struck out by Mr. Shadwell, it appeared to me to be of a novel character, and I am very much countenanced in having so little acquaintance with this subject, by finding that every lawyer to whom I have applied for information on the subject since the argument of this case, has not been able to give me much assistance. I must confess, when one looks into the books, there are more difficulties than I could have supposed had existed: but I think, that from the result of all the cases which are important upon this subject, we shall be very fairly entitled to draw that conclusion which has usually prevailed, — that where lands are extra-parochial the tithes arising therefrom belong *prima facie* to the Crown.

In 1 Rolle's Abr. p. 657, letter O. pl. 4, it is said — "The King shall have the tithes in places [55] which are without any parish, come en forests, et hujusmodi, and may grant them by letters patent, and the patentee shall have them." Now, assuredly, however we consider it, this is a very general proposition. It is, in substance, the King shall have the tithes in places which are extra parochial: as, for instance, in forests et hujusmodi. Now, what I observe, with respect to forests, as applying to the expression of the word, as found in this place is, that it is used as one instance of an extra-parochial place: if so, then the words "et hujusmodi" must apply, I think, to something that is not forest, but is, however, of the nature of forest, so far as that it is not within a parish: for the proposition is predicated of a forest as a place not within a parish. The King being admitted to be entitled to tithes of forests "without any parish," the word hujusmodi must be taken to apply to every thing of the same sort, in respect of its not being within a parish: it cannot be applied to forest as forest, therefore I consider it to be used to include every tract of land which is extra parochial; for that is, as I conceive the true meaning of the word hujusmodi.

Then, in the next passage, we find it stated, that in the case of *The Prior and Convent of Carlisle* it is said, "that tithes of land within a forest which is without any parish belong to the King;" and it assigns as a reason, "pur ceo que il in foresta prebati villas edificare, ecclesias construere, terras assartare, et ecclesias illas, cum decimis terrarum illarum, pro voluntate sua cui [56] cuique voluerit conferre potest, eo quod foresta illa non est infra limites alienius parochie." Now that passage certainly does seem to qualify the preceding passage, which appears to be very general, and an almost universal proposition. There, it was said, the King shall have the tithes in places without any parish, as in forests, et hujusmodi; but here the reason given is, "because he may build towns, erect churches, assart lands, and give the tithes of those lands to any body, according to his pleasure," — which by the common law no other person could do.

In Brooke's Abr. tit. Dismes, pl. 10, it is said, *nota*, that the King has tithes of places in great forests, such as Inglewood, Rockingham, and Sherwood, et hujusmodi, which are without any parish, and the Bishop shall not have them. Now, this is equivocal, and seems rather to incline against the proposition stated in Rolle, for here it is said, that Kings have tithes of places in great forests, such as Inglewood, Rockingham and Sherwood, et hujusmodi; and in this case I should consider hujusmodi to mean only such great forests as are so specifically named.

Then, in Style, 137, we have the case of *Burton v. Warr*, which was in 24 Cha. 1. It was there said by the Court, that "tithes which lie not within any parish are due

to the King,"—this is very general: "and that lands must be parcel of a parish either by prescription or by act of Parliament; and that lands lying within a forest [57] and in the hands of the King do not pay tithes, although they be within a parish,"—that is, because the King is capable of holding the tithes; "but if the lands be disafforested and be within a parish they ought to pay tithes; for their not paying tithes, being in the King's hands, is but an immunity for that time only." So that here it is held, that tithes not lying within any parish are due to the King,—that is certainly very general: then the case goes on to say, not qualifying or restraining the generality of the first passage, that the lands must be parcel of a parish, either by prescription or by act of Parliament; and that lands lying within a forest do not pay tithes, for they are in the hands of the King; but if the lands be disafforested, if they be within a parish, they ought to pay tithes. Now, that must mean, of course, to the parson of the parish: for the King's right was only for the time whilst they were in his hands. So that although it does not say they shall not be paid to the King, I think it must be understood, after the first general proposition, that "tithes which lie not in any parish are due to the King," that the tithes which are not within any parish necessarily belong to the King; but that if disafforested within a parish, they go in that case to the parson.

In the 2d Institute, p. 647, there is this passage, speaking of an opinion of Sir W. Herle, it is said, "He grounded his opinion in this case upon the canon law, which is, that the Bishop is to have all tithes growing in lands not assigned to any parish [58] within his diocese"—that is very general. "Yet," he proceeds, "this canon being against the law of the land, never had allowance within this realm; for in such parts of forests as are out of any parishes the King shall have them." Here he certainly specifies of forests particularly; but the first part of the passage is, that the Bishop is to have all tithes growing in lands not assigned to any parish. Now, I should have conceived, that when Lord Coke gave this first part of the proposition so generally, that the Bishop is to have all tithes not assigned to any parish within his diocese, he would have gone further and said, that by our law also all other tithes belonged to the Bishop, unless he meant the second part to cover the whole, and to be co-extensive with the first. Lord Coke then cites the case of *The Bishop and Prior of Carlisle*. Then he adds, and Edward the First granted tithes coming of land within the Forest of Deane, as were not within any parish, to the Bishop of Landaff and his successors. Now there have been two cases in this Court upon that grant—one of them in the time probably of many of us, certainly in my time, I mean the case of *The Bishop of Landaff*—in which, although there was no decision upon the point, it was understood to be as much matter of course, passing currently, that the tithes of extraparochoial places belonged to the King as that the fee-simple of a freehold estate of inheritance descends to the heir.

[59] Lord Coke, also, in the 2d Institute, p. 651, in commenting upon the statute of Edward the Sixth respecting tithes, says, "Where the King ought to have the tithes within the wastes or common in his forests which are not within any parish, this branch giveth the tithes of the increase of cattle to the parson of the parish where the owner dwelleth." That is, the tithes of the cattle agisted, wherever that might be, not within the parish. Here the word "forest" is again used, but I think that the same construction should be put upon it here, which I have endeavoured to shew ought to be put upon it in the passage which I quoted previously from Rolle.

In Cro. Eliz. pp. 511, 512, we find a very material case (*Wright v. Wright*). Sir Edward Coke, at that time, it is true, was only counsel; but we know that the author of these reports, as does Lord Coke himself in his own reports, states the arguments, if they are not contradicted, as having been considered to be founded upon the law of the land, and therefore sanctioned by the Court. We find there, that Sir Edward Coke is stated to have used this argument for the prescription being good, that, "before the Council of Lateran, tithes were not payable here to certain persons, nor to places, as appears, 11 Ass. pl. 9, 44 Ed. III. 5, 16 Hen. VII. 18, which is the reason also, why the King shall have the tithes of lands out of any parish, because the Council extended not unto them, and laymen [60] at the common law were not capable of any tithes." The effect of this, therefore, is, that such was Lord Coke's statement of the law in argument to the Court, and it was not contradicted by them, nor by any authority that I have seen, namely, that before the Council of Lateran tithes were not

payable to certain persons, nor to places. Whether it be correct or not, that is, whether it be corroborated by the researches of antiquarians or not, I do not know, and it is a point of no great consequence. Be that fact as it may, that is the reason given why the King shall have the tithes of lands which are extra parochial.

There is a text book which I shall now refer to, as I have always understood it to be a book of some value as an authority. I mean Sir Simon Degge's. In p. 227, he says this, "As for extra-parochial tithes there have been some differing opinions. Sir William Herle was of opinion that they belonged to the Bishop of the diocese, as general parson of his whole diocese, grounding his opinion, as it should seem, on the canon law, but there was never any such canon law received or approved in this kingdom." He here refers to cases in the Year Books, the same as were referred to by the counsel for the defendant, but which seem to throw no great degree of light upon the subject. Mr. Selden, he says, considers that tithes in parishes may be disposed of arbitrarily: these are the two opinions. "But," he observes, "it hath been resolved, both in Parliament and by several judgments at common law, that all extra-[61]-parochial tithes belong to the King, who is a mixed person, and capable of tithes at the common law in permanency,"—that is the conclusion which Sir Simon Degge drew beyond all doubt.

I shall next refer to Comyns's Digest, tit. Dismes, 3. Comyns, as was stated very accurately at the Bar, quotes the authority of Rolle's Abridgment and Style which I have already mentioned. He says, that "extra parochial tithes belong to the King generally." Now there can be no question that the authority of Lord Chief Baron Comyns is very considerable, and although he quotes those two books which I have mentioned, (as had been already suggested at the Bar), yet it is evident, that the conclusion which he drew from them, and the construction which he put upon the cases, is exactly the construction which I have adopted, although he does not state his reasons, which would no doubt have been much better than those which I have given here; but it is quite clear that he deduced the same doctrine from the decisions in those cases, which I consider them as establishing.

In Bacon's Abridgment, tit. Tithe, G. 67, it is said, "All tithes arising in an extra parochial place are, by the canon law, to be paid to the Bishop of the diocese, in which the place lies:" (in former times there were no parishes, and the whole diocese was considered one parish,) but that was not the common law of England. "But by the common law," he says, "all such tithes are to be paid to the [62] King. As the appropriation of tithes, in consequence of the Decretal Epistle of Pope Innocent III. extended only to parochial tithes, all the tithes of extra parochial places continued to be due to the King. And, consequently, all extra-parochial tithes of which no grant has been made, are at this day due to the King." And this no doubt proceeded upon the principle, that where there is no particular grantee (for that is the original supposition) in order to extinguish the condition of occupancy, as much mischief must always arise from such a mode of claiming property, it was considered as remaining in the King, from whom, it is presumed, all property in land originally proceeded in some way or other which cannot now be satisfactorily shewn.

I shall now conclude my references with what Mr. Justice Blackstone says, in the first volume of his Commentaries, p. 113, "Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious or careless owners, or were situate in forests or desert places, or for other now unsearchable reasons, were never united to any parish, and, therefore, continue to this day extra parochial, and their tithes are now by immemorial custom payable to the King instead of the Bishop, in trust and confidence that he will distribute them for the general good of the Church:" "Throughout the land the tenth part of the produce must be rendered for the [63] benefit of the parson, excepting in excepted cases, but they must be rendered, and it is presumed to be for the benefit of the Church, even though recovered by the hands of the Crown.

Upon the whole, therefore, it appears to me clearly from the cases and text books which I have cited (many of them certainly using the word "forests," without stating more), that we must take the word "hujusmodi" where used throughout, and upon which I put that extended construction, as intended to mean not merely a forest in the common acceptation of the word, but to include all tracts of land not belonging to any parish, so as not to confine the King's right to that which is, strictly speaking,

a forest. That construction too agrees with the conclusion drawn by the Chief Baron Comyns and Mr. Justice Blackstone. So viewing all the authorities, therefore, and finding it extremely difficult to draw any other conclusion, unless I could find any decisions to oppose it—and I have not been able to find any case or dictum contradicting it, either upon the present or upon any former occasion when I have found it necessary to refer to cases on this subject—I cannot but consider the general principle to be well established, that the King is entitled to the tithes of all lands situate in extra-parochial places.

But when I say I have found no case or dictum leaning the other way, I mean to except a chapter in a book called the "Doctor and Student," and there there is certainly to be found the following dialogue. The Doctor says, "It was asked of me but late, [64] if certain waste ground, whereof was never any profit taken, and that lay within no parish, but in some forest, or that is newly won from the sea, were brought into arable land, whether the Parliament might appoint, who should have the tithe thereof, and he that asked me the question, thought it might. I pray thee shew me thy conceit, what thou thinkest therein."—Thus speaks the civil lawyer: the Student then says, "I think, that if the freehold be in the King, he may assign the tithes thereof to whom he will: and if the freehold be in a common person, that he may do likewise. But then (he continues) I think, that if that common person do not assign the tithes so as it may stand conveniently to the maintenance of the service of God, that the Parliament may do it, and order the tithes to the increase of God's service, as they shall think convenient." Then the Doctor says, that he thinks these things ought to be ordered by the Archbishop, to which the Student replies, "Though tithes be spiritual, yet the assignment of the tithes to other is a temporal act, which the Parliament, with a cause, may order, as it may do all temporal things within the realm: and that the King, or any other that hath the freehold of such waste grounds as be in no parish, may assign the tithes thereof to whom they will, it may appear thus: Before parishes were divided, and before it was ordained by the law of the Church, that every man should pay his tithes to his own Church: every man might have paid his tithes to what Church he would, and might one year have given it to one Church, and [65] another year to another, or have granted them to one Church for ever, if he would. And like as every man before the said severing of parishes, might have given his tithes to what Church he would, because he was bound to no Church in certain: so may they do now that have lands that lie in no parish: for they be at liberty to assign them to what Church they will, as all men were before the said law made, that tithes should be paid to the proper Church:"—afterwards, he says, "In the twenty second year of King Edward the Third, in the Book of Assize it appeareth, that the King granted the tithes of certain asserts that were newly taken out of the Forest of Rock, to a provost, and he thereupon brought a *seire facias* against divers that took the said tithes, returnable into the Chancery: and there exception was taken that the suit pertained to the Spiritual Court, and not to the Chancery: and it was answered again, that that was to be understood where the suit was taken against them that ought to pay the tithes, and not where it was brought against them that were wrongful takers of the tithes. And thereupon the defendants were put to answer, and pleaded unto an issue, which was sent drawn into the King's Bench, to be tried according to the law, and there the defendants made default: whereupon the plaintiffs prayed execution. And in this case Thorpe said, 'That the old law hath been alway, that the king should assign the tithes where he would.'" Such, then, is the doctrine found here—that if there were land not within a parish, the owner of the land has a right to assign [66] the tithes as he chooses, as he might originally at common law, as persons have imagined. But it seems to me, that the authorities which I have mentioned before, are superior to the authority of the "Doctor and Student;" and therefore I have drawn that conclusion which I have stated. Although I do not think it at all necessary, for the determination of this case, that I should have gone into the question so far as I have done upon this point, yet I thought I owed it to the counsel for the defendant, who have displayed great learning throughout the argument, to say thus much with a view to settle the Law. In this particular case, however, we must remember that the King had the freehold of all these lands: and therefore, even according to the supposition in the "Doctor and Student," he might assign these lands as he pleased; and he has assigned them,

as Mr. Attorney General says, and as indeed the defendants say also, only they insist on an assignment to other persons than the Crown lessees. So that taking it either way, according to the doctrine laid down in the "Doctor and Student," it takes from the defendant in this case at least the advantage which he might have derived under other circumstances from the proposition urged in argument on his behalf, that the King is not entitled to the tithes of lands which are extra-parochial.

If then we have established that the tithes were originally in the King, and, by originally, I mean when these tithes arose, that is, when the lands in question were newly recovered from the sea, or from [67] the water: we then come to the part of the case which raises the question, whether the Crown has granted away these tithes to any one else or not? For the defendant, it is said that it is immaterial to whom they have been granted; for, if granted at all, they are no longer in the Crown: and the very statement of the case, supposing the observations I have made upon the law, taken from the "Doctor and Student," to be incorrect the very statement of the case, which I am about to make, will shew that that cannot apply to this case: and it will shew that it is merely a matter of speculative research, in this instance, to enquire whether the King is entitled to extra-parochial tithes or not; for it is clear that he was entitled to these tithes beyond all doubt. Even the defendants say, that he granted them to their predecessor from whence it must be concluded, that they admit that his Majesty was entitled to them: and they accordingly mainly rely upon the title which they claim under the King, namely, the grant of the Crown. They surely then cannot say that the King has never exercised any act of ownership over these tithes, and that he could not grant leases of them. Therefore, taking it from the statement of this case, on one side or the other, it is clear that his Majesty was seised of these tithes at the time of the Restoration: and that at once equally puts an end to any difficulty that might have arisen upon the question, whether the King is entitled to extra-parochial tithes or not? I consider however that I have shewn there is no doubt but that he is entitled to them, and that he may deal with them [68] as owner, as an ecclesiastical person may, because he is *persona mixta*.

[His Lordship then, with great minuteness and particularity, went through the whole of the documentary evidence, consisting principally of grants from the Crown of the lands in question, and of leases of the tithes by the Crown from time to time, and a decree of this Court (Easter Term 1714) of an account of the tithes in favor of a Crown lessee, founded upon the lease: all of which, he observed, being in effect a continued exercise of ownership on the part of the Crown, and not contested by any one, afforded the strongest evidence that the tithes were not intended to pass, and did not pass by virtue of the grant of the land to Lord Torrington: and that throughout the whole tenor of that grant, there was nothing which could be taken to relate to any thing but the land itself.]

Then (continued his Lordship) a question arises upon the construction of this grant to Lord Torrington: and in opposition to the case, as I have stated it, on the part of the Crown, fortified as it is by the usage, the granting of the leases, and the establishment of the lessee's right under them in a suit in Equity against persons claiming under this very grant, it requires a very strong case indeed to shew that the tithes passed from the Crown to any person by any other mode than under those leases. This grant is certainly however a very important document. It was made on the [69] 14th of May 1690, which was in the second year of the reign of King William and Queen Mary. Before I enter more minutely upon the question of its construction and operation, I will first observe, that with respect to the words used in the introductory part of it, namely, "Our will and pleasure is and we do hereby of our more abundant grace certain knowledge and mere motion" that there is no doubt, and so far I entirely concur with the observation of the counsel for the defendants, that they have a virtue inherent in them, which gives, in some respects, to grants of the Crown, a more favorable latitude of construction in behalf of the grantee than would have place, if those words were absent; and I have no difficulty in construing this grant of the Crown, in the present case, as I would a common conveyance between man and man. At the same time, however, I must observe, that I consider there is a difference even where those words are used; although I do not at present mention that so much as being applicable to this case, as to prevent any future misconception of the opinion which I am delivering; therefore I repeat, that I hold there

is certainly a difference between a grant of the Crown even with those words, and a grant made between subjects*.

The Crown, by this instrument, grants to Lord Torrington all these parcels of lands (describing them particularly), being part of the Great Level called Peterborough or Bedford Level, [70] which said premises (it recites) were by indenture of the late Queen, and her then trustees, bearing date the 6th of November, 1688, demised to Lord Viscount Castleton, for the term of twenty-one years, at the yearly rent of 323l. ss. 9d. Then, after specifying other parts of the premises and former leases and grants of them, it has first these general words, "and also all and singular other grounds, lands, tenements, and hereditaments, parcel of the 10,000 acres in Peterborough Level."—Those well-known words could not, as I conceive, per se, pass tithes, which no doubt are a particular species of property; for they do not belong, nor are they appurtenant to land: they are collateral to the land, and are quite distinct from it. So far therefore we see clearly that nothing was granted here but that which had been granted to the Duke of York, and by him when he became King to his Queen, without any reference whatever to tithes—"which in and by the said recited letters-patent of our said Royal Uncle King Charles the Second, were granted or mentioned, or intended to be granted to the said late King James the Second, when he was Duke of York," and so on. It is likewise clear that those lands were of the yearly value of 3000l. [His Lordship then read the general words, as in p. 45, ante, and various other parts of the grant, making occasional comments on the tenor of the language of the instrument, the substance of which was, that there was nothing from which it could be collected that any conveyance of the tithes to the grantee was intended, every part of it appearing [71] to be applicable to land only; and he observed particularly on the fact, that the tithes were in lease when the grant was made, and new leases were granted as often as they reverted.]

Now, I confess (continued his Lordship,) when I read this grant through, I found it utterly impossible to persuade myself that it was intended to pass the tithes in question under these words,—“all gardens and orchards wastes tithes oblations obventions waters and water-courses,” and so on. I consider them as meant to carry the appurtenances of the land, though very inaccurately used for that purpose certainly. [His Lordship had observed, in the course of the argument, that the words “oblations and obventions” being also used in the same place, amongst the general words, in a grant of extra-parochial lands, shewed that the whole must have been introduced by inadvertence, or at least without any intention to pass the tithes.] We can only therefore, as it seems to me, understand that the grant applies itself entirely and solely to the land, notwithstanding the introduction of the word “tithes.” It describes the 10,000 acres which were granted to the Duke of York, and afterwards by him to his Queen—it represents the value to be 3000l. a year, which is the value of the yearly rent, all obviously relating to the lands; and the language throughout is inconsistent with any idea that tithes were part of the object of the grant, or that they were intended to be passed by the word “tithes”: the grant expresses reversions in general terms; but [72] those were reversions in the land; and not one word is said as to any reversionary interest in the tithes which were undoubtedly then in reversion. Now if, in addition to all this, we consider that so soon after this grant was made, a successful suit was instituted by Sir John Shaw the lessee of the tithes, against the occupiers of the lands, it seems to me to be very difficult indeed to suppose that the tithes were intended or considered to be passed. When we consider the defence, and the result of that suit—every thing belonging to it, shews, that in the minds of the parties most interested there was a conviction, that the tithes had not passed, but were the property of the Crown in reversion, although in the hands of the lessee at that moment. I cannot help regarding the result of that suit as a kind of contemporary judicial construction of the grant, supposing that construction to be more difficult than it really is; and I cannot, with the evidence I have before me (if there be any other I cannot act upon it), hesitate to pronounce, that in my opinion the title of the Crown to the tithes of these extra-parochial lands was perfect down to the expiration of Sir John Shaw's lease; for so it appears to me to have been beyond all doubt.

Here arises the question whether the reversion passed, the tithes being in the Crown at the time of the grant to Lord Torrington. We ought to observe that there

* Vide *Rex v. Capper*, ante, vol. v. p. 260.

is no suggestion of any tithes being received or abandoned by Lord Torrington before the present suit. The tithes after the ex [73] piration of Sir John Shaw's lease reverted to the Crown: and it should be always remembered that when the grant was first made to Lord Torrington, the tithes were under lease to Berkley and Gascoigne: but at the time when the next lease was made, the tithes were actually in the Crown. After the observations I have made respecting the grant to Lord Lincoln, and his conduct pending the suit, I need not repeat that I consider it very strong evidence, and, in the absence of any evidence to oppose it, quite conclusive of the then acknowledged right of the Crown. I do not mean to say, that if there was any other evidence to oppose it, it might not be answered: but there being none brought before me, that is the conclusion which I must draw in the present case.

Then it is said, very truly, that after the period when Sir John Shaw received the tithes, in 1715, there does not appear any evidence of the Crown or its lessee having received any tithes, or any compensation for tithes: and that though it appears that the Crown had been in the habit of exercising ownership with regard to granting leases, it had not received any tithes. Therefore it is said, that the act of the 9th Geo. III., usually called the Nullum Tempus Act, bars the present claim. That act is the only bar in my view of the case which can be fairly proposed: for if that statute had not passed, it is perfectly clear, from all that I have stated, that there could have been no defence against this suit of the Crown. It is answered by the Attorney-General, that the [74] acts of the Crown in granting leases, the last of which comes down to 1780, amounts to a sufficient demonstration of the claim, so as to take away the effect of the statute. It is also added, that the tithes in question have been constantly kept in charge, and they give evidence of their having been in fact kept in charge during all the time referred to. Now whether the act of granting leases in the way in which the Crown granted leases here, would keep up the title of the Crown against the operation of the statute from 1715, I have not been able to satisfy myself. I think, however, adverting to the principle of law upon the subject, that that part of the statute is more applicable to cases of mere concealment than to any other object, and that it therefore does not apply here. However, it appears that these tithes were, besides, actually in charge: and if so, I think that would, under the Act of Parliament, prevent the right of the Crown from being barred by its operation. Let us inquire what the act means, by being in charge. In the 3d Institute, 189, we find that my Lord Coke says, in commenting upon the words of the 21st James I.—“Or that the same have been duly in charge to his Majesty, or to the late Queen Elizabeth, within the space of three score years.” “Duly in charge, in judgment of law, is the roll of the pipe: for although a note before the Auditor, or any other, may be a mean to bring it in question, and to be put in charge: yet that is not, in judgment of law, said to be duly in charge, unless it be in charge in the pipe. On the words “Or have stood insuper of record within the said space of three score years,” Lord Coke says, “It [75] cannot stand insuper unless the thing in question were before duly in charge.” That was the construction which he put upon the statute of 21st James I. c. 2. But looking into the statute in question, the 9th of Geo. III. (c. 16, s. 2) we find there are these words introduced, expressly, I suppose, for the purpose of altering the law as it formerly stood—“Provided always, and be it enacted, that where the rents revenues issues or profits of any manors lands tenements tithes or hereditaments are or shall be in charge by to or with any Auditor or Auditors, or other proper officer or officers of the Revenue, such rents revenues issues and profits shall be held deemed, and taken to be duly in charge, within the meaning and intent of this act, any usage or custom to the contrary notwithstanding.” The evidence here is, that the tithes were in charge with the Auditors during all the time referred to, and that brings us down to the present moment. Then if the Crown had the tithes at the Restoration, and never granted them to Lord Torrington, the defendants are not entitled to them, but the Crown clearly is: for we find it exercising a most decisive act of ownership over them, of which there can be no doubt: and, if the Crown have been granting leases from time to time, or if the tithes have been kept in charge with the Auditor, according to the requisition of the act of 9 Geo. III.: unless the defendant can shew that they were granted to Lord Torrington, he can have no defence here. Now being of opinion, that he can not make a defence under the grant to Lord Torrington, I must therefore give a decree against such of [76] the present defendants as are called upon for the account.

The last clause of the act was very much pressed upon us, as connected with the preceding clause, to shew that the putting in charge in this case was insufficient; but I think it is only necessary to read them together, to shew that they have no connection with each other. [His Lordship read the clauses.] It seems to me, on reading both the sections very carefully, that this last section was introduced as applicable solely to cases of concealment, which is not the case here. Therefore, I am of opinion, that this accounting before the Auditor is a sufficient standing insuper for the purposes of supporting this suit.

A case was cited, and much relied upon on the part of the Crown, said to have been decided in the county of Northampton*, and which was pressed [77] upon the

* *The Attorney-General v. Maxwell and Others.* Northampton Summer Assizes, 1814. Coram Graham, Baron. Thursday, July 21, 1814.—If the Auditors make due returns to the office of Commissioners for auditing the public accounts of the rents and other profits of lands, &c. forming part of the Crown revenue, those returns constitute a putting in charge within the meaning of the 9 Geo. III. c. 16, so as to save the right of the Crown from the operation of that act; although for more than sixty years the Auditors have received nothing in respect of such revenue, and although the Crown within that time, have not instituted any suit or proceeding to recover any part of it.

The question tried under this information at the above Assizes, before Mr. Baron Graham and a Special Jury, was, shortly, whether the Crown was entitled to the tithes arising upon the common and waste lands of the Borough Fen—a part of what is called the Belford Level—the Commissioners, appointed under the act for enclosing the Fen, having determined that the Crown was not entitled to the tithes.

It was admitted that the lands in question were extra-parochial, and the only disputed point was, whether the Crown had not been barred of its right by the operation of the Nullum Tempus Act: and that depended, as was admitted, on whether these tithes had been duly put in charge?

Amongst other evidence put in on the part of the Crown, were several leases of these tithes by the Crown, reserving one-third to be paid into the hands of the Receiver-General—a decree of this Court in 1714, in favour of Sir John Shaw, the lessee of the Crown of the tithes of the lands in question, ordering an account of the tithes. A witness from the Auditor's Office produced numerous accounts from the custody of the office, purporting to be the accounts of various auditors* against the Receiver-General: and he stated, that that was the mode in which the revenues of the Crown were kept in charge. In the earlier series only of those accounts, which commenced in 1715, was there any actual receipt returned in respect of these tithes; and from that time till 1716. All the later accounts, continuing down to 1812, were returned Nil.

To all those later accounts, Lens, Serjeant, objected that they were mere ex parte recitals by third persons, who were not bound by their contents, and therefore could not be admitted as evidence to bind others, in regard of the matters to which they related: and he contended, that their being enrolled in the office, could not, even in the case of the King, make them a record for such a purpose, for what other purpose soever, such as that of history for instance, they might be considered as records—that in point of fact, the very return of nil was, if evidence of any thing, evidence that these lands were not kept in charge, for upon such returns, no one could be called on to account. He also submitted, that if such returns by the Auditors were allowed to be binding to a certain extent, they were, at most, by the terms of the statute, only a first step towards a putting in charge: for, by the 10th section of the statute, it is enacted that, “no putting in charge, nor standing insuper, nor taking or answering the farm rents (&c.) of any lands (&c.) out of charge, shall be deemed a putting in charge (&c.) unless thereupon, such lands (&c.) have been, or shall be, upon some information or suit on behalf of his Majesty, upon a lawful verdict given or demurrer adjudged, or upon a hearing ordered or decreed for his Majesty, within the space of

* Mr. Hewlett, who was examined, stated that, in all such cases, it was usual for the officer rendering the account, to set down all the items of which it was composed, whether any thing had been received or not: where any sum had been received, it was returned accordingly; where none, the officer, returned “Nil.”

Court as an authority deciding that point, and overthrowing that last position on which this defence has been rested. That was certainly a *Nisi Prius* case, and there is not, I admit, the same respect due to a *Nisi Prius* decision, as to a judgment in *Banc*, beyond all doubt. At the same time it is a decision, and one which, as far as it is an authority, bears directly upon this point; and if I see no other case in any way opposing it, I certainly ought to treat it with respect, [78] at least, under any circumstances: and perhaps, in this case, I may go further and say, I ought to treat it with particular respect; for without knowing more of the circumstances of that case than I know at present, it derives great weight from some of those of which I have been informed. I mean no compliment when I say this, but understanding that Mr. Serjeant Lens was of Counsel in the cause, and that he objected at the trial to the evidence of the putting in charge, [79] as being insufficient to support the claim of the Crown against the statute—that the opinion of the learned Judge who tried the cause was against him upon that point—that the verdict, in consequence, went against him—and that he ultimately submitted to that verdict: I hope I shall be excused for saying, that I consider the acquiescence of so learned a person in that judgment and that verdict, as affording a very considerable sanction to it; and I am very glad to [80] avail myself of the opinion of the learned Judge who tried that cause, and the submission to that opinion by my Brother Lens, in forming my own judgment now upon the same subject.

I must therefore decree against all the proper parties, according to the prayer of the bill.

sixty years before" [the commencement of any such proceeding]. In the present instance, there had been no such proceeding since the suit in 1714 to the present time: and to have protected and preserved the right of the Crown, some suit should have been instituted upon one of the returns of nil, within the time prescribed by the statute of limitations, for such it was. Therefore he urged, first, to the Court, that in point of law, and afterwards, to the jury, that, in point of fact, there had not been any such putting in charge of the lands in question, as to the tithes, as would entitle the Crown, notwithstanding the statute, now to recover against the defendant in the present information.

Clarke, for the Attorney General, contended, on the other hand, that there had been such a putting in charge of the subject-matter of the present claim, as saved the King's right from the operation of the Act of Parliament. By the terms of the statute, the Crown was only barred where his Majesty shall not, within sixty years, have received the rents and profits of the land, &c. claimed, or unless the same shall have been duly in charge to the Crown, or shall have stood insuper of record within that time—the act contemplating a twofold means of protecting the right of the King, either of which would be sufficient for that purpose. Therefore, he submitted, the return of nil by the Auditors, was a keeping in charge, as contra distinguished from receiving the rents and profits, meaning, not that nothing was payable, (in which case there would have been no return), but that nothing had been paid by the lessees of the tithes of the Bedford Level to the Crown through the Receiver General, in respect of those tithes. He submitted that the object of so requiring the subject matters of the revenue to be kept in charge where not paid was, that there might be a public record of such charges, where they might be found by all men in order to prevent concealments and to quiet possessions; and therefore they were so enrolled in the Auditor's Office; but if no return should be found there for sixty years, the statute then, and then only, would operate as a bar to the claim of the Crown, and those claiming under it by letters patent, or grants of concealments, or otherwise.

Graham, Baron, (having admitted the evidence, notwithstanding the objection of the defendants' counsel) directed the Jury, that the title of the Crown had been unobjectionably proved up to 1715, and that the only remaining question in the cause was, whether—as the Crown had not, for more than sixty years, attempted to enforce the payment of the rent for the tithes of the lands comprised in the information from the lessee, nor had, for so long a time, as that during which the Auditors had, in the accounts of the Receiver-General, to whom it should have been paid, returned nil, instituted any proceedings—such alleged laches had the effect of barring the right of the Crown, by virtue of the *Nullum Tempus* Acts—His Lordship, adverting to the argument founded on that return—that it was a virtual renunciation of the right of the Crown—declared

As to Lord Eardley, I do not know of any instance of the Court calling upon an individual, [81] under the same circumstances, to account. He admits, it is true, that he occupied part of the lands on which there was a decoy; but I am not aware that wild ducks have ever been held to be titheable.

DECREE.

That the defendant, Lord Eardley, go without day, as to the claim for tithes against him in the information mentioned.

[82] Refer it to the Deputy Remembrancer, to take an account of the tithes claimed by the information against the other defendants, from six years prior to filing the information, as to those persons who became occupiers prior to that period: and as to the other persons from the time when they respectively became occupiers, to be paid by the defendants—with the usual reference as to the executors, &c.—and with all usual directions.

End of the Sittings after Mich. Term.

[83] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, HILARY TERM, 60 GEO. III. AND 1 GEO. IV. GRAY'S INN HALL.

In the early part of this Term occurred a Demise of the Crown by the death of His Majesty George the III., which happened on the 29th day of January, after he had entered upon the sixtieth year of his reign.

Rex erat ——— nobis, quo justior alter
Nec pietate fuit: nec bello major et armis.

His present Majesty King George the IV. immediately succeeded to the Crown of these Realms, and was proclaimed on the following Monday, the 31st of January.

it to be his opinion that it was not: that the Crown could not be injured by the neglect of its lessee: and that, most probably, the very reason for recording the returns of nil, was to protect the Crown from the effect of continued non-payment, whether it were the result of indulgence or of any other cause.

Then, (observed his Lordship) the question arises, whether the enrolling such returns in the Auditor's Office, is a putting in charge within the meaning of the 9th Geo. III. Upon that subject—after describing the nature and effect of the mode in which that had been done in the present case, and applying to it the language and requisitions of the act of Parliament, in that respect, in detail, with great particularity and minuteness (the object and history of which, he appears to have elaborately and carefully explained)—the learned Judge pointed out, in what the benefits of that statute consisted, as it regarded the interest of the subject on one hand, and the right of the Crown on the other: both of which (he stated in effect) would be best preserved by the course which had been proved to have been pursued by the officers of the Crown in this case: for by so giving publicity to the King's claim, his Majesty's title to the subject-matter might be saved: whilst the subject's right to quiet possession and to a fair and full knowledge of his liabilities would not be disturbed by being rendered possibly subject to latent claims long become dormant by negligence and laches*.

Such was, in substance, the doctrine comprised in the learned Baron's charge to the Jury, who, consonantly with his Lordship's direction, found a Verdict for the Crown.

* Mr. Baron Graham's charge to the jury, in explanation and elucidation of the law, was of course considerably more diffuse; (as appears from the short-hand writer's notes of it, with which the reporter has been furnished by the courtesy of the Solicitors of Woods and Forests) but he has used the freedom of giving, thus shortly, the effect of what is represented to have been said by the learned Judge at Nisi Prius, as he has done in the detail of the arguments, for the sake of curtailing as much as possible, consistently with presenting an entire view of it, a case necessarily of so great length.

[84] MEMORANDA.

The several patents of precedence which had been granted to counsel by the late King, becoming void on the death of his Majesty, such Barristers as then enjoyed that distinction now retired behind the Bar.

In this Term the degree of the coil was conferred upon Thomas Peake, of Lincoln's Inn, Esq. Barrister at Law, who distributed as Serjeant the customary presents of rings. His were inscribed with the motto "*Æquâ Lege.*"

The following Rules were made by the Court, to take Effect from the End of this Term.

REGULE GENERALES, HILARY TERM, 60 GEO. III. AND 1 GEO. IV. Where a plaintiff would have been heretofore entitled to sign judgment for want of a plea, where the declaration had been delivered or filed, and notice given four days exclusively before the end of the Term, in which the process was returnable, he may now do so on giving two day's notice exclusively, if a rule to plead have been given.

It is ordered that, in all cases, wherein the plaintiff, by the present practice of the Court, would be entitled to sign judgment for want of a plea, where the declaration had been delivered or filed, and notice thereof given four days exclusively before the end of the Term in which the process [85] is returnable, the plaintiff shall, from and after the first day of next Easter Term be at liberty to sign such judgment, provided the declaration be delivered or filed, and notice thereof given two days exclusively before the end of the Term within which the process is returnable, a rule to plead having been duly entered.

HILARY TERM, 60 GEO. III. AND 1 GEO. IV.—Declarations and other pleadings must now be engrossed on stamped paper, and entered in a book, to be kept in the Office of Pleas.

Whereas, by the practice of this Court, ingrossments on paper of declarations and other pleadings have not been required to be made by the party declaring or pleading; and whereas it is expedient to alter the same: Now, it is hereby ordered, that from and after the last day of this Term, ingrossments on paper of all declarations and other pleadings shall be duly made on stamp, and filed or delivered by the parties respectively declaring or pleading, within the times prescribed by the Rules and Orders of this Court for filing and delivering declarations or other pleadings respectively: and it is further ordered, that a book be kept in the Office of Pleas, wherein entries shall be made of declarations so filed*.

[86] WARD v. BOTTALIN. Monday, 24th Jan. 1820. —In the Exchequer the report of the officer on a reference that an answer is impertinent, must be confirmed by the Court on motion for that purpose. —If the defendant mean to except to the report, he must first move for leave to do so. —Both motions must be made, on notice, and orders obtained without will be set aside for irregularity.

In this case the bill was filed for an account —and an injunction to restrain the defendant from proceeding in an action at law. The answer having been referred to the Master for impertinence, he reported it to be in some respects impertinent.

At the Sittings after Michaelmas Term, Barber, on the part of the plaintiff, obtained an order for confirming that report, and for expunging the impertinent matter.

On the same day Collinson, for the defendant, moved for and obtained an order for leave to file exceptions to the Deputy Remembrancer's report. Mutual notices were afterwards given by each party to discharge the order which had been obtained by the other, on the same ground of objection: which was, that both had been

* Vide *Smith v. Bulkeley*, ante, vol. ii. p. 114.

obtained absolutely in the first instance without notice; and the two motions were now brought on together.

Barber submitted that, according to the practice of the Court of Chancery, his motion was one of course, and that, having been granted, the defendant's subsequent order was therefore a nullity.

[87] Collinson, on the other hand, contended that by the practice of this Court, the order obtained by the plaintiff, having been moved for without notice, it was therefore irregular, and ought to be discharged; and that for the same reason the order which he had obtained was regular, and not affected by the preceding irregular order. He adverted to a case in *Fowler's Practice* (*Maylor v. Hanky*, 2 Fowl. 14), in support of that doctrine (admitting the practice to be different in the Court of Chancery, where the Master certifies the impertinence, whereas here he reports it): and he also referred to a recent case of *Donison v. Curry**, where the Court held that notice of such a motion was necessary.

The Court ordered a reference to the officer to enquire of, and report the practice; and the Deputy Remembrancer accordingly thereupon certified, that he had been attended by the respective clerks in Court and solicitors of the parties, as to the mode in which the orders had been obtained: and he found in respect to the first order, that although obtained on motion in open Court, it had been moved for without notice; and as to the other, that it had been obtained also without notice, but not in open Court, having been drawn up and entered from a minute, made upon production of the signature of counsel: and he therefore found that both the orders had been irregularly obtained, which he submitted to the Court.

The Court afterwards (10th May) discharged both the orders without costs, ordering the expence of the report to be equally borne by both parties.

The defendant then moved on notice for leave to file exceptions to the report of impertinence, which not being opposed was granted.

[89] THE ATTORNEY-GENERAL v. THEAKSTONE AND ANOTHER. [On a Seizure of a Vessel called the "James."] Wednesday, 26th Jan. 1820.—The *Gazette* is sufficient evidence of a Proclamation issued under an Order in Council:—because it is a public act, regarding the Crown and Government, and must pass the Great Seal before it can be admitted into the *Gazette*.

A verdict having been found for the Crown on the trial of this information at the Sittings after last Trinity Term,

Jervis, in the course of the following Michaelmas Term, obtained an order (upon a motion for a new trial) that the matter should stand over, and that the entering up of the judgment should in the mean time be stayed until further order.

The information was filed for the condemnation of the defendants' vessel, on a forfeiture under the 33 Geo. III. c. 2, s. 4, for having on board, whilst loading for Pernambuco, gunpowder, an article at that time prohibited, by Proclamation under an Order in Council, to be exported or carried coastwise.

The cause having been called on for trial, and the case stated to the Jury, the *Gazette* of Tuesday, the 26th May, 1818, (wherein the Order in Council in question was published) was put in and read, upon which

Jervis objected that it was usual and necessary to prove the Order in Council, by

* *Donison v. Curry*. Michaelmas Term, 1819.—Costs of the notice of motion to confirm the Master's report that an answer was impertinent, allowed on taxation of costs, because it is a necessary part of the proceeding.

In this case the answer had been referred for impertinence, and reported to be impertinent, and the plaintiff had obtained upon notice of the motion, an order confirming the report, and referring it back to the Deputy Remembrancer to expunge the impertinence and tax the costs.

A question arose upon taxation of the plaintiff's costs, whether a notice of the motion was or not necessary? The defendant contending that it was not; and that therefore it ought not to be allowed in costs. The Deputy Remembrancer was specially attended upon the point; and he decided that the notice was necessary; and therefore allowed the costs.

production of the [90] original, and by proof of the hand writing of the Lords of Council, stating that in a great many cases of impressing seamen (the authority for which is an Order in Council and a Proclamation) the original order had always been produced.

In answer to that objection the case of *The King v. Holt* (5 T. R. 436) was cited, in which the Court of King's Bench decided on the argument of that objection, that addresses of bodies of subjects offering their loyalty at the foot of the Throne, and received by the King in his public capacity, became acts of State, and as such acts are announced to the public in the *Gazette*, the *Gazette* is an authoritative means of proving it, as it is an act relating to the King and the State.

The Chief Baron however observed that to obviate the doubt as to the legality of the mode of proof, he would rather have the Order in Council itself proved: and a witness from the Council Office was called for that purpose. He produced the original draft of the minute of the order, which he stated to be the only document remaining in the office, and that the paper was considered in the office as the original Order in Council. It appeared however on his cross examination, that the paper produced was the same draft that had been prepared in October, 1817, when the previous order prohibiting the exportation of gunpowder was made, and that the paper was again [91] used as the draft of the further order for the same purpose, in May, 1818, when the previous order expired. He also proved that such orders are not signed either by the Prince Regent, or the Clerk of the Council in waiting: and that the name of the Clerk is only attached to the minute of the order, for the purpose of shewing that he was in attendance at the time when it was made. That from the rough draft of these orders different copies are issued to the Commissioners for executing the Office of Lord High Admiral, the Wardens of the Cinque Ports, and other officers of State—that the one produced was the original and only minute of the order deposited in the Council Office, and that no entry of it had yet been made in the books.

The Chief Baron ultimately told the Jury that he had thought it proper for the present to over-rule the point made by the defendants' counsel, and when the period should arrive that the question could be discussed, the defendants would have all the advantage that could be derived from the objection which had been taken,—that there was nothing for the Jury to consider,—and under these circumstances he directed them to find a verdict for the Crown, which was accordingly done.

The claimants having afterwards brought an action against the person who was said to have put the gunpowder on board, without the con[92] sent or knowledge of the claimants, it came on to be tried at the last Lancaster Assizes, and a verdict was found for the plaintiff (the present defendants) for 1500*l.*, subject to the opinion of Mr. Baron Wood and Mr. Justice Bayley, whether the *Gazette* was legal evidence of the Order in Council.

Jervis, in the course of last Michaelmas Term, moved for a new trial, on the ground of the objection taken by him at the Sittings, when

The Lord Chief Baron observed that he had himself no doubt upon the point that the *Gazette* was evidence of the Proclamation, because, before it can be inserted, it passes the Great Seal: and he stated that he had been informed, that it had been admitted in evidence under similar circumstances in a very highly criminal case. His Lordship also added, that in conversation with a very learned person, who had been Attorney General for many years, he had learnt that it had been so decided in his time, when it was much doubted by persons who had afterwards admitted, that there was no solid foundation for such doubt.

GARROW, Baron, suggested that, as the same point had been reserved at Lancaster, it would be proper and convenient that the matter should await the decision in that case, when it might be mentioned again.

[93] That suggestion being adopted, the Court granted the rule which,

Clarke now prayed might be discharged—submitting that this was the only instance in which such an order had ever been made by the Court—and he urged, that it would be of mischievous consequences as a precedent, if it were allowed to stand; for it might have the effect of delaying the judgment of the Crown indefinitely. The Judge, who tried the cause at Lancaster, might think proper to wait for the determination of this Court; and the parties in that cause might, after all, bring a writ of error—while in the mean time a considerable expence was incurred by keeping charge of the vessel, which was daily decreasing in value.

Jervis stated that he did not oppose the motion, the point having been disposed of. Per Curiam. Order discharged.

[94] COOMBE AND UX. v. MINES, Administratrix, &c. Wednesday, 26th Jan. 1820.—The Court in discharging a rule for judgment, as in case of a nonsuit, obtained for not proceeding to trial after issue joined—where the plaintiff gave as a reason for not proceeding, that a suit in Equity was then depending between the defendant, an administratrix, and the representatives of the deceased partner in trade of the intestate; and stated that the suit having been compromised, he was desirous of bringing the action to trial—ordered it on the terms of the plaintiff giving a peremptory undertaking, and paying the defendant the costs of the present application, refusing to order the costs to abide the event of the cause.

Cause was shewn by Carter against a rule which had been obtained by Hill in the last Term for judgment, as in case of a nonsuit, for not proceeding to trial after issue joined.

The plaintiff stated in his affidavit, that the action was brought on a note of hand, drawn by the intestate, payable to the plaintiff's wife while sole—that the defendant (an administratrix) had filed a bill in Equity against the surviving partner in trade of her intestate; and that the plaintiff having been informed that the suit was likely to be compromised between the parties, did not therefore press the present action: but that having been since informed that the suit had been compromised, and that the defendant had possessed himself of the intestate's goods &c. he was now anxious to proceed in the suit.

Upon that statement, the Court were asked to discharge the rule to shew cause, upon a peremptory undertaking; and also—(upon the authority of a note of a case of *Dunn v. Williams* (1 Man. Exch. Pr. 322) in Manning's Ex. Pr., where it is stated that such an order was made in that instance, the peculiarity in the practice of this Court being considered [95] productive of much vexation and expence.)—that the costs of this application might be ordered to abide the event of the suit, as a reasonable excuse had been given for not proceeding to trial after issue joined.

The Court however would only discharge the rule upon a peremptory undertaking, and paying the costs of the application.

ACKLAND, ESQ. v. PAYNTER, GENT. AND OTHERS. Friday, 28th Jan. 1820.—Where a sheriff have taken possession of goods and chattels under a fieri facias, the officer should continue the possession: or if he may (*sed quare*) abandon it even necessarily for a time, he must clearly and satisfactorily account for so doing if he would sustain his right against others, afterwards claiming under legal authority to seize the same goods.—A Jury having determined by their verdict upon a question of abandonment, left to them on the evidence, the Court will not under such circumstances as are disclosed by the report in this case, disturb that verdict.—In case of an abandonment on the return day of the writ, possession cannot afterwards be resumed.

[Referred to, *Bagshawes, Limited, v. Deacon*, [1898] 2 Q. B. 175;
Lumsden v. Burnett, *ibid.* 179.]

The plaintiff, who was sheriff of Pembrokeshire, brought the present action of trover against the defendants for cattle, goods, and chattels, of which the plaintiff was lawfully possessed, as of his property, on the 15th day of June, 1818. The object of the action was to recover from the defendants the cattle &c. said to have been taken from the plaintiff's officers who had seized them in execution. It was tried at Hereford Summer Assizes, 1819, when the Jury on the evidence found a verdict for the defendants.

Taunton, W. E. this Term, obtained a rule to shew cause why there should not be a new trial, stating that at Nisi Prius the plaintiff claimed [96] by virtue of a levy, said to have been made by his officers, under a writ of fieri facias, at the suit of a judgment creditor—that the answer set up to their *prima facie* case was, that the defendants, who were the attorney and servants of the debtor's landlord, had driven and taken away the cattle, goods &c. by virtue of a distress made on the premises for

rent, before the execution of the fieri facias—that it was proved at the trial, that no person on the part of the defendants was in possession of the goods said to have been distrained, at the time when the sheriff's officers entered to execute the writ: and he submitted, therefore, that there was no actual distress then in force against the effects—or that there had been such an abandonment of that distress as to let in the execution.

The learned Judge's report being now read, it appeared to have been considered by him, as the result of the evidence on the part of the plaintiff, that the bailiffs had legally executed the writ of fieri facias by taking possession of the goods in question on the 3d of June, 1818. The writ of fieri facias was returnable on the 10th: the goods were advertised for sale on the 16th, and on that day the defendants drove and carried them away. When the bailiffs first came to levy they were informed by the tenant, that there was a distress on the premises, and he shewed them the notice. They however, disregarding that information, remained on the farm in possession.

[97] On the part of the defendants it was proved, that in the month of the previous May, a witness, acting for the first-named defendant (one of his clerks) distrained the goods in question; and drawing up a schedule, left it with a servant of the tenant, to whom he committed the possession on behalf of the landlord: and he also drew up and left with the tenant a corresponding notice. The witness went several times afterwards to the premises to see that the possession was kept, as did other clerks of the defendant Paynter. At the request of the tenant, that Paynter would give him time till the harvest to pay the rent, he had, as agent to the landlord, agreed to give him till July; and for that reason it was that an appraisement was not made so soon as it might have been. The goods were appraised on the 8th June, and advertised for sale under the distress on the 9th; but were not sold for want of bidders on that day. It was also proved, that the sheriff's officers had not permanently continued all the time in possession, and particularly that they were seen at Haverfordwest (five or six miles distant from the tenant's farm), on several occasions, between the 9th and 13th of June.

The learned Judge, upon this evidence, directed the Jury, that the questions for their consideration would be, whether the goods were actually and fairly taken in execution: and if they were, whether there had been any abandonment of the possession by the bailiffs directing them—that where [98] from motives of compassion to the tenant a distress is concealed, it is not sufficient to preclude a judgment creditor—and that then would arise the other question, whether the plaintiff's officers had not abandoned the levy made by them by absenting themselves, as proved?

The Jury found a verdict for the defendants.

Jervis and Sir W. Owen shewing cause, contended that the questions turning upon matters of fact, as to whether a levy had been made, or had been abandoned, and having been therefore left to the Jury, were determined conclusively by their verdict—that a sheriff's officer having once abandoned possession, was not entitled to resume it under the same writ, as had been determined in the case of *Blades and Another v. Arncliffe* (1 Maule & Selw. 711). They also cited *Atkinson v. Matheson* (2 T. R. 176), where Mr. Justice Ashurst said, in taking a distinction between mesne process and an execution, that in the latter case, if the bailiff voluntarily permit the prisoner to go at large, though only for a minute, he cannot afterwards retake him. They further submitted, that this being an action of trover, the plaintiff could not support it, unless he could shew himself entitled to the possession of the goods at the time of the alleged finding: whereas he never took possession, or if he had, had so abandoned it as to admit the distress.

[99] The defendants' counsel being stopped by the Court,

Taunton and Russell endeavoured to support the rule, on the ground, that the question of abandonment in this case being a question of law, was one wholly out of the province of a Jury to decide. They submitted, that in *Blade v. Arncliffe* the possession had been completely and entirely abandoned, if indeed in that case it had ever been taken by the officer there, where the only question was, whether the bearing a warrant in the drawer of a table on the premises was sufficient to make a landlord who distrained a trespasser: so that there was no actual counter possession as in this case. They urged that it was not absolutely necessary that an officer should continue in possession every instant of the time between the seizure and the return of the writ, no case having decided that he cannot in a case of necessity quit possession for a short

time animo revertendi: and there may be legal purposes for which he might quit possession before the return of the writ.

[GARROW, Baron. The case of *Blades v. Arundale* certainly does not establish that an occasional absence would amount to an abandonment. Lord Ellenborough said, in that case at Nisi Prius, that some one should be on the premises who might apprize others that there was an adverse possession, which a table, being a blind, deaf, and dumb representative of the sheriff, could not do. But surely a man might leave the premises on some occasions, as for food for instance.]

[100] As to the case of *Atkinson v. Matteson*, he observed that the taking of the person under a *capias ad satisfaciendum* was distinguishable from a *fieri facias*, the former being considered a higher satisfaction in regard of the privilege of the person, which once taken and suffered to go at large, could not be retaken: and therefore Mr. Justice Ashhurst's doctrine was not applicable to a case of execution against goods.

RICHARDS, Lord Chief Baron. It seems to me that there was sufficient evidence of a levy having been made. The question is confined therefore to the second point. It is clear that, after the levy was made, the officers were absent: but it is not necessary for us, in this case, to inquire what period of absence would amount to an abandonment of possession. Any absence, unless satisfactorily explained and accounted for, would however be *prima facie* an abandonment. In this case, although there had been no absence before the 10th, if the officer had abandoned on that day, he could not resume possession after the return of the writ. It is clear the officer was absent for some time between the 9th and the 13th. It then becomes a question of fact: and having been so left to the Jury, we ought not to disturb the verdict.

GRAHAM, Baron. This action is necessarily founded on the temporary right of the sheriff, and his legal possession was necessary to give him such a qualified property in the goods as would [101] enable him to support the action of trover. There is no question but that a levy was in fact made, although in a very slovenly manner. But I think the possession was afterwards abandoned. I do not mean to lay down the general proposition, that a sheriff can in no case quit possession without any qualification; but I should consider, that to shew it not an abandonment, he ought to be able most clearly to account for it, as being caused by some urgent necessity, and to give very satisfactory evidence of that. In this case, however, it was necessary, at all events, to prove that the officers resumed possession before the 10th of June, and continued it till the 15th: and, if they were absent in the intermediate time, it was a final abandonment: and a relinquishment of that temporary possession, without which this species of action cannot be supported; and therefore the plaintiff must be held to have failed whether the defendant was himself a trespasser or not.

WOOD, Baron, was absent.

GARROW, Baron. As it is not necessary in this case for me to intimate any opinion whether the quitting of possession by the officer, and absenting himself from the premises during the currency of the writ, whether negligently or necessarily, was or was not abandonment, I shall therefore abstain from doing so: and shall only say that, under all the circumstances of this case, I think that [102] we ought not to disturb the verdict; and therefore the rule must be discharged.

Per Curiam. Rule discharged.

POUND v. WILDGOOSE AND OTHERS. Friday, 28th Jan. 1820.—Where an answer is to be taken by commission in which the plaintiff joins, the plaintiff is entitled to six days' notice of the time and place of taking the answer, to be given to the Commissioner named by him: and such notice should be a six-day notice, and be signed by two of the other Commissioners.—An answer taken at the office of the solicitor for the defendant for the 22d January, pursuant to notice given by the solicitor for the defendant, and left at the office of the solicitor for the plaintiff on the 17th, was ordered, after having been put on the file, to be taken off for the irregularity, but without costs.

Martin moved that an answer, which had been filed in this cause, might be taken off the file for irregularity, and that the defendants should pay the costs of the application.

The affidavit of the plaintiff's solicitor in support of the motion stated that he received notice left at his office on the 17th January, from the defendants' solicitor,

that the answer of the defendants would be taken at his office on the 22d—that he did not know who were the Commissioners named on the part of the plaintiff or the defendants, for the purpose of taking the defendants' answer; and that if he had known who had been named on the part of the plaintiff, and a regular notice had been served on him, he would have procured the attendance of one of them to have seen that the answer of the defendants was regularly taken—and that he considered that such a measure was necessary to the interest of the plaintiff.

[103] The objection now made to the answer, as it had been taken, was that according to the course of practice, where the plaintiff joins in commission to take the defendants' answer, the terms of the commission are, that the defendant shall give to the Commissioner named by the plaintiff six days' notice of taking the answer, in order that he may attend if he thinks proper, and such notice should be signed by two of the other Commissioners, stating the time and place of taking the answer.

Lynch opposed the motion; but the Court granted the order, without Costs.

THE KING v. DRYDEN. Saturday, 29th Jan. 1820.—Assessed taxes (where chargeable). The lower part of a smaller house, used as an office, adjoining the dwelling-house of the party, and having an internal communication with the latter, is not exempt from the assessed taxes on windows within the 1st section of the 57 Geo. III. c. 25, on the ground of its being used as offices, and for no other purpose.—Nor is a room, having no communication with the dwelling house, if it be part of the house, within the exemption of the statute, as being used only for an office.

The defendant had paid the sum of 7l. 6s. 7d. into the hands of the sheriff of the town and county of Kingston upon Hull, under a *levari facias*, issued against him for additional assessed taxes, with 2l. 19s. 8d. for costs, for the purpose of obtaining the opinion of this Court on his liability to the duty on windows, under the circumstances of his case.

[104] Tindal obtained an order of Court, calling on the Attorney General to shew cause why the writ and all proceedings thereon should not be set aside, and the money returned to the defendant.

The defendant in his affidavit stated, that immediately adjoining his dwelling house there was a smaller house, a part of which defendant and his partner, who were attornies, used as offices for conducting their business, and the other part was let in tenements—that between the said dwelling house and the said offices there was an internal communication—that having been charged the above sum for assessed taxes in respect thereof, the defendant appealed, and the appeal was allowed by the Commissioners—that the surveyor being dissatisfied therewith, demanded a case for the opinion of the Judges; but the defendant afterwards receiving intimation that the matter would be reheard, attended before the Commissioners at a meeting for that purpose, when they (not being the same Commissioners as had before determined in his favor) without reference to the former determination, confirmed the charge. The affidavit also stated, that as no case has been stated for the opinion of the Judges, the defendant had therefore refused to pay, and having been returned a defaulter, the sheriff had levied.

The affidavits of the surveyor and collector filed in answer stated that the charge had been made in consequence of the offices having an internal communication with the house; and it stated that [105] no case had been prepared for the opinion of the Judges, because the defendant had consented to a rehearing before the Commissioners—that they might in the mean time be furnished with cases in point, if any could be found—and that upon the second hearing the cases in the subjoined notes* were produced.

The Solicitor General and Shepherd, having shewn the above facts for cause, supported by the [107] authority of the cases so determined, and now produced,

* *Cowell's Case*. 23d Jan. 1784. The windows of the upper story of a house, of which the lower part or ground floor is occupied by the owner as a dwelling, are chargeable with the duties on houses and windows, although let to a trader as a warehouse, and is not used by him for any purpose of habitation, and although there

Tindal admitted that his case had been answered, and submitted to a discharge of the rule which had been obtained, without further argument.

The Court therefore pronounced the
Rule discharged, with Costs.

he no communication between the upper story so let, and the lower part of the house so occupied for habitation.

[Stated by the Commissioners, for hearing and determining Appeals upon
the Duties on Houses, &c.]

Mrs. Cowell, of Leeds, widow, being possessed of and occupying a building, lying under or covered with one roof, which building is three stories high. The ground floor and chambers are used by her for habitation and dwelling. The upper story is let off to a wool stapler, who lives at some distance, and used by him as a warehouse, and not as a dwelling-house for lodging or habitation, in which upper story are six windows. There is no entry, passage, or communication with the said dwelling-house; but there is a distinct way or stair-case from the yard adjoining the said house, which leads into the warehouse.

The Commissioners having determined that, as the said upper apartments had not been occupied as a lodging or habitation, she should be discharged from the payment for the six windows.

At the instance of the inspector the Commissioners sent the above case for the opinion of the Judges, who declared that the determination of the Commissioners was wrong.

Signed H. GOULD.
G. NARES.

Case of Thomas Lake. 2d Sept. 1817.—The windows of the lower room of a dwelling-house, used as an accounting room, and having no communication with the dwelling part of the house, are not within the exemption of the 57 Geo. III., but are liable to the duties.

[Stated by the Commissioners of Taxes, for the opinion of the Judges.]

Appeal against an assessment of eight windows, charged by the assessor in his house, on the ground, that one of the [106] said windows was situate in a lower room of his dwelling-house, which was then used for no other purpose than his accounting room, and for his business generally; and that all communication had been stopped internally, and a door was made externally. The Commissioners therefore held, that the appellant was exempt from the charge of that one window upon that account, as being within the 57 Geo. III. c. 25, s. 1; but the inspector objecting and requiring a case, the Commissioners stated and signed the above, to which was returned the following opinion:

16th June, 1818.—We are of opinion that the determination of the Commissioners is wrong.

G. WOOD.
C. ABBOTT.
J. BURROUGH.

Reinhardt's and Others Case. 9th Feb. 1818.—The windows of a shop on the ground floor of a dwelling-house, having no internal communication with the house, are chargeable with the duty.

[Stated for the opinion of the Judges.]

J. C. Reinhardt, one of the appellants, was the owner of a dwelling-house, fronting a street in Leeds, occupied in the following manner, viz. on the ground floor was his shop, totally unconnected with any part of the house, it being necessary in going from the shop into the house to go out into the yard. Over the shop is a drawing-room [and so of other buildings belonging to other persons in trade, having shops used in trade under similar circumstances]. They had been charged for their shops under the 48 Geo. III. c. 99, and contended that their shops were within the exemption 57th Geo. III. c. 25; but the Commissioners confirmed the charges of the surveyor, stating the above case, to which the under-mentioned subscribing Judges returned the following answer.

8th Dec. 1818.—We are of opinion that the determinations of the Commissioners are right.

R. GRAHAM. W. GARROW.
J. A. PARK. J. RICHARDSON.
J. BURROUGH. W. D. BEST.

[108] THE KING v. JONES. [On several Writs of immediate Extent into the Counties of Gloucester, Somerset, Monmouth, and the City of Bristol.] Saturday, 29th Jan. 1820.—[Remedies of the Crown against Collectors of Taxes.]—Local Commissioners for the Affairs of Taxes issued their warrant under the 43 Geo. III. c. 99, s. 41 and 52, for seizing and securing the real and personal estate of a Collector refusing to pay over money received by him, but as matter of arrangement did not proceed to sell the property so seized under such warrant, which had been issued expressly to secure a certain sum of money said to be due from him to the Crown. Five days after, the Solicitor for the Taxes (the Collector being declared a bankrupt on that day) issued extents, under which was taken not only the property already secured by the warrant of the Commissioners of Taxes within their jurisdiction, but also other real and personal property in other places, for the purpose of levying precisely the same sum claimed on the same account; but—it being eventually discovered, that the sum actually due to the Crown for monies received by the Collector, amounted to very considerably more than the sum for which the warrant (and consequently the extent) had issued, but not to double the amount—the Crown sold all the property, and applied the proceeds in discharge of the public debt, in aid of the parish, as far as it extended to satisfy it, which produced a net sum much larger than the sum sought to be raised originally, but not sufficient to pay the whole debt; which sum, so produced, was paid into the receipt of the Exchequer in August, 1817. Under such circumstances, this Court refused to make absolute a rule (founded on the objection, that it was having recourse to two modes of proceeding for the same debt), granted to shew cause (obtained on a motion made in July, 1819) why it should not be referred to the Deputy Remembrancer, to take an account of the money due to the Crown, with a view to get the surplus, beyond the amount of the sum originally sought to be levied, paid back to the assignees of the bankrupt, holding that for such a debt so incurred, in such a character, the Crown was entitled to use every mode of proceeding given by statute. The delay in the application, although not conclusive against assignees, strongly prejudices their claim.

The assignees of the defendant had obtained an order on the 16th of July, 1819, calling upon the Attorney-General to shew cause, why it should not be referred to the Deputy Remembrancer, to take an account of the several sums of money received on behalf of the Crown, under the writs of extent, and the several proceedings against the defendant, his estate and effects, and to tax the Crown's costs of such proceedings, and to make his report thereon with all convenient speed.

The affidavit (of the survivor of the defendant's assignees) on which that order was obtained, [109] stated that a commission of bankruptcy, dated 20th May, 1814, had issued against the defendant, under which he was on the 21st of May declared a bankrupt. The provisional assignment, and bargain and sale to the assignees, was enrolled on the 25th; that on the 21st May, four writs of extent, tested of that day, were issued against the bankrupt, and that other writs were also afterwards issued for levying on the bankrupt's lands, &c., the sum, in the whole, of 14,000*l.* only, for money received by him, as collector of the assessed and other taxes, from the parish of Clifton, for the years 1812 and 1813, ending the 15th of April, 1814, and that divers lands, &c. and chattels, &c. had been extended under the said writs, which had been wholly, or for the most part sold, and the proceeds paid to the Deputy Remembrancer to an amount of more than sufficient to satisfy the said sum of 14,000*l.*

In opposition to the above order, affidavits were filed, stating that there appeared, on or about the 16th May, 1814, to be unaccounted for by the defendant, in respect of the duplicates of assessment delivered to him for the said years, 22,000*l.* and upwards; that being summoned before the Commissioners, in consequence of failing in his payments, he stated that the public monies in his hands amounted to no more than 14,053*l.* 2*s.* 11*d.* which he stated that he was unable to pay, whereupon two of the Commissioners, by their warrant, dated the 16th May, 1814, as empowered by the 43 Geo. III. c. 99, required and caused [110] the defendant's real and personal estate in Clifton to be seized into his Majesty's hands and secured. The defendant afterwards signed a memorandum (18th May), purporting, that he delivered up possession of all his real property in Clifton (describing it), and empowering the Commissioners Clerk to sell it, under the direction of the Commissioner for the

Affairs of Taxes, to discharge the said arrears due from him to the Crown for money collected. In aid of that proceeding, the above extents were issued by the Solicitor for the Affairs of Taxes, against the lands, &c. of defendant, into all the before-mentioned counties and city, under which the real estates of the defendant therein were seized, including the property which had been already seized by the Commissioners; but as to that subject, to the operation of the said warrant which had been suspended (but not revoked), in consequence of arrangements made between the Crown Solicitor and the assignees of the defendant, thereby delaying the sale of the property, in order to obtain a more advantageous disposition of it for their greater general benefit.

The affidavits also stated that it had been afterwards ascertained that, at the time of issuing the said warrant, the defendant had out of the said sum of 29,000*l.* collected by him, applied to his own use the sum of 21,300*l.* and upwards. It was also sworn, that the estates, &c. of the defendant so seized, 17,135*l.* and upwards, had been sold, and that the produce thereof, and of [111] debts collected had been paid into the Exchequer, in aid of the parish of Clifton, by different payments from February, 1815, to August, 1817, 10,000*l.* of which was stated to have been the produce of the sale of the Gloucestershire estates—that at the time of issuing the said warrant, the Commissioners had no other means of ascertaining the amount of the sums received by the defendant than by his own acknowledgment, and that as he had only admitted receiving 14,052*l.* 2*s.* 11*d.* they issued their warrant for that sum only; and that as no security had been taken from the defendant, a proportion of the deficiency of the collection would still remain to be assessed on the parish.

It also appeared, from the affidavits, that the assignees had in Michaelmas Term, 1814, withdrawn their claims under the extents. Afterwards, in 1816, they presented a memorial to the Treasury, for the purpose of obtaining by that proceeding, the object now sought by them, in which they had represented the facts consistently with the statements now made by the affidavits put in, in opposition to the present application, but the Lords Commissioners of the Treasury had declined interfering.

The object of the motion was to get allowed to the assignees, so much of the 17,135*l.* as exceeded the sum of 14,053*l.* 2*s.* 11*d.*

Jervis and West, on behalf of the assignees, contended that as under these circumstances it was [112] evident that the proceeding by warrant of the Commissioners, and by the extent which was immediately afterwards issued for precisely the same sum, claimed on the same ground, it was a double proceeding for a single object, and therefore one or the other could not be supported; for either the Commissioners' warrant must have the effect of precluding the extent (which, they contended, could not be sustained for the sum sought to be recovered by the warrant, because there was no debt due on record to the Crown until the 21st May, when the extent issued): or the extent of superseding the warrant: and in either case, they urged, the only sum to be raised was the 14,053*l.* 2*s.* 11*d.*; that if both sums were levied, the estate would be made to pay more than was pretended to be due to the Crown; and that it could not be permitted, consistently with a regular course of proceeding, that where two different modes of remedy had been improperly resorted to for the purpose of obtaining an object to which one of them would have been adequate, the party so proceeding should be suffered so to avail himself of the effect of it, as to retain out of the proceeds a sum, however clearly due to him, beyond the amount of the demand which was made the foundation of the proceeding, upon a subsequent discovery that more money was really due to the party than he had sought to recover by either proceeding.

The Attorney-General and Shepherd, for the Crown, and Parke, for the parish of Clifton, shewed cause.

[113] They first objected, that as the assignees had been guilty of laches, (if they had any reasonable ground for the present application) in not making it long before, they were therefore precluded from now coming forward with this motion, which was one that more peculiarly required immediate and early diligence than every other; because the objection of lying by was much strengthened in such a case as this, by the consideration, that the inhabitants of parishes were constantly changing, and thereby, consequently, liabilities might unjustly be cast on persons who had not originally been responsible. To support that preliminary objection by authority, they cited *Res v. The Justices of Lancashire* (12 East, 370), and *Res v. The Stainforth and Keadby Canal Company* (1 M. & S. 32).

They then submitted that, in a case of this sort, the Crown was justified in the proceedings complained of, by the provisions of the statutes 25 Geo. III. c. 35, and the 43 Geo. III. c. 99. By the first of those acts (sect. 1), it is enacted, that all monies becoming payable from the purchasers of lands, seized by the Crown process, shall be applied towards the discharge of the debt due to the Crown, and all costs and expences, under the direction of this Court, the surplus to be paid under the like direction, to the persons entitled to the lands: and in this case, supposing it to be held, that the extent had improperly issued for more than part of the Crown's debt, the persons entitled to the property in Clifton in the present [114] instance, would be the Commissioners under the warrant and the arrangement by virtue of the latter statute. They therefore urged, that the order should be discharged.

RICHARDS, Lord Chief Baron. In this case it is not denied that 21,300*l.* was due from Jones to the Crown, and the question is not, whether the property is sufficient to pay that debt, but whether the Crown is entitled to only 14,000*l.*

I do not think the delay in making this application is sufficient to bar the assignees' claim, but I think it a strong feature in the case, as it corroborates the notion of the parties having acted under the arrangement: and, in all respects, it operates in favor of the opposition to this application. It is clear, that the Commissioners' warrant was legally issued, and no doubt, the estates might have been sold under it. The sale, however, was made under the extent, and the inquisition finds, that the houses in Clifton were subject to the warrant, which has the same effect as if they had been found to be subject to a mortgage, saving to the mortgagee his claim. There is no pretence for saying that the warrant was ever abandoned, and that gives the Crown debt, so far, a priority as to all other creditors, as much as the extent itself. Under these circumstances, I think the debt was fully secured: and we cannot say that, in a case of this sort, where the Crown has two securities, it may not resort to both.

[115] GRAHAM, Baron. This application is an attempt to overhaul an arrangement entered into long ago for the convenience of the party now so applying. From the 21st of May, the Crown was entitled to priority by virtue of the extent, and in case of any dispute between the parties on the subject of the warrant, the Crown officers might have proceeded to execute the extent and to levy the debt which the Crown was entitled to be paid fully. The notion, that 14,000*l.* only was due, proceeded on a mistake arising from Jones's misrepresentation, and can only apply to the warrant; but the extent was competent to cover the whole debt, even if the warrant had been abandoned, but I do not think it was. [His Lordship then stated the material circumstances.] Can it be endured, that in such a case as this, the application should be made? If the assignees had any ground, they should, in the first instance, have applied for an *amoveas manus*.

WOOD, Baron, was absent.

GARROW, Baron. I entirely concur; and it might be sufficient for me to say so. I am, however, desirous of giving my reasons. The form of the order sought to be obtained in this case, is by no means sufficiently explicit: it only prays an account: but it has clearly a further object, which ought to have been stated: and in that view, it is impossible this application can be sustained: and I think if the Court could have known the [116] facts now disclosed, this rule would never have been granted.

Notwithstanding the cases which have been much pressed on the Court, I however think, that the time which has been suffered to elapse is not sufficient to bar the claim of the assignees. The delay, it must be observed, shews clearly the acquiescence of the parties in the arrangement which is now sought to be disturbed. That arrangement, I think, we are bound to support: and we should, by granting this application defeat the justice of the case, and to no purpose: for the Crown might still obtain the same end by adopting another course. The fact of the arrangement having taken place, is further recognized by the memorial of the assignees to the Treasury, in 1816. Having failed, however, in that, in July, 1819, they come with the present application to this Court, and I feel myself fully warranted in saying, that there is not the slightest foundation for it: nor can I refrain from observing, that there is something suspicious in the motion being made after the death of the acting assignee. I am, therefore, of course of opinion, that this order should be discharged.

Per Curiam. Rule discharged.

[117] IN THE MATTER OF A PARCHMENT SCHEDULE OF DISCHARGE, MADE BY THE COMMISSIONERS EXECUTING THE SEVERAL ACTS RELATING TO THE DUTIES OF ASSESSED TAXES, FOR THE DIVISION OF COLYTON, IN THE COUNTY OF DEVON, FOR THE YEAR 1816, ENDING 5TH APRIL, 1817. Saturday, 29th Jan. 1820.—The Commissioners executing the several acts relating to the duties of Assessed Taxes for districts, are not entitled under the 43 Geo. III. c. 161, s. 15, empowering them to discharge assessments at their discretion, to discharge persons charged for houses, under sec. 10, on the ground of not having been occupied during the whole year: unless notice in writing have been given to the Assessor, of such houses having been unoccupied.—And if the Commissioners should insert any such allowance in their schedule of discharge,—as in that case the opinion of the Judges cannot be taken, because that can only be done on a case of appeal, this Court will order them to amend their schedule by striking it out.—*Quere*, as to the liability of houses charged, to the duties under the circumstances of the present case? *Semble*, houses left unoccupied by the owner during part of the year, where the furniture is not taken away, are liable to the duties for the whole year.

An order had been obtained by the Attorney-General, calling upon the Commissioners to shew cause, why they should not be ordered to amend their schedule of discharge, by striking out the sum of 10*l.* 1*s.* 9*d.* (being part of the sum of 13*l.* 18*s.* 7½*d.* inserted therein as discharged from the assessment and not authorized by the powers given to the Commissioners by the several statutes, &c.), and to return the same, so amended, to this Court, and cause the said 10*l.* 1*s.* 9*d.* to be collected and levied in discharge of the said assessment. Service on the Clerk of the Commissioners, ordered to be deemed good service.

The affidavit of the Surveyor, which was read on applying for the order, stated in effect that the assessors appointed by the Commissioners, duly brought into charge in the assessment for that year, three furnished dwelling-houses, then, and usually used and occupied as lodging houses by persons and families resorting to Seaton, for [118] occasional residence only, similar to furnished houses in other watering places; and that certain persons, owners and proprietors of two of the said dwelling houses, were charged in the assessment for them, to the amount of 20*l.* 3*s.* 6*d.*: that no appeal was made, and the assessment being, therefore, in force for the whole year's duty, payable by quarterly instalments, were signed and allowed by two of the Commissioners, and delivered to the collectors for collection after all appeals heard and determined: and that the Commissioners had transmitted and recorded in this Court the parchment duplicate for the division, containing the full amount of the said assessment, and including therein the whole year's duty charged on the person assessed respectively, according to the directions of the several acts: that the collectors collected one moiety of the duties charged by the assessments on the parties, for the first half year, ending at Michaelmas, 1816, and paid the same to the Receiver-General, and also demanded from them the remaining moieties of the said duties which became due for the second half year, ending on the 5th of April, 1817, and they, having refused to pay, were returned defaulters, under 48 Geo. III.; that the collectors having neglected to enforce the remaining half year's duty, although the said houses were continued and preserved during the whole of the year with the furniture, but happened to remain unlet during that portion of the year; and thereupon, two of the Commissioners, without any appeal by the parties assessed, within the year of assessment, upon their [119] application, caused the last-mentioned half year's duty to be inserted in the present parchment schedule of discharge, in the absence of deponent.

The affidavit proceeded to state that the schedule had been transmitted to the Receiver-General by the Commissioners, or by one of the persons assessed, who acted as their Clerk, and by the Receiver-General to the office of the Commissioners for the Affairs of Taxes, previous to its being recorded in this Court, as required by the statute, and that a copy was transmitted to the deponent: when, (having discovered that the sum of 10*l.* 1*s.* 9*d.* now sought to be restored, had been discharged without authority, and contrary to the intent of the acts, and the general practice in other districts, and the opinions of the Judges, on cases demanded by surveyors or appellants in cases of appeal as authorized by the statutes) the deponent, in the

execution of his office, reported the circumstances to the Commissioners for the Affairs of Taxes, who required the Commissioners of the Division of Colyton, to correct and amend the said schedule (as now required); but that they declined so to do alledging that they considered themselves authorized in their discretion, to make and allow the discharge under the 15th section *¹ of the act of [120] 43 Geo. III. c. 161, as a house becoming unoccupied within the year, in the manner mentioned in Schedule A. of the said act: and that they had denied any authority by which they could be required, as they had been, to amend the schedule, no case having been demanded by the surveyor, agreeably to the 73d section of the last-mentioned act.

The affidavit also stated, that it had been submitted to the Commissioners of the Division, that the said 13th sect. with reference to schedule A. applies only to discharges, where a house actually becomes unoccupied by a tenant quitting on the expiration of his lease or demise, and does not extend to those cases of owners of furnished lodging-houses of this description;—and that it had also been explained to the Colyton Commissioners, that the surveyor had no means of demanding a case for the opinion of the Judges in the present instance, under the 73d sect. or otherwise, inasmuch as there had been no determination of the Commissioners, on any appeal against the assessment, in which case only authority is given to demand a case under the provisions of the act,—and that the Commissioners had refused to rectify the schedule, as required, without the authority of this Court.

[121] Clarke now shewed cause on behalf of the Commissioners of Colyton, on the affidavit of Mr. Townsend, one of the persons assessed, which stated that the dwelling-houses in question were originally purchased by him, the deponent, with part of the furniture in them, together,—that one of them he designed for his occasional residence, and the other to be let by the year, or for a term, and not as lodging houses; and that one of such houses had been usually let to a tenant by the year; that finding it inconvenient to occupy the one which he had intended for himself, and the tenant of the other house quitting it during the year of the assessment, he advertised both of the houses to be sold, and if not sold, to be let, meaning, for a term of years; that he was unable to sell or let them, and that they remained altogether unoccupied and unproductive for the period mentioned in the schedule of discharge, and much longer, and that no person during that time resided therein; and that, upon proof of those facts upon oath before the Commissioners of Colyton, they (considering themselves duly authorized to do so by virtue of the several acts in that behalf) granted under their hands and seals their schedules of discharge.

Upon these facts being stated as cause why the order obtained by the Attorney-General should not be discharged:

The Court enquired whether the party assessed had given such notice as appeared to be required [122] by the 15th section of the act, and being informed that he had not, they made the

Order absolute *².

*¹ That section enacts (the statute having required that all houses occupied at the time of making the assessment, (5th April,) are to be brought into charge to the duty in schedule (B.), “That every house so charged, although the same shall, within the year, become unoccupied, shall be charged on the former occupier for the time being, unless notice in writing shall have been given to the assessor of such house being unoccupied; and the Commissioners are empowered at their discretion to discharge such assessment.”

*² The following cases of opinions given on appeal from determinations of the Commissioners, were intended to have been cited in support of the order to amend the schedule: and being of considerable importance, they are here published as connected with the points of the preceding case.

Price's Case. The owner of a house, occupied by him till the 26th of June, is chargeable with the assessed taxes for the remainder of the year, that is, till the succeeding 5th of April, although he quitted possession on the 26th of June, and ceased to occupy the house afterwards.

The Reverend Richard Price occupied a house, being his own property, in the Tithing of Port in the Division of Farringdon, Berks, where he was rated for the

[127] CORAM RICHARDS, LORD CHIEF BARON.

OLIVER AND WIFE, AND THEIR HEIR AT LAW v. COURT AND OTHERS. Wednesday, 3d Feb. 1820.—Fraudulent purchase set aside. The plaintiff—who was tenant for life of the premises, sold under the contract now sought to be set aside by virtue of his marriage settlement, without impeachment of waste,—having become involved in debt and greatly embarrassed in his pecuniary affairs, in May, 1801, conveyed all his estate, right, title, and interest, in the settled premises,

same to the assessed taxes on the 26th day of June, 1817.† He left the Titbing and went to reside at Swansea, and ceased to occupy the house in Port, which remained empty the remainder of the year, ending 5th April, 1818. He appealed to the Commissioners of Assessed Taxes for the Division, [against a charge made on him for the whole year], claiming an abatement for three quarters of a year's house and window duty, from the assessment for the year ending the 5th day of April, 1818‡ in respect of the house being unoccupied as before mentioned; but the Commissioners determined that, as he was the owner of the house, he could not be relieved from any part of the tax for that year.

Not being satisfied with that decision, the Commissioners, at his request, stated the foregoing case for the opinion of the subscribing Judges which was as follows:

25th February, 1819.—We are of opinion that the determination of the Commissioners is right.

G. WOOD. J. A. PARK.
J. BAYLEY. W. D. BEST.

[123] Borough of Scarborough, in the County of York.

Sollett and Glass's Case.—Houses let as lodgings in places of public resort, and which are so occupied by the various families hiring them for the season (much less than half a year at a time), and are, during the remainder of the year, left wholly unoccupied, are chargeable to the assessed taxes for the entire year.

This was an appeal to the Commissioners from the surcharge of the surveyor of the windows, and the assessors of the house tax, on each of the above parties, under the circumstances of the following case, stated on an appeal for the opinion of the Judges whose names are subjoined.

Within the Borough of Scarborough aforesaid, there is a place called the Cliff, on which several houses (called the New Buildings) have been erected and furnished at a very great expence, for the purpose of letting lodgings to the company resorting thither in the summer season, the situation being without the town, and commanding a fine prospect of the harbour, sea, &c. Those houses are large, and generally let to three or four different families at the same time, during the Spa season, which begins about the latter end of June, and continues only till the beginning of October. Richard Sollett and William Glass, were the owners of two houses, each situate upon the said place called the Cliff, in one of which they and their families resided the whole year, but the others were occupied as lodging-houses for the company during the summer, as above mentioned, and were shut up and unoccupied from the end of one Spa season to the beginning of the next, being a period of not less than about eight months, during which time the same were not aired by fires or otherwise, or used in any manner whatsoever by Sollett and Glass, their families, or servants; and bills were affixed upon their doors, purporting that such houses were to be let ready furnished. The surveyor of the windows made a surcharge upon Sollett, of 2l. 5s 6d., being the amount of the duty upon the forty-four windows in his said house so let as a lodging-house, from Michaelmas 1783 to Lady-day 1784, the time during which the house was so shut up and unoccupied, as before mentioned; and the assessors of the house tax also charged Sollett with the sum of 20s. for the duty upon the other house during the same time. The surveyor of the windows likewise made a charge upon Glass, of 2l. 6s 6d. for forty-five windows in his said lodging-house; and the assessors

† The year, with relation to the practice of assessing the duties, commences on the 5th of April.

‡ 43 Geo. III. c. 161. 48 Geo. III. c. 55.

to trustees, for the purpose of sale (subject to a rent-charge of 150l. per ann. reserved to himself), for the benefit of such of his creditors as should execute the deed. Immediately after he had himself executed that deed, he left the country, and went to reside in the Isle of Man, for the manifest and avowed purpose of personal protection, from his still unsatisfied creditors. The trustees thereupon employed a land surveyor for the purpose of measuring and valuing the plaintiff's interest in the premises, preparatory to putting them up to sale. He (surveyor) was assisted in the performance of that duty throughout by his son, the defendant, the purchaser, who had, then very recently, been his father's partner in the business (himself also a land surveyor and auctioneer) so that he had had great share in making that valuation, by measuring, and mapping the estate, &c. The result of that valuation (which was completed in December, 1801) was an estimate stating the annual value to be 232l. 3s. 5d. On the 6th of February following the estate was put up to sale by public auction, upon which occasion the defendant (the purchaser) was employed as the auctioneer. The estate not being then sold, as no one had offered any bidding, the defendant, on the next day proposed to the trustees to purchase the estate himself for 500l. They

of the house tax charged him 14s. 3d. for the duty upon the same house for the time last above mentioned, the same being also shut up and unoccupied.

[124] The Commissioners, on the hearing of the appeal, assuming that the appellants made as much money of their said lodging-houses in one summer, as the annual rent of their said houses would amount to if let by the year, confirmed the charges of the surveyor and assessors, and stated the above case, to which the annexed opinion was returned by the subscribing Judges:

Serjeants' Inn, 31st August, 1785.—We are of opinion that the determination of the Commissioners is right.

H. GOULD.
E. WILLES.

Skinner's Case.—Persons letting houses furnished, as lodging houses for a part of the year, not being at any time occupied for more than six months successively, and paying three quarters of a year's assessed taxes, are still liable to be charged for the other quarter: and the Commissioners have no power to make any abatement in the assessment: although during the quarter for which the abatement be claimed, the houses have not been opened.

[Stated for the opinion of the Judges on an appeal from the determination of the Commissioners of Assessed Taxes.]

At a meeting of the Commissioners for hearing and determining the appeals against the duties on houses, windows, and lights, imposed by an act of the 6th year of his present Majesty's reign, and by another act made in the 24th year of his said Majesty's reign, within the lower part of the south division of the Lath of Aylesford, in the said county of Kent, holden by adjournment at the Rose and Crown Inn, in Tunbridge town, on the 8th February, 1787,

Robert Skinner being assessed to the said duties for three dwelling houses at Tunbridge Wells, which he furnished for the purpose of letting as lodging houses to the company resorting to Tunbridge Wells in the summer, which lodgings are usually let about the beginning of June, and left between Michaelmas and Christmas, and not inhabited upon the average, more than six months in the year, although the appellants paid for three quarters of a year to the said duties: and Edward Strange and Thomas Wood being assessed to the said duties for one dwelling house each, at Tunbridge Wells aforesaid, which they furnish for the same purpose, and which are usually let and left about the same time, appealed against the said duties for the quarter of the year, from the 5th day of January last, to the 5th day of April next. And it appearing that the said lodging houses were shut up before the said 5th day of January last, the furniture remaining therein, and that the said appellants intend to keep the same shut up until after the said 5th day of April next, without [125] opening, for the purpose of airing or letting, or making any use thereof, We, the Commissioners present, are of opinion, that the said Robert Skinner, Edward Strange, and Thomas Wood, ought to be abated the assessments to the said duties, on the said lodging houses, for the said one quarter of a year: but Mr. John Park, one of the

immediately acceded to the proposal, and let the defendant into possession on the 15th of April, but did not require of him to pay the purchase-money till the 5th of March, 1803, when the conveyance to him was executed, and they then received it without taking or requiring interest. That conveyance was soon afterwards executed by the plaintiff, who came from the Isle of Man for that purpose, upon receiving a letter from one of the trustees, informing him, that if he did not execute the deed, the annuity of 150l. would be no longer paid. At the time of the sale to the defendant there was a quantity of valuable timber on the estate, said to be worth from 300l. to 700l., which had not been taken into consideration in making the above estimate of the plaintiff's interest.—That purchase was, under these circumstances, sought to be set aside, on the several grounds of having been made by a person of skill in business, employed confidentially on the part of the plaintiff to value and sell the estate for the vendor's advantage—knowledge in consequence acquired by him—fraudulent abuse of trust—inadequacy of price—and duress and coercion.—The defence was, that the consideration money was not adequate—that the character in which the purchaser had stood, with relation to the parties, was not one of trust or confidence—that he had acquired no knowledge which he had not fully communicated—and that as the plaintiff had himself by joining in the conveyance confirmed it, and as so great a length of time had been suffered to elapse since the purchase, it amounted altogether to such complete and entire acquiescence without any complaint or

assessors, being dissatisfied with our determination, required us to state the case specially, to be transmitted to the Judges for their opinion, which we have done accordingly.

Given under our hands the day and year first above written.

Signed by the Commissioners.

Serjeants' Inn, 3d December, 1787.—We are of opinion that the determination of the Commissioners is wrong.

H. GOULD. J. WILSON.
J. HEATH. A. THOMSON.

Sussex.

Wright's Case—A person keeping a house for the purpose of being let as a ready-furnished lodging-house, is chargeable for the whole year's duty, although it be unoccupied and unfurnished for one entire quarter.

At a meeting of the Commissioners acting in and for the Upper Division of the Rape of Chichester, in the county of Sussex, for hearing and determining appeals against the several duties under the management of the Commissioners for the Affairs of Taxes, held the 31st day of January, 1807,

Mr. Wright appealed against the assessment made on him in the parish of Southbersted, in the said county of Sussex, for or in respect of the duties on houses and windows, and inhabited houses, for the quarter of the year ending the 5th day of January, 1807, on the ground that the house was unoccupied during the whole of such quarter.

The house was unfurnished, and kept for the purpose of being let as a ready-furnished lodging-house, and had been, previously to the 10th of October last, let and occupied as such; but it had not been let, and no person had resided therein during the quarter above-mentioned, though a person went occasionally into the house to air the same.

[126] The Commissioners, on hearing the above appeal, were of opinion that the house ought to be considered as unoccupied during the quarter above-mentioned, and not liable to the duty on houses and windows, and inhabited houses, and relieved the appellant accordingly. But the acting surveyor, Mr. Marsden, having expressed his dissatisfaction with this determination, and requested that the case might be stated for the opinion of the Judges, We, the undersigned, two of the Commissioners, have done so accordingly.

Signed by the Commissioners.

15th June, 1808.—We are of opinion that the determination of the Commissioners is wrong.

H. GROSE. G. WOOD.
S. LAWRENCE. J. BAYLEY.
S. LE BLANC.

protest on the part of the plaintiff as that it had operated to preclude him from all right to the relief which he sought. Held, that the purchase ought, under the circumstances of the case, to be set aside—that the defendant Court had no right to purchase by reason of the situation of relationship in which he stood to the parties selling—that the inadequacy of price was sufficiently established under the circumstances of fraud disclosed:—that independently of those circumstances, the omission of the timber in the valuation would alone (although said to be a mistake) have been sufficient ground for setting the purchase aside, when made by a person in the character with which the defendant was clothed—that under the circumstances of duress in which the plaintiff was shewn to have been and to have continued in this case, his execution of the deed was void, if necessary: and, if unnecessary, nugatory—and that the length of time which had elapsed between the original transaction and the institution of this suit to annul the contract was no bar to the plaintiff's claim to relief in Courts of Equity (where the jurisdiction to relieve is not subject to any limitation in point of intermediate lapse of time by analogy to the statute; but only to such as is usually, for the sake of convenience, prescribed by the discretion of the Court), in consideration of his having been, from poverty and embarrassments, non compos sui.—Trustees have an important duty cast upon them by the acceptance of a trust, and ought to exercise due diligence in the execution of it, and to attend with some degree of vigilance to the interest of the cestui que trust. In this case, where no culpable acts were expressly charged against them by the bill, but the circumstances of the case disclosed to the Court that they had neglected their duty, by remaining passive and supine where the interest of the cestui que trust was invaded, and did not appear to have been attempted to be protected by them, the Court reprobated their want of attention and activity as a gross breach of duty, and refused to give them (although necessarily made nominal defendants to the bill) their costs of suit. If one of trustees only acts, the others delegating the whole duty to him, are involved in and responsible for his conduct in the execution of it.—An auctioneer employed to sell cannot be permitted on equitable principles to purchase the property himself.—If the person so employed has also been in other respects connected with the interests of the vendor, as by having been concerned in valuing the property, and purchases the estate the next day by private contract, where the property was not sold at the auction in consequence of no bidding having been made, and no satisfactory account of the proceedings of the day be given by the auctioneer in his answer to a bill filed against him as purchaser, under such circumstances, the purchase will be set aside; for in such a case the Court will consider that the duties of an agent so circumstanced, were not concluded with the mere business of the day.

[S. C. Dan. 301.]

The plaintiffs filed this bill in Trinity Term, 55 Geo. III. against the defendants, the principal of whom, (Court) was the purchaser of the plaintiff Oliver's life interest in the estate in dispute: the others were the trustees of the plaintiff appointed under a conveyance of the estate, executed by him for the benefit of his creditors—and certain incumbrancers on the estate since the defendant Court had been in possession. The bill prayed a discovery; and that the purchase (made in 1800) might be declared fraudulent, and therefore decreed to be set aside, and the conveyances delivered up to be cancelled: the plaintiff Oliver offering to repay the purchase money with interest to the defendant Court, upon his accounting for the rents and profits whilst in possession.

[129] It was also prayed, that in taking the account the defendant Court might be charged with a full and fair rent for the premises, and for the full value of all the timber cut by him; and be decreed to pay to the plaintiff what should be found to be due to him on taking such accounts; and also that the defendant might be decreed to account for all waste committed by him—and for an injunction, restraining him from committing further waste on the premises.

The bill stated that the plaintiff, being seized &c., by articles of settlement (in 1787), before his marriage, covenanted to convey to trustees a certain freehold estate in the county of Worcester, of the yearly value of 183*l.*, to the use of himself for life, without impeachment of waste, except voluntary waste in buildings, remainder to his

wife for her life, with power to lease, remainder to their children, in such shares as plaintiff should appoint, and in default to the trustees for a term of 200 years, for raising portions for younger children; and after and subject thereto, to the sons and daughters in strict settlement, with remainder to the use of the right heirs of the plaintiff—that in March, 1799, the plaintiff having become embarrassed in his circumstances, had conveyed certain other real estates of which he was then seised to two of the defendants in trust for the benefit of such creditors as should execute the deed—that the trustees caused the said estates to be advertised for sale by public auction, and frequently offered them for sale by [130] private contract, without being able to procure any thing near the price at which they had been valued by the surveyor employed for that purpose, and that the plaintiff owed at that time considerable sums to persons not parties to the above deed of March, 1799.

The bill then stated that the plaintiff being by virtue of his said marriage settlement entitled to a life interest in the settled estates, with reversion in fee to himself on failure of issue of the marriage, conveyed all his estate, right, title, and interest in the same, by indenture of the 16th May, 1801, to trustees (the same persons as had been appointed by the deed of 1799) in trust also to sell for his creditors, reciting, as part of the consideration of such deed, that he was to be paid or allowed an annuity of 150*l.* during his life, and subject thereto upon trust to sell the plaintiff's interest in the property, to pay the proceeds to the unsatisfied creditors, and the surplus, if any, to himself.

It further stated that, previous to 1799, the father of the defendant (Richard Court) carried on the business of land surveyor and agent, in copartnership with his son; and that in 1801 they were employed in that character, by the trustees in the last-mentioned deeds, to survey, measure, and value all the estates so conveyed by the trust deeds; and that during the year 1801 they frequently surveyed and measured the property; and the entire management of it, for the purpose [131] of sale, was committed to them by the trustees, as their confidential agents—that the defendant Court afterwards took another person into partnership, but that he still continued to conduct the management of the property for the purpose of selling it, by means of which employment he acquired an intimate knowledge of the trust property and its value—that in February, 1802, the property, which was the subject-matter of the deed of 1787, was put up to sale by public auction, upon which occasion the defendant Court acted as the auctioneer in the employ of the trustees; but that the defendant having then formed an intention of purchasing the property himself, by contrivance, prevented any sale from taking place; and on the next day, or the day after that, himself made proposals to the trustees to become the purchaser of the property, and afterwards entered into a contract with them for the sale thereof to him, at a very small and inadequate price, namely, 500*l.* for the whole, including a large quantity of very fine and valuable timber trees, growing upon the land, to an amount in value of 700*l.*—that in April, 1802, the trustees let the defendant Court into possession of all the said trust estates comprized in the deed of 1787, which he had held ever since; and that he had committed great waste thereon, by cutting down trees calculated for ornament and shelter, by pulling down walls and part of the mansion-house, ploughing up pasture, and other means, damaging the estate to an extent in value of 500*l.*

[132] It was also alleged that the defendant Court soon afterwards borrowed 800*l.* of the defendant Waldron on security of the said life-interest of the plaintiff by way of mortgage, and that the deed was executed by the trustees, whereby he had become an incumbrancer at the time of filing the bill to that extent—that he (defendant Court) had also entered into an agreement for a lease of the premises with defendant Stokes, and had received from him 400*l.* as a consideration for such agreement—that they had both had notice, and that application had been made to all the defendants to deliver up possession on re-payment of the money paid by Court to the trustees, which they had refused to do.

The bill then proceeded to charge various acts, letters, bills of charges for business done (in surveying, valuing, and superintending alterations and preparations, and arrangements for selling the property &c. &c.) and conversations, in support of the foregoing statements, and in explanation of the relative situation of the parties, the nature and extent of the transactions between them—making out a strong case of means of knowledge of the property and its value on one side, and of submission and confidence on the other. It charged also, that the property was worth very

considerably more than the money paid by Court, and that it had recently before the sale, been valued by himself at 235*l.* per ann., and that it was worth about 1400*l.* or 1500*l.* Then, suggest-[133]-ing pretences, that the plaintiff Oliver had subsequently confirmed the purchase by deed, the plaintiff charged that he did in fact execute some deed purporting to be a conveyance of his interest in the premises, but that he was at that time, and had been for a long time before, residing in the Isle of Man, for the purpose of avoiding his creditors, in consequence of being greatly involved and embarrassed in his pecuniary circumstances, and that he executed such deed at the desire and instance of the trustees, who had threatened him, by letter, written by defendant Hill (one of the trustees), that, unless he executed it, the annuity of 150*l.* would be no longer paid to him; in which letter Hill gave him permission to draw on him for money to pay his expences of the journey—that the deed was executed under the influence and controul of the trustees, and that at the time of executing it the plaintiff did not know that the defendant Court was the purchaser of the estate; and that the whole was the effect of duress, fraud, and confederacy.

Finally—after suggesting a pretence, that if the plaintiff had at any time had any good ground of objection to the purchase, it ought to have been raised long before the bill was filed—it charged that ever since the year 1802 the plaintiff had been in indigent and distressed circumstances, and in want of the means of commencing a suit, and that but for utter inability, the consequence of such distress, he would have proceeded long before to have set on foot a legal inquiry as to the [134] merits of the transaction. It also charged that all the creditors had been paid the full amount of their composition of 17*s.* 6*d.* in the pound.

The bill was afterwards twice amended.

The answer of the defendant Court stated that he had paid the full value of the premises bought by him of the trustees; that during the years 1801 and 1802, the defendant's father was employed on his sole and separate account by the trustees, in surveying and valuing the trust premises, and that he had nothing to do with any thing concerning them but the measuring, mapping, and planning—and that William Roberts (defendant's then clerk, and afterwards his partner) also occasionally assisted defendant Court's father in the measuring, mapping, and planning. In his answer to the amended bill, he stated that he had dissolved partnership with his father in 1797, and that during all the transactions, in the bill stated, he was not a partner with his father, and only occasionally assisted him in his business as his agent; denied that he or his father were directed to endeavour to sell the estate so purchased, except in his (defendant's) capacity of auctioneer, and that only because his father was not qualified to act as an auctioneer; and he also denied that he was the confidential agent of the trustees, or that he had the management of the estate (which, he alleged, had been wholly confided to the solicitor of the trustees in that respect), or that he or his father had acquired any full or complete knowledge of the [135] property, beyond what they obtained in their employment as measurers and valuers, all of which information, at any time so acquired, had been by them communicated fully to the trustees; and that no advantage was taken of such knowledge in making the purchase.

Then (having denied any intention to become a purchaser at the time when the estate was put up by him to auction, on the 6th of February, 1802), he admitted, being desirous of purchasing it about the next day (but he did not know the exact time), and stated that he then proposed to purchase the estate at 500*l.*, if no higher price could be got by the trustees before the estate should be conveyed to him; and he also admitted his subsequent purchase, as charged; insisting, however, that the consideration paid by him was the full value, and not an adequate price. He alleged that it was not till twelve months after the time when he entered into such verbal and conditional contract, that the estate was conveyed to him; and that he believed that no better offer had, in the mean time, been made to the trustees; and that the consideration money (500*l.*) was paid on the execution of the conveyance which was then executed by the trustees in April, 1803, and in a short time afterwards, by the plaintiff. [In his answer to the amended bill he admitted, that it was no part of the agreement, that the trustees might, notwithstanding, sell the estate to any one else who should offer more money for it, and that [136] he was let into the possession about a year before he paid his purchase money.]

He admitted that the annual value was 232*l.*, according to his father's valuation,

but alleged that it was subject to heavy charges and outgoings, as the said annuity of 150l., 10l. 5s. 7d. per ann. for land tax, 10l. per ann. for repairs, and 1l. 3s. 8d. for chief rent: that he had since his purchase laid out 300l. in improvements, and that he had paid a large premium on insuring the plaintiff's life, which, with other matters stated in the answer, had left the defendant, as he calculated, only 23l. 10s. 9d. clear annual income for the risk of his purchase money, the then gross rent of the settled estates being not more than 235l.: that the land was very foul and out of condition, the buildings dilapidated, and the poor rates and taxes high, at the time when he made the purchase.

The defendant Court, therefore, on the facts stated, submitted, that the plaintiff had not made out a case for relief: and insisted strongly on the great length of time which had been suffered to elapse before this suit was instituted, and on the intermediate acquiescence of the plaintiff—of all which matters he claimed the benefit, as if he had pleaded it in bar of the discovery and relief sought by the bill.

He denied waste, but admitted cutting down trees worth 6l. for repairs—that Stokes had be [137]—come his tenant of the premises and that he also had cut down some small trees, neither ornamental nor affording shelter, for the sake of enlarging the garden, and worth about 5l. [In his answer to the amended bill, however, he admitted that Stokes had ploughed up grass lands,—and he also admitted making alterations in the buildings, but denied having done any injury, alleging, on the contrary, that he had thereby greatly improved the property.] He suggested, as to the timber, that he had purchased all the interest of the tenant for life in the premises; but by his answer to the amended bill, in which he admitted it to be worth 300l. or 400l., he stated, that he did not consider it as belonging to him under the purchase of the estate, except as far as the same should be necessary for repairs and improvements: for that the timber had not been estimated by him, in his calculation of the value of the estate, when he had estimated it at 500l.: and that he did not consider that he had any right thereto save as aforesaid, submitting, in that respect, to the judgment of the Court.

The defendant also alleged that the trustees were informed of the valuation of the property as made by his father, and that it had been delivered to them in writing—that the creditors were also apprized thereof, and that they had subsequently had several meetings with the trustees upon the subject, during the course of arrangement of the plaintiff's affairs. The answer then, (denying that the plaintiff was so embarrassed in circumstances [138] as he had represented himself to be, having at least the said annuity and the pay of a commission in the Manx Fencibles) admitted, that he had till within the last two years resided in the Isle of Man, as defendant believed, to avoid his creditors. [In his amended answer he admitted the lease to Stokes, and that he agreed to pay a rent of 235l. for the estate so purchased by defendant and for another farm then rented by the defendant—and in his answer to the re-amended bill, he stated that the said other farm was held by him on lease, at 40l. per ann., and that Stokes was to pay him a premium of 400l. for such lease.] He also admitted the mortgage to defendant Waldron for 800l., which he stated was secured by assignment of the said interest of plaintiff and the policy of insurance on the plaintiff's life for that sum.

The trustees, by their answer, denied that they had directed the defendant Court or his father to sell the said trust estates: or that they had in any other way employed the father than as a surveyor, or the son than as his assistant and as an auctioneer, having in all other respects committed the confidential management of the estates to their solicitors. They admitted that the Courts had obtained full information of the said trust estates, and of their value &c. by means of their duty in the course of such employment, and also the agreement with the defendant Court, for the sale of the estate in question, at the time mentioned in the bill, for the sum of 500l., which [139] they stated they considered a fair and adequate price, and that it was not worth 1500l., regard being had to its being subject to the annuity of 150l., and they denied that the complainant had paid or satisfied the creditors. They also denied using any undue influence to procure the execution of the conveyance to Court by the plaintiff.

On the part of the plaintiff it was proved by his first witness, that the defendant Court and his father appeared ostensibly to carry on business together as partners from 1796 to 1803; that the estate in question was well timbered and in good order,

and that the mansion and buildings were in good repair in 1802; that at present, some of the timber had been felled, some of the pasture ploughed, and the house and buildings in much worse repair. He also deposed (having stated himself to be a person competent to make an estimate, as he had himself bought and sold estates, and farmed and occupied his own lands), that in 1802 the estate in question, consisting of 102 acres, was worth for the life of a man of the age and health of the plaintiff, who was then forty-one and now fifty-six (some of the witnesses said fifty-eight or fifty-nine), about 4300*l.*, being twelve years purchase at 300*l.* a year, and allowing 700*l.* for the timber to which the plaintiff, as tenant for life without waste, was entitled,—and he stated, that in 1802 he had himself rented land in the neighbourhood of similar quality, at from 3*l.* to 4*l.* per acre per annum. He described the mansion or dwelling-house, in the pleadings men [140] tioned, as a large sized square handsome house, with coach-house and stables, and as a fit residence for a gentleman of large fortune; and he stated, that since 1802, a large circular wall which surrounded the court at the back of the house had been taken down. Many other witnesses were examined, the general effect of whose testimony was to prove, that at the time when the plaintiff quitted the estate, and in 1802, the house was in complete and ample repair, the lands well ordered and cultivated, and a quantity of fine timber growing on the estate; that the complainant left the country in a very embarrassed state of circumstances and greatly in debt, in or about the year 1802—that since, and whilst defendant Court first occupied the estate, the general condition of the property became deteriorated; and that, afterwards, when the defendant Stokes (then about twelve years ago) became the occupier of all the estate except the house, great waste was committed during his occupation in cutting down ornamental timber, ploughing up sound old pasture land, and by general bad husbandry, until he finally deserted the premises about two or three years ago—that they then became obviously in all respects in a very ruinous state; but that of late (about a year ago) the defendant Court had resumed the occupation, and had since been laying the foundation of great improvement, yet it would be many years before the property could be restored to the condition in which it was left in 1802. Many of the witnesses (all who spoke to the same facts) confirmed the statement of the first witness, as to the original [141] value of the property, and the great depreciation since, in consequence of waste and bad management.

On the part of the trustees, their solicitor proved that he was employed on their behalf, and that of the other creditors of the complainant, to conduct the business of the execution of the deeds of 15th and 16th May, 1801, and the sale of the trust estates for their general and common benefit—that most of the trust property (five out of eight lots) was sold by public auction, on the 6th February, 1802, and that the three other lots were afterwards sold by private contract, amongst which was lot eight, the estate in question, which was sold to Court for 500*l.*, and that, in his judgment, all the said estates were sold for the best prices that the trustees could get for them.

Upon the facts stated by the bill and answers, and in the depositions of the witnesses,

Jervis, Martin, J., and Simpkinson, for the plaintiff, submitted, that a case was made out for the interference of the Court, as sought by the prayer of the bill.

Having stated the facts charged by the bill, and commented on the effect of them on this transaction, they rested their case, in substance, on three grounds: 1st. That the defendant Court had been, whether directly or indirectly, confidentially employed, or at least employed not only [142] originally and long before the purchase was made, in a character capable of furnishing him with full and accurate knowledge of the true value of the property purchased, but subsequently, and immediately before the purchase, as an agent in a new character, namely, that of auctioneer, whose duty it was to dispose of the premises to the best advantage in favor of the vendor; and who, in that character, could not for that reason, be permitted to become himself the purchaser, for the obvious reasons on which that principle had been established as a rule of equity, by the authority of numerous decisions (a).

2dly. That this was a case of inadequate consideration, bottomed on the very found

(a) *Ex parte James*, 8 Ves. 337. *Campbell v. Walker*, 5 Ves. 678. *Mason v. Dixon*, 12 Ves. 371. *Lowther v. Lord Lowther*, 13 Ves. 95.

which was the foundation of the first objection, and of which fraud it was strong evidence, the purchase having been made between parties meeting on unequal terms, for a consideration very far below the value^(b) set upon it by the purchaser, who had been employed jointly with another person to measure and value the premises, in which valuation the timber had not been accounted for, although it had been proved to be alone worth more than the amount of the purchase money.

3dly. That in the embarrassed state of the plaintiff's circumstances, the united conduct of [143] the defendant Court and his own trustees towards him, had operated to place him in a state of absolute duress throughout the whole of the transaction.

Upon these grounds, and upon the facts, they strenuously urged that the plaintiff was entitled to the relief prayed by the bill.

2d, 25th & 26th November 1819.—Martin and Phillimore, of counsel for the defendant Court, denied, that under the circumstances of this case, he had at any time either in relation to the plaintiff or the trustees, been shewn to have acted in a confidential or fiduciary situation—or that he had at any time acquired any knowledge which he did not fully communicate: and in *Lowther v. Lord Lowther* the Lord Chancellor so qualifies the proposition there stated by him, "that an agent to sell shall not convert himself into a purchaser," by adding, "unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed"^(a); and that, they submitted, had not been charged or suggested throughout the whole of this bill, amended as it had been twice after it had been filed, and which they objected to as being multifarious in form, though its substantial object were single, namely, the rescinding of the contract, and in improperly making persons parties (as the trustees and the satisfied mortgagee), who ought not to have been brought [144] before the Court—who had not been charged as in any way implicated in the subject-matter of the complaint, and against whom nothing had been prayed.

They then applied themselves to the facts of the case, for the purpose of shewing that Court (the defendant) had never been employed by the plaintiff or the trustees—that he had merely assisted his father in measuring and surveying the premises, never having himself had any thing to do with the valuing—and that the partnership formerly subsisting between the defendant and his father had been dissolved (as the answer alleged) since the year 1797.

[In this part of the case the defendant's counsel proposed to read from the answer the defendant's allegation, that the partnership had been dissolved in order to rebut an assumption by the plaintiff that the partnership had continued longer, in which he insisted he was borne out by the admissions of the defendant, and by the evidence of certain books and papers which were produced: and he submitted, that having done so, it would be conclusive on the plaintiff, unless he should give evidence to disprove what was so sworn. The Lord Chief Baron, however, said that that was not the effect of allegations in an answer. A plaintiff (said his Lordship) has a right to assume a fact, and the defendant must disprove it, and that is the established course. I remember a case in the Court of Chancery, where a bill had been filed [145] by a mortgagor against a mortgagee in possession, and the mortgagor stated that the mortgagee had been overpaid, and that so far from owing any thing to the mortgagee 30l. was due to him. The plaintiff having given some slight and inconclusive evidence, the answers of the mortgagee were read to falsify the plaintiff's account, wherein there were statements which, although they were very loose and inconsistent, averred that the account furnished by the mortgagee was correct. Upon that occasion, Lord Thurlow treated it as absurd, that he, as a Judge, was to be bound by what should be sworn in an answer, and more particularly where the statements were made in an inconsistent manner: and although it was very much pressed upon him as being conclusive evidence, he refused so to consider it. I cannot consider the statements in this answer conclusive*.]

They then protested against the attempt in the bill to bring forward in a case of a party seeking to set aside a contract, matters which took place subsequently to the completion of it, as had been done in this case; and they urged, that for such an

(b) *Lowther v. Lord Lowther*, 13 Ves. 103.

(a) *Colles v. Trecothick*, 9 Ves. 245.

* Vide ante, p. 13. *Kempson v. Yorke*, pp. 17, 18, 19.

object, the principal part of these pleadings and of the evidence was irrelevant and superfluous.

Returning again to the facts, they insisted, that upon the evidence adduced, there was nothing in the employment of Court by the trustees that disqualified him from purchasing; that there was no principle or authority on which such a proposition [146] could be built, as that an auctioneer might not, after an ineffectual attempt to sell by auction, purchase by private contract; and in this case Court was only known to, or connected with the trustees as an auctioneer, whom it was groundless to charge with confidential agency, or superior and hidden knowledge, particularly in a case where the most efficient knowledge appeared to have been the quantity of interest of a person who was tenant for life under a settlement without impeachment of waste, a knowledge more within the province of a solicitor than of a surveyor. If an auctioneer were to continue incapable of buying when his duty was at an end the same reason would entitle him to commission upon the purchase of the estate by any other person. They then offered to read the answer of the trustees, to shew that they never had employed the defendant Court in any other way than as an auctioneer: that, the Lord Chief Baron, however, said could not be done; as nothing in their answer could be read as evidence for Court.

Upon the case of *Ex parte Janus*, which had been cited, they observed that the characters there said to be excluded by the policy of the law from making purchases, are trustees, solicitors, and assignees under a commission of bankruptcy; and to such relative persons only is the doctrine of disability cautiously confined. In such cases the reason is obvious, and it is stated to be, because such persons have either positive possession over the estate, or uncontrollable power [147] to make any disposal of the property beneficial to themselves. Yet, even there it is said, that an assignee, when he puts off the character, may purchase. In all the cases, the principle upon which the jurisdiction of equity is founded is, that there must either have been actual fraud, or the parties must stand together in such a relative connection, and the conduct of the purchaser must be so gross, that fraud must be necessarily implied.

Upon the question of inadequacy of price they urged, that there was nothing in the shape of evidence of that. It was for that purpose (they insisted) that the subject of the timber had been introduced into the bill, and in order to give a colour to that part of the case. They, however, submitted that, under the defendant's contract, the timber had not been bargained for, nor had it, under the circumstances of this case, been in fact sold. All parties must have considered, that the subject-matter of the sale was the plaintiff's life interest only, and if the timber had not been thought of, it was a mere mistake; or if it had at any time been considered as sold, that also was a mistake, and a mistake rather in point of law than of any other description. Clearly, therefore, this was not a case of fraud; and fraud, and undue advantage, must be shewn in all cases, where a contract is sought to be set aside, on the ground of inadequacy of price. If there were fraud in this case, the trustees would [148] be equal participators in it; but there is nothing of the sort imputed to or charged against them, although they have been made defendants to this suit, but for what purpose it is impossible to conjecture. Inadequacy of price, too, it has always been held, should be in so glaring a disproportion as, in the words of Lord Kenyon, to excite an exclamation of surprise. Now, in this case, inadequacy of price has not been proved in any way, and if the timber be no part of the bargain, the purchase-money will be considerably beyond, rather than beneath, the value. They then suggested that this suit might properly have been instituted for the purpose of establishing the plaintiff's right to the timber, and in that case the only true and disputable question between the parties would have been raised, and brought fairly before the Court, whereas there was not a shadow of pretence for the prayer of the present bill.

On the point of the personal disqualification of the defendant Court to be a purchaser, by reason of his employment, such as it was, under the trustees, they submitted that the decisions of the Master of the Rolls (Sir W. Grant) and the Lord Chancellor, (Eldon) in the case of *Andrew v. Morrison* (Wils. Rep. 71), had completely determined that question in a very solemn manner, entirely overwhelming the very slender authority on that [149] point, which had been attempted to be gathered from dicta and analogy with decided cases. The case of *Andrew v. Morrison*, on this subject, they insisted, was completely decisive of the question which had been raised

by these pleadings. There the connection between the parties contracting was infinitely more of that species which has been termed confidential, than that in which a surveyor or auctioneer could be placed under any circumstances. In that case, the purchaser had been most confidentially employed, and entrusted as the land-steward of the vendor, and for the express purpose of managing and nursing the estate, in order to prepare it for sale to the best advantage; and he was constituted the sole agent to whom the conduct of the sale was committed. He was a skilful man of business, very conversant with such matters, and particularly, having a perfect knowledge of all the information that related to the estate which he purchased, and the vendors were ladies. In that case, too, the purchase-money was palpably greatly below the value, and there was no room for any thing like mistake or misapprehension in the subject-matter of the purchase, and there were many strong and specific charges of fraud and confederacy in the bringing about so advantageous a purchase: yet, notwithstanding so strong a case, the Master of the Rolls dismissed the bill, with costs, and that on the express grounds (p. 87), that although the purchaser had been an agent for such purposes, he had relinquished that agency—that although he had, during such [150] agency, competent means of acquiring information, he had communicated it to the plaintiffs,—and “because, from the moment he had discharged all the obligations attached to the character of an agent, he stood just in the same situation as any other purchaser, and was entitled to all the advantage that he might eventually derive from the bargain,” although the estate were proved to be worth more than he contracted to give for it, provided the vendor had a fair opportunity of exercising his own judgment, upon full information with regard to all the particulars of the estate. Such was the opinion of the Master of the Rolls, as delivered by him at the close of his judgment. On appeal to the Chancellor, his Lordship, affirming that decree, concludes with adding this reason, “that he did not see, from the circumstances alleged, that there was sufficient to shew that the defendant had been systematically acting with fraud, with regard to that property.” They observed, that if the concluding words of those judgments were applied to the present case, they would be as precisely applicable to the facts, as they furnish the true principles of equity on which this case ought to be decided.

They finally urged, as an insuperable objection to sustaining the present suit, the fact of the plaintiff having, by his own deed, confirmed the contract between the trustees and the defendant Court, followed also by his very long acquiescence in the bargain which had been made, and his [151] laches in not having objected to it before, or at least protested against being considered as assenting to it. Length of time, they urged, had ever been held in Courts of Law and Equity, on principles of convenience and security, to be a bar to claims which have been so long suffered to lie dormant, as to turn even an usurpation into a right. Thus, in the case of *Bonny v. Ridgard* (1 Cox, Ch. Ca. 145), a well-founded claim was held by the Master of the Rolls to be barred by length of time: and in a more recent case, *Gregory v. Gregory* (Coop. Ch. Ca. 203), Sir W. Grant also held, that the length of time which had elapsed in that case was a sufficient bar to a bill filed to set aside a purchase, in a case where the plaintiff would otherwise have been held entitled to a decree; and his Honor therefore dismissed the bill, but without costs.

They therefore submitted, that upon these grounds the present bill ought to be dismissed.

Clarke and Wrottesley, for the defendants, the trustees, submitted that as to them the bill must be dismissed, with costs, as there had been no imputation thrown on their conduct, and therefore they were entitled to the usual indulgence. It had appeared, that they had done nothing to incur any blame in the course of the transaction, and that they had acted with impartiality and good faith between all the parties.

[152] [The Chief Baron, however, intimated that he was of a different opinion, for he thought that there had been so much negligence on the part of the trustees, as to deserve considerable reprehension—that although they had, perhaps, done nothing morally wrong, they had been very culpable in omitting to do what was right in discharge of their duty—and the more respectable the persons in this instance were, the more aggravated was their neglect, and the more fit themselves for making an example of to others; and his Lordship said, that their supineness would be matter for his further consideration.]

Buck appeared for the defendants, Waldron and Stokes.

Jervis, on the part of the plaintiffs, replied.

Cur. adv. vult.

3d Feb.—The Lord Chief Baron now delivered his judgment, which he preceded by succinctly stating the situation of the parties to the suit, the general nature of the case, and the substantial object of the bill.

[His Lordship then gave the following exposition of the facts, as appearing to him to be the fair result of the evidence in the cause.]

The plaintiff was clearly entitled, under his marriage settlement, to an estate for life in the [153] premises in question, without impeachment of waste. Having become involved in insurmountable difficulties previous to March, 1799, he conveyed certain of his real estates to trustees for the benefit of his creditors, in order that they might be sold, and the produce applied in discharge of his debts, and in extricating him from his embarrassments. Continuing, however, to be still pressed by his creditors, who were not included in that arrangement and his difficulties increasing, in May 1801 he conveyed the estates which had been settled on his marriage, to the same trustees, and for the same purpose, that of sale for the benefit of this second class of creditors, the residue, if any, to be paid to himself of course. Now, the plaintiff being tenant for life without impeachment of waste, had certainly a right to cut timber, and, therefore, provided he did not commit equitable waste, he was entitled, as part of his interest, to commit what is called legal waste, subject to the restriction of a Court of Equity. That right was of course, as incident to his estate in the premises, transferred by him when he so conveyed his interest in the property to the defendants (the trustees), in trust, as I have stated, for the benefit of his unsatisfied creditors. [His Lordship then set forth the particulars, and the object and effect of that conveyance.] That very deed proves sufficiently that the plaintiff was, at the time when he executed it, in very embarrassed circumstances. He reserved to himself by that deed certainly a rent-charge of 150l. [154] per annum, and subject thereto he conveyed his whole interest in the estate to these trustees for the purposes which I have already mentioned.

It appears that afterwards, when the plaintiff had withdrawn to the Isle of Man (where embarrassed persons found, at that time, a greater protection as to their persons on such occasions than at present), for the avowed purpose of avoiding his creditors, the trustees took measures for effecting a sale of the conveyed estates. With that view, and as a preparatory step, an admeasurement and valuation of all the trust estates took place during the year 1801, by the direction of the trustees. That admeasurement and valuation was undoubtedly made by the Courts, father and son, in conjunction. It certainly does not appear distinctly what precise part the defendant Court himself bore in that matter: but he admits his concurrence and co-operation with his father, who (he states) took upon himself the valuation in performing that service. He then tries to distinguish the nature of his part of the undertaking from that of his father, who, he says, took upon himself entirely and exclusively the valuing, leaving to the defendant the measuring, mapping, and planning. It appears, however, quite manifestly, from the papers relating to that transaction, and even from the pleadings on the record, that beyond all doubt, the defendant knew what had been done in every stage of that business, and, of course, the result of the survey; for although he might [155] not, perhaps, have been actually in co-partnership with his father during the whole time, it really is not of much moment whether he was or not, he must have had the same opportunities as his father had, whom he assisted throughout, of observing and noticing all those matters which were best capable of furnishing him with information on the subject of the real value of the estate during the progress of the admeasurement and the estimate.

Now it is a most important fact in this case, that in the valuation which was then made no notice was taken of the timber; and in that respect great negligence is imputable to the trustees in not having required that omission to be supplied by the defendant and his father, or in not having apprised the plaintiff of the circumstance, or not adverting to it themselves when they sold his interest in the premises. It is, however, quite clear, that the timber was not valued, and that was beyond all doubt, in this case, a necessary subject-matter of consideration in forming a true valuation of the plaintiff's interest in this estate such as it was. So very material a subject-matter of calculation was it, that without an estimate of it, the real value of his interest could not be ascertained. In point of fact, the value of the timber is not, at this

moment, known exactly : but from all the evidence, and even from the pleadings, it is clear that it was, with reference to the sum given for the purchase of this estate, very considerable, [156] amounting to at least something between 700*l.* and 300*l.*

It does not appear either, to what extent the valuation which had been made of the average annual produce of the estate, such as it was, is correct or true ; for the statement in that respect is not supported by any evidence, or, at least, by any that satisfies me ; and the allegations on the record, and the witnesses who speak to that point differ much in the estimation put upon it. One of them in particular, who appears to have been well qualified to give an opinion, states it at much higher : and there is no witness examined on the part of the defendant as to the correctness of the valuation made and reported by the surveyor employed for that purpose, whoever he was ; although, considering the other circumstances of this case, that may not, perhaps, be now very material to the plaintiff ; but it is very much so, as affecting the defendant Court. He, however, does not even in his answer, offer any thing to support that valuation. Much, indeed, is stated of expences incurred by him [those his Lordship particularized, reading from that part of the answer.] But there is nothing which approaches the real question of the fairness of the alleged estimate, which is, as I have observed, a matter of great importance to the defendant in this case, for the onus lies on him to shew that the valuation on which he proceeded, is correct and fair, and to satisfy the Court in that respect. But how has that been [157] done ? In the first place it is a material and prominent fact, that one of the incidents to the interest of the plaintiff, of no small magnitude in point of value, was certainly not taken into consideration in making the valuation, and that was the timber. Then the statement furnished by the pleadings is, that the annual value was estimated at 232*l.* 3*s.* 5*d.* which, deducting the rent-charge of 150*l.* would leave 82*l.* 3*s.* 5*d.* and that at eight years purchase would be worth 657*l.* 7*s.* 4*d.* from which, if a further deduction be made of 10*l.* a year for repairs, which the defendant has stated in his answer to be the average expenditure by him on that account, the value of the purchase will amount to 577*l.* 7*s.* 4*d.* Now that calculation is, of course, exclusive of the timber ; and if I also take a general average of what has been stated to be the value of the timber, I must put it as high as 300*l.* or 400*l.* at the least—and indeed the defendant Court himself, in his answer to the amended bill admits, or rather states, the timber to be worth 300*l.* or 400*l.*—a sum which, if added to the total amount of the consideration-money paid by the defendant for the purchase, would alone make a very considerable addition to the true value of the plaintiff's interest in the estate.

We find, therefore, that the facts are, that there was a conveyance of all the plaintiff's interest in these premises made to trustees, in trust to sell for the benefit of creditors, and that by a person in the very embarrassed state [158] in which the plaintiff then manifestly was. Although the conveyance was executed in the month of May, 1801, no valuation was made till the end of that year, (December). The sale was then immediately fixed for the 6th of February, 1802, a bad time of the year most clearly for appointing the sale of an estate by auction, and therefore unwisely adopted. It is admitted that the defendant Court was the person who was employed as auctioneer upon that occasion, and it was therefore his business and duty to sell the estate to the best advantage for the vendor. It turns out, however, that although many persons were present attending the sale, there was no bidding offered for this property. Why that so happened we do not know, for there is no information furnished by the party most capable of giving it. The defendant merely says that the estate was put up to auction, and that he acted as auctioneer, and that no one bid a sufficient price. But in fact no one appears to have bid at all. Then he is asked, with propriety, as to the time when he first formed an intention to become the purchaser, and to that he does not think proper to give any satisfactory answer. Indeed, the defendant states his case throughout in his answers in a way which necessarily requires that I should observe upon it. As to most of the particular facts respecting which he is interrogated, he says he knows nothing. As to the time when he first intended to become the purchaser, he says he does not know whether it was on the day when he put up the estate to sale by auction [159] or not. In answer to the question of what passed at the auction, he only says that there was no bidding to the best of his recollection and belief. One thing, however, is quite clear, and that is, that he himself offered to become the purchaser of the estate the very next day. Under all the circumstances, then, standing so entirely unexplained,—the defendant

giving no sort of account of what passed at the time of the auction,—not stating any thing that was done by himself as auctioneer towards attempting to put up the estate for sale,—nor bringing forward a single witness to give any evidence or explanation of any part of his conduct, or of the business of the day,—surely I may appeal to any one who hears me, or to any man of understanding and plain common sense, whether strong suspicion must not necessarily attach to the conduct of an auctioneer who buys an estate under such dubious circumstances. At the auction by which he was employed to sell the property there was no bidding for the particular lot, and for that one only; and when called upon for an explanation, he gives no account whatever of any thing which took place upon the occasion as to any effort made by him towards selling at the public sale the estate which he himself proposed to buy, and actually agreed to purchase the very next day by private contract!

Under such circumstances as these, I cannot but consider myself judicially bound to believe that the defendant Court had determined within [160] himself, when he mounted the chair, to become the purchaser of the estate which he was engaged as an auctioneer to sell; and I am quite sure that if I were to allow this to be done in the present case, I should hold out encouragement to every auctioneer in the kingdom to take a similar advantage of his own culpable neglect of duty.

It was said that there is no legal objection to an auctioneer, although he may have been employed to sell, becoming himself a purchaser afterwards of the very same estate; and that when he has once retired from his duty, he becomes an indifferent person, and is then capable of treating with the owner for the purchase on his own account. I do not deny that in general and ordinary cases he may do so; as where a person, in all other respects a stranger, is merely employed for the time as the auctioneer; but I deny that in such a case as this, and under the circumstances disclosed to the Court by this proceeding, he could purchase; because in this case I consider that the person who acted as auctioneer was so connected with the parties that his agency must be considered to have continued after he had descended from the rostrum; for where I see so intimate a connection so long subsisting between parties so situated as these unfortunately were, and find a purchase made of the employer's estate so immediately following an ineffectual attempt to sell, I am bound to say that the party purchased as auctioneer, or at least while his general duty continued. I am clearly of opinion that an auctioneer, while his employment con-[161] tinues, cannot purchase the estate which he is engaged to sell; and that opinion is founded on the well known and established rule of equity, that persons who are in any way invested with a trust, or an employment to be performed by them to the advantage of their cestui que trust, or principal, are, *prima facie*, virtually disqualified from placing themselves in a situation incompatible with the honest discharge of their duty.

The present defendant, however, made the purchase now brought before the Court, under circumstances which are sufficient to disable him from retaining it on many other grounds of objection, each of which would be singly sufficient to authorize a Court of Equity to set it aside. There are, indeed, so many features of fraud in this case, and they so characterize the transaction of this purchase, as to make it impossible for the Court to withhold its interference in setting it aside.

[Having recapitulated the circumstances attending the original admeasurement and valuation.] Now I cannot but suspect (continued his Lordship), that that pretended valuation of the defendant and his father was, in many respects, actually and in truth, the valuation of the defendant himself; but even if it were not, it was the valuation of his father whom he admits he assisted in the means of making it, and he was at that time intimately associated with him in the business of [162] a surveyor, in which he had been a very short time before in actual partnership with him, and soon after, when his father gave up business, he succeeded him, as was natural, upon his retirement, taking the very same employment wholly upon himself, and continuing to act (in consequence, no doubt, of the former connection) in whatever could be done by him in the way of his business in the concerns of this very property. His Lordship then again adverted to the circumstances under which the offer to purchase had been made, and which was so instantly accepted and concluded.] By that contract the trustees gave the purchaser an interest far beyond in quantity the ascertainable and stipulated consideration of the purchase money, for (independently of the inadequacy of price of the estate itself) they conveyed to him the plaintiff's right to the timber—

because, if the contract was a good one in any respect, in buying the plaintiff's interest without reserve, he clearly bought the right to the timber as much as to any other part of the estate, for all the interest, right, and title of the tenant for life were conveyed by the trustees to the purchaser. It is a prominent trait in this case, that the timber was overlooked in the bargain^{*1}. Then the value of this property, which had been estimated at 577l. 7s. 4d., exclusive of the value of the timber, is pretty clearly shewn by what took place after the purchase. [His Lordship adverted to the important [163] facts of the mortgage to Waldron and lease to Stokes, &c., as stated among the circumstances of the case.]

It was said, indeed, at the bar, that the including the timber in the purchase, (if it were included) was a mistake; for that it was not in fact sold, because not included in the valuation. A mistake I agree it undoubtedly was, in the mildest way of considering it; but, if it were no more, it is precisely that kind of mistake which operates in Equity to prevent the person employed as auctioneer to sell the estate, from being himself entitled to be considered a fair purchaser. If the timber was not sold, in point of fact, by the contract, it was in point of law; and the purchaser, if he had a right to any thing under it, would also have a right to the timber by the terms of the conveyance.

But I think I may rest my judgment in this case altogether on the facts in evidence, shewing that the defendant as auctioneer, on the 6th of February, undertook the performance of a stipulated duty towards his employers (the trustees), that of selling the estate by auction, of the inefficacy of which he does not pretend to give any account, and his own immediate purchase from them of the trust estate: and I may appeal to the Bar, whether there would not be found in that alone, amply sufficient ground to authorize and require a Court of Equity to set aside a purchase so made, if application had been made re-[164]cently afterwards for that purpose, by the tenant for life.

The case of *Andrews v. Mowbray*, which has been relied on for the defendants, is nothing at all like this in its circumstances, nor can the principle of that decision be applied to a case of this kind. That case is very accurately reported, and whatever I may have thought, or still think of that decree, pronounced by two such learned Judges, I feel myself bound to abide by the doctrine which it called forth, as applicable to the particular facts and circumstances of that case. There are, on the other hand, very many authorities which support, on principle, the power of Courts of Equity to take cognizance of such frauds as these (and which constantly come before the Lord Chancellor in cases of bankruptcy), and establish that agents, auctioneers, and other persons so situated, are not capable of purchasing^{*2}, by reason of the duties which they have to fulfil.

On principles of public policy alone, however, I think I might be justified in entertaining the opinion that a Court of Equity ought not, upon proof of the facts which have been revealed in this cause, to suffer this bargain to stand.

Then arises the question whether the length of time which has been allowed to pass before the [165] purchase was sought to be set aside or complained of necessarily, operates as a bar to a party claiming relief through the medium of a Court of Equity in such a case as this.

Before, however, I enter upon the opinion which I hold as to that part of the case, I think it necessary to make an observation upon the conduct of the trustees, who are defendants in this case. The circumstances which have been brought before the Court in the course of this investigation, certainly very considerably implicates the trustees in the guilt (I do not mean morally) of a total neglect, at least, of the duty which they took upon themselves in accepting the trust from which naturally resulted an implied undertaking to execute it faithfully. That duty they have not in any one respect performed: for—not to repeat what I have already strongly urged on the topic of their having given up the estate in the manner which they did, for so inadequate a consideration so very considerably below the fair value, disregarding the palpable omission, in the alleged valuation, of any account or estimate of the timber—they sold for 500l. the property which this distressed man had entrusted to them, and which they knew to be worth 577l.; but they did not even then take the common measures to secure to their cestui que trust the inadequate fruits of that improvident

^{*1} Vide *Peacock v. Evans*, 16 Ves. 516, 517.

^{*2} *Ex parte Bennet*, 10 Ves. 381. *Ex parte James*, ante.

bargain. Nor can I give them even the advantage of a conjecture that they might have been ignorant of the real value of the property, or of what they were doing throughout; [166] for, without insisting, as I might do, on its being their duty to inform themselves on matters of so great importance and moment, so gross are the circumstances of this case on the part of the principal defendant, and so negligent have they (the trustees) been in passively suffering them, that I am absolutely compelled, judicially, on the evidence, to impute to them knowledge of all the circumstances which aggravate the conduct of the defendant Court. Then they let him into possession, almost immediately, without his paying a shilling of the purchase money, when they ought to have withheld the possession until it had been paid. They do not require him to pay the purchase money for nearly a year after he took possession, nor do they then demand any interest for the intermediate time during which he retained it in his hands. Throughout all the transactions, therefore, I must say, that I consider the supine conduct of the trustees exceedingly culpable; and however respectable these persons may be in life (and I think that aggravates their conduct), they have in this case been proved guilty of gross negligence and breach of duty. They have, in some measure, identified themselves with the principal defendant the auctioneer, having by their neglect held out a temptation to entice him into a trap, and he has in turn caught them in his. Nor is it any excuse for the trustee who has not taken an active part on himself in the course of these transactions, that he had nothing to do with the conduct of the other to whom he left the management of the matter: [167] for where several trustees leave the entire performance of the duties of the trust to one, all are equally responsible for the faithful and diligent discharge of their joint and several duty by that one to whom they have delegated it.

[Adverting again to other facts in the case, his Lordship then continued.] Even on the facts which are thus stated and admitted upon the record, can any man of plain understanding, for a moment, doubt the gross impropriety of the conduct of the auctioneer, bound as he was by the duties of his situation to take care of the interest of his employers: and if he has misconducted himself, it is clear that the delinquency of his misconduct must in part attach to the trustees, by whose neglect he has been enabled to do so much mischief: they, therefore, must participate, in some degree, in the consequences. Under the circumstances of this case, I venture to ask, if this contract, so entered into and completed, had been at the time, or within any reasonable period afterwards, brought under the consideration of a Court of Equity, it could have been suffered to stand for a moment.

Then, say the defendants, this transaction took place so long ago as twelve years before the filing of the bill, during all which time, there has been a perfect acquiescence on the part of all persons interested, and no complaint has ever been made. Now—giving every credit to such an argument, to which generally, and in ordinary cases, it would [168] be entitled, on the solid ground that there may be mischief in disturbing titles sanctioned by long acquiescence of parties interested and who were not ignorant of their rights, as well as on the principle (which experience has for ages justified and which is, therefore, recognized and adopted by the several Courts of Law and Equity in this kingdom) that it is frequently better—where transactions of long standing, originally not well founded, have been suffered to lie dormant—to endure the old injustice than induce a new injury; I cannot but consider that in the present case there is a very satisfactory answer to be given to that argument well founded as it is, and entitled to great attention: and that is, that during all the intermediate time which has elapsed between the impeached transaction and the filing of this bill, the plaintiff has been, in consequence of his debts and his poverty, completely non compos sui.

They say, however, that he came over from the Isle of Man for the purpose of executing the deed, and that he did execute it without making any objection. Now upon that I will state what has occurred to me. The execution of the deed by him was either a necessary or an unnecessary act: if it was an unnecessary act, why should he be brought over to execute it, unless indeed it were for the purpose of giving some colour to a transaction which required so much, and which, without it, would not bear investigation. Still if it were unnecessary, it would be nugatory in effect. If it were necessary that the plaintiff [169] should join in the conveyance, in order to complete and perfect the defendant Court's title by such an act—then let us see under what circumstances and by what means it was brought about in this case. The trustees

wrote to the plaintiff, circumstanced as he was, a letter, requiring him to come over for the purpose of signing the deed: and in that letter they threaten him, that if he do not, the annuity of 150*l.* will be withheld from him! Such a mode of proceeding—towards a man situated as the plaintiff at that time was—in such very distressed circumstances—living abroad, whither he had retired with his family, from a fear of his creditors, with nothing, most probably, but that annuity to subsist upon—must have had most assuredly the effect of placing him in complete and absolute duress. If therefore the conveyance by the plaintiff was not necessary, it can have no effect; and if it were necessary, it is rendered null and void by the circumstance of undoubted duress, under which it was executed. I therefore put the execution of that deed by the plaintiff altogether out of the question: for I cannot treat it as any thing like an effectual confirmation of the contract for sale of these premises, which had been so made by the trustees: and I am bound judicially to regard it as wholly nugatory, both against the defendant and the trustees.

Then the only substantial objection is the length of time which elapsed before any step was taken by the plaintiff. The bill was filed in 1815: and [170] the transaction was certainly entirely concluded in February, 1803. Now even if this were a case of a claim of legal estate, the right would not have been barred at law by the Statute of Limitations: but, if it had, a Court of Equity would not be precluded in such a case as this from affording the party relief. Although Courts of Equity, for the sake of convenience, have usually adopted on the principle of that statute, and as it were by analogy to it, a restrictive rule which has been found to be of considerable practical utility, as to a limitation of time for the commencement of suits, generally; yet those Courts have always exercised a discretionary power of relaxing that rule wherever circumstances have required it, and it has been found not adapted to meet the justice of any particular case*. Now surely this of all others is peculiarly such a case as demands a relaxation of that rule of practice. Having regard to the utterly impotent situation of the party during the whole of the intermediate time, how can he be considered to have lost his right to redress? He continued to reside in the Isle of Man, where he had sought refuge, under the same insuperable embarrassments as had originally driven him there. I do not know the extent of his means whilst he remained there beyond the annuity of 150*l.*, or whether any of his debts had then been paid during his retreat: but we find [171] that he was so circumstanced, during the whole time, as that he was not able to return to England till the year 1813: and I would ask what lawyer in the kingdom will say that—where a party has laboured under a fraud, practised upon him in 1802, when he was living out of the kingdom in consequence of the embarrassed state of his affairs, which obliged him to remain abroad till 1813—he therefore loses all right to have justice dealt out to him by a Court of Equity on his return at that time, when he claims to be restored to his property of which he has been in the mean while deprived by the effect of that fraud? I, for one, certainly think that he does not: and that therefore there is not in the present case any sort of ground for maintaining that objection.

I am clearly of opinion that the plaintiff has fully made out his case; for there have been disclosed such facts in the course of this investigation as, on principles of public policy, render it impossible that this transaction can be permitted to stand. And I will add, that the circumstances of this case afford ample ground for granting the relief which is prayed by the bill: for not only do they authorize the interference of the Court on behalf of the plaintiff: but they also plainly evince the wisdom of adopting in judicial proceedings those principles of public policy which have since been constantly recognized and acted upon by Courts of Equity in administering relief in all cases of this nature.

[172] His Lordship then pronounced the following

DECREE.

Declare the purchase, by the defendant Court of the plaintiff Oliver's life interest in the estate and premises in the pleadings mentioned, to have been, under all the circumstances, improperly made by the defendant, and that it ought to be set aside—and decree the same accordingly.

* Vide *The Warden, &c., of St. Paul's v. The Bishop of Lincoln*, ante, vol. iv. p. 86.

Let the conveyance stand as a security to defendant Court for payment of what should be found to be due on the balance of the account directed.

Refer it to the Deputy Remembrancer to take an account of the purchase-money, and to compute interest and to take an account of the rents and profits received by the defendant Court, or (Ac.)—to charge him with the amount of the fine or premium received from Stokes in respect of the lease: to set an occupation rent on the premises during the occupation by Court, and to make annual rests—what should be found to be due from Court to be paid in reduction of the purchase money and interest—to make allowances for all material repairs and lasting improvements, and whatever part should not have been satisfied by the rents and profits, to be added to the purchase money. Upon payment by the [173] plaintiff of what should be found to be due to defendant Court: to direct him to re-convey the premises to plaintiff, free from incumbrances, Waldron (the incumbrancer, who had been since satisfied) to join in the conveyance—to take an account of the timber felled, and how disposed of, and of all waste committed by Court or persons claiming under him, and to set a value thereon.

The costs of the plaintiff to the hearing to be taxed, and paid to him by defendant Court—the costs of defendants Waldron and Stokes to be paid to them by the plaintiff in the first instance, and afterwards to be repaid by the defendant Court to him.

The bill to be dismissed as against Stokes: and as between the plaintiff and defendant Hill and Rufford, (the trustees) the Lord Chief Baron does not think fit to give any costs on either side—the bill to be dismissed as against them—and the injunction to stay waste to be continued.

Reserve costs and further directions, with liberty to the parties to apply to the Court in the mean time.

[174] YORKE, Esq. v. OGDEN AND ANOTHER. Demurrer. Saturday, 12th Feb. 1820.—The statute of the 4th Anne, c. 16, does not affect the action on the bail-bond, when brought by the sheriff, and he may sue on it in any Court, and is not restricted to that in which the original action was brought: and therefore on a general demurrer to an action by the sheriff on a bail bond forfeited, on the ground that the action on the bond appeared by the declaration to have been brought in a different Court from that out of which the original process issued, the Court gave judgment for the plaintiff.

The plaintiff (sheriff of the county of York) brought the present action in this Court against the defendants on a bail-bond, conditioned for the appearance of the principal in the Court of Common Pleas, and the condition being set out in the declaration, the defendants put in a general demurrer, in which the plaintiff joined.

Tindal, in support of the demurrer, submitted, that the objection, in this case, of the plaintiff having brought his action in this Court on a bond given for the defendants appearance in an action in the Common Pleas, appearing on the face of the pleadings, afforded good ground for general demurrer, upon which the questions would be, whether the statute 4 Anne, c. 16, s. 20, had limited the jurisdiction in actions upon bail-bonds to the Court in which the original action was brought, and whether it were applicable both to the sheriff and to the assignee.

First, he contended, that the action on the bail-bond must, according to the authorities*, be brought in the same Court as that out of which the process in the original action issued: and for [175] that he cited *Franks v. Parson* (Barnes, 22), *Croft v. Muldichurst* (1 Bur. 612), *Morris, Assignee, &c. v. Rice* (2 Bl. Rep. 838), *Dunn v. Heslop and Gulpin* (6 T. R. 365); and, secondly, that the statute extended to the sheriff as well as to the assignee, the words of the statute being, “And if the said bail bond or assignment” (Ac.), *Donnelly v. Barclay* (5 T. R. 152), where the Court held that distinction immaterial. He therefore urged, that the plaintiff having stated the condition of the bond in the declaration, had put himself out of Court.

Campbell, contra, contended that there was no ground for this demurrer. If there was any thing in the objection, he submitted it should have been pleaded in abatement, or it should have been made the subject of a special application to the Court to stay the proceedings on the bail bond—that it was not a point of law but of

practice merely : and that all the cases cited in support of this demurrer were cases of application by motion.

He then insisted, that the sheriff was not within the statute of Anne, as he was entitled at common law to sue on the bond when forfeited : for he was an obligee suing an obligor : and that as the statute does not require the plaintiff to sue in any particular Court, special circumstances might justify his suing in a Court out of which the original process did not issue. The words of the act are, that "the plaintiff in such [176] action, after such assignment made, may bring an action and suit thereupon in his own name." Even, therefore, if this had been the case of an assignee of the sheriff, the demurrer could not be supported on the statute : and if there were any such rule in the Courts, as that the action on the bail-bond should be brought in the Court wherein the original action was pending, it must have been made for purposes of convenience merely : and parties seeking to avail themselves of it, must do so by special application, not by general demurrer, which necessarily admits the jurisdiction of the Court.

In the case of an action brought on the bond by the sheriff, he insisted this precise point had already been ruled by the Common Pleas, in *Newman and Baker v. Faucitt* (1 Hen. Bl. 631), where on a rule to shew cause why the proceedings on the bail-bond should not be set aside, the Court held that the statute of Anne did not apply to the sheriff : and that therefore he was not restricted to sue in the Court in which the original action was brought.

Tindal, in reply, admitted that the cases which had been determined in the King's Bench could not stand with that decided in the Common Pleas : but he submitted that the former were the best founded : and he observed that the case of *Donatty v. Barclay* was the latest determination, and that that applied to the case of a sheriff.

[177] On the question whether a general demurrer was the proper mode of availing himself of the present objection by the defendant, he submitted that the rule was, that wherever the objection was apparent upon the pleadings, it might be taken advantage of by general demurrer, and that whether the ground were want of jurisdiction or any other : and therefore, if on the face of this declaration the Court must necessarily see that the action should have been brought in another Court, and that they have no authority in the case, they might give judgment for the defendant on that demurrer,—*The King v. Fearnley* (1 T. R. 316) ; and he ought not, in such a case, to be driven to a plea in abatement which must necessarily be filed in four days, and verified by affidavit.

Cur. adv. vult.

THE LORD CHIEF BARON now delivered the judgment of the Court :

We are of opinion that the statute of the 4th of Anne does not affect the right of sheriffs to sue on the bail-bond, for the act does not in any way allude to the action by the sheriff himself, which he was entitled to bring by the common law before that statute was passed : and the sheriff takes a bail-bond on his own risk.

The cases which have been cited in support of this demurrer, as determined by the Court of [178] King's Bench, are quite distinguishable from this. In the case of *Morris v. Ross* the action was brought by the assignee of the sheriff, and in *Dixon v. Heslop and Gilpin*, and the more recent case of *Donatty v. Barclay*, the actions had been removed from an inferior Court. The case from the Court of Common Pleas, on the other hand, which was cited in support of the present proceeding (*Newman and Baker v. Faucitt*), is precisely in point ; and it was there held that the sheriff might sue in either of the Courts.

On the authority of that case therefore, and considering that the sheriff has a right to bring an action on a bail-bond forfeited at common law, independently of the statute, we are of opinion that this demurrer cannot be supported ; therefore there must be judgment for the plaintiff.

Per Curiam. Judgment for the Plaintiff.

End of Hilary Term.

[179] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER,
AND EXCHEQUER CHAMBER, EASTER TERM, 1 GEO. IV.

MEMORANDA.

[Hilary Vacation.]

In the course of this Vacation, new patents of precedence were granted to the Counsel whose patents had expired on the Demise of the Crown, in the last Term; and they again took their seats within the Bar.

R. M. Casberd, Esq. was appointed one of His Majesty's Counsel in the Law.

Mr. Serjeant Heywood was made Chief Justice of the Great Sessions for the Counties of Carmarthen, Pembroke, and Cardigan; and

[180] Mr. Serjeant Marshall was appointed a Justice of the Great Sessions for the Counties of Chester, Flint, Denbigh, and Montgomery.

[Easter Term.]

Henry Brougham, of Lincoln's Inn, Esq. Barrister at Law, was, during this Term, appointed to the office of Attorney-General to Her Majesty; and

Thomas Denman, Esq. of Lincoln's Inn, Barrister at Law, was, at the same time, appointed Her Majesty's Solicitor-General; and they, in consequence, took seats within the Bar.

THE KING v. WINSTANLEY. Wednesday, 3d May 1820. —By the acts of Parliament passed for building, improving, and maintaining the Liverpool Docks, the corporation (who are trustees for the purpose of carrying them into execution) are authorized to levy certain rates and duties on the ships and vessels entering and going out of the Port of Liverpool: and they are empowered to borrow money not exceeding 600,000*l.* for the maintenance of the Docks, by sale (by auction), of assignments of the rates and duties (for the form of which, see the case) so imposed on the shipping, securing to the purchasers 100*l.* each, with interest, till paid:—Held, that such assignment was not a mere chattel, but a charge upon the Docks; and therefore an interest in land: and, consequently, that the auctioneer selling such assignments cannot be called upon by the Excise for the higher duty imposed by the 43 Geo. III. c. 69, schedule A., and 45 Geo. III. c. 30, on the sale thereof; because they are, as being an interest in land, liable only to the lower duty.—Trustees appointed by an act of Parliament for the purposes of the act, are liable to duty on such sales ordered by them in the execution of the trust.

This was a proceeding by *scire facias*, against the defendant, who was a licensed auctioneer, founded upon his bond (in the common form) to the Crown, for not having accounted for the duties alleged to be charged on certain sales by [181] auction of statutory securities issued by the trustees of the Liverpool Docks, under the act of the 51 Geo. III. c. 143.

The cause came on to be tried before the Lord Chief Baron, at the Sittings at Westminster, after Hilary Term, 1819, when it was agreed, that a verdict should be taken for the Crown, subject to the opinion of the Court, on a special case, which was in effect as follows:

Under various acts of Parliament, passed from time to time, previous to the 51 Geo. III., certain lands belonging to the Corporation of Liverpool were appointed, and other lands, tenements, and hereditaments, were purchased by, and vested in the said corporation, for the purpose of making, erecting, and maintaining, certain docks, basins &c. for the accommodation of shipping in the port of Liverpool, to remain to, and for such uses for ever: and the corporation were thereby authorized to levy certain rates and duties upon ships and vessels coming into and going out of the port of Liverpool. By the 51 Geo. III. (an act for the improvement of the port and town of Liverpool and amending the several acts relating to the docks &c.) after reciting the former act, it was enacted that the corporation and their successors should, for the purpose of carrying all the said acts into execution, as to all things relating to the docks, quays, basins, works, and buildings, erected or made under the said acts, or which should be

erected or made, be called and known by the name and style of the "Trustees of the Liverpool [182] Docks;" and by that name should have perpetual succession, and be incorporated, and have a common seal: that from and after the 24th day of June, there should be paid, and payable to the said trustees, and to their collector, &c. for every ship or vessel (ships in his Majesty's service excepted) coming into, or going out of the said port of Liverpool, by the master, or commander, or owner of every such ship or vessel, according to the tonnage burthen thereof, the several rates or duties of tonnage, thereafter particularly specified, according to the several and respective classes of voyages in the said act described; and before the vessel should be permitted to clear out at the Custom House of the said port or depart, that there should be payable to the trustees, upon all goods, wares &c. imported from parts beyond the seas, or brought coastwise into the said port of Liverpool, or exported to parts beyond the seas from the said port of Liverpool, by the owner or owners, consignee or consignees, of such goods, wares, merchandizes, or other commodities, certain rates and duties,—that the several collectors should not permit any vessel to be cleared outwards, unless and until the rates and duties, chargeable under the authority of the act, should be fully paid, and the owner or owners, consignee or consignees, of such goods and merchandize, should have produced to the said collector of the customs a certificate thereof: and that if any master, &c. should, by any means whatsoever, elude or evade the payment of the rates and duties thereby made payable, to forfeit, besides such rates and duties, [183] a sum of money equal to the rates or duties so eluded or evaded.

It was thereby also enacted that it should be lawful for the trustees to borrow money (not exceeding 600,000*l.*) on the credit of the rates and duties, and to assign the said rates and duties to persons advancing money, as a security for any sum or sums of money so to be borrowed, with interest, by a form of assignment, the material part of which is in the following words: "By virtue &c., we, the trustees &c., do assign unto &c. his executors, administrators, successors, or assigns, all and singular the rates and duties arising, granted, and made payable to us by virtue of the said act, or of any other act relative to the docks, in the port of Liverpool aforesaid: and also all the estate, right, title, and interest of us, of, in, and to the same, to hold unto, &c. (the lender), his executors, administrators, successors, and assigns, until" payment, with interest, after the rate &c.: and such assignment was made transferrable by indorsement in the way of memorandum. The act provided that the persons lending the money so raised, should be equally entitled to respective proportions of the rates and duties, according to the amount of their advances; and the assignments were directed to be put up at auction, the money borrowed to be laid out in building the docks.

The trustees of the docks, in pursuance of those acts of Parliament, proceeded in the erection of new docks, and in the other improvements thereby [184] authorized: and they had raised money by the means therein given, for carrying into execution the purposes of the said acts.

On the 3d December, 1816, the defendant, being a licensed auctioneer, gave due notice of holding an auction sale at Liverpool, of assignments of the rates and duties of the said docks, to the amount of 20,000*l.*, in sums not less than 100*l.* each, by the "Trustees of the Liverpool Docks," to the Collector of Excise for Liverpool, in whose collection the said sale was intended to be made: and in pursuance of such notice, afterwards, on the 6th of December, 1816, he did sell, at and by way of auction, a great many of the said assignments on behalf of the said trustees, such assignments being made by the said trustees, in the form prescribed by the act of 51 Geo. III., towards raising the sum of 600,000*l.* therein mentioned, on the credit of the rates and duties, by the said act authorized to be levied.

The defendant afterwards delivered to the collector a catalogue of the said assignments, therein particularly described, containing an account of the several prices at which the same were respectively sold, and the defendant then paid to the collector a sum, as an auction duty of 7*d.* in the 20*s.*, upon the amount of the assignments sold; at the same time protesting, that no auction duty at all was payable upon the sale by auction of the said assignments,—and so of others sold subsequently.

[185] The Collector of Excise afterwards demanded from the defendant payment of a further sum, as the residue of the duties by law due and payable by the defendant, for, and in respect of the purchase money arising and payable by virtue of the afore-

said sales, charging the duties payable on such sales, at 1s. on the 20s. of such purchase monies as aforesaid, in lieu of the sum of 7d. in the 20s., of such purchase money, paid by the said defendant under and with such protests as aforesaid; and that further rate, charge, and sum of money, the defendant refused to pay to the collector.

The questions for the opinion of the Court were: 1st. Whether any auction duty was payable by the defendant upon the sale by auction of the assignments. 2dly. Whether the defendant ought to have accounted for the auction duty on the sales, after the higher or the lower rate of duty imposed upon sales by auction.

If the Court should be of opinion, that no duty was payable upon the said sales by auction, or that the lesser duty of 7d. only in the 20s. was payable thereupon, the verdict for the Crown was to be set aside, and a verdict entered for the defendant: but if the Court should be of opinion that the higher duty of 1s. in the 20s. was payable upon the said sales by auction, the verdict for the Crown was to stand.

Walton, for the Crown, admitting that unless he could distinguish the present case, by its cir[186]-cumstances, from those of the case of *The King v. Bates* (ante, vol. iii. p. 341), the verdict obtained by the Crown could not be supported.

He submitted, on the authority of that case, that the sales by auction, of the assignments in question, were clearly liable to some duty of excise: and the only point would be, whether the auctioneer should not have paid, instead of the lower duty of 7d. in the 20s., the higher duty of 12d.

The case of *The King v. Bates*, he contended, was wholly distinguishable in every material respect from the present, which would be sufficient to take this case out of the principle of that determination. There the bonds, which were sold, secured to the purchaser the sum upon the credit of rates or assessments, imposed on persons occupying houses &c. in respect of their occupation, and the act of Parliament, authorising the issue and sale of those bonds, directed that where houses were unoccupied, one half of such rate should be charged on such premises, to be paid by the owner: and there were provisions for the assessing of public buildings, vacant spaces of ground, and dead walls, "making them" (in the words of the Lord Chief Baron) "a charge upon the premises." And his Lordship, in concluding his judgment, puts it wholly on that ground, for he says, "They (the authorities cited) appear to me entirely to govern this case, independently [187] of the construction, which, without them, possibly, might still have been put upon these clauses in the act of Parliament, which has so charged real property with the liability to this payment."

In the case before the Court, the corporation were authorized to levy rates and duties, not upon the Liverpool Docks, but on the ships and vessels coming into and going out of the Port, and on the merchandize which composed their cargo, and not in any manner on the Docks, the land on which they were erected, or the buildings &c. They were empowered to assign such rates so charged on shipping to purchasers, by an instrument executed to them, their executors, administrators, and assigns, and transferrable by mere endorsement: so that this case was not at all within the letter or principle of the determination in the case of *The King v. Bates*, and, therefore, could not be affected by the authority of that decision. In the case of *The King v. Bates*, too, there was another strong distinction which has no place amongst the circumstances of this case: the holder of the security was entitled to resort, through the medium of the trustees, to the owners of the houses &c. for the payment of the rates assessed on their property, --whereas, here, there was no such means afforded, the only method of enforcing payment of the duties being by laying a sort of embargo upon the vessel on which they were imposed, and by subjecting persons evading the payment to a certain penalty.

[188] All these same circumstances which distinguished the present case from that of *The King v. Bates*, he submitted, operated equally to distinguish it from the case upon the authority of which that decision was founded: for all the authorities cited there were cases of a charge, in some way or other, upon land.

The case of *Knapp v. Widdows* (note to *Crooke v. Farrow*, 4 Ves. 491), was on an assignment of tolls of a turnpike road. *Barber v. Barber* (2d Ves. 672), was a case of shares in the navigation of a river. In the case of *Hodg v. Hodg* (10 Ves. 315), the question arose upon assignments of bonds for the improvement of the city, and of the commissioners of the turnpike trusts; and in *Pearce v. Sparrow* (10 Ves. 41), the subject-matter was a security by assignment of the poor's rates and the county rates.

all being obviously an interest in land; and in the case of *The King v. Bates* the judgment was pronounced (ante, vol. iii. p. 359) to proceed, independently of those cases, upon the fact of the statute having expressly "charged the party, in respect of the occupation of real property."

He, therefore, insisted that, these assignments created no interest in land, and that, consequently, being a mere chattel of a personal nature, on its being sold by auction, the sale was chargeable with the higher duty of 12d. in the 20s.

[189] Hollingshed, who was to have argued the case on the part of the defendant, contended that no duty was payable in respect of the sale of these assignments, as the party selling were merely trustees under an act of Parliament: but

The Court [dispensing with further argument on the other point, respecting the rate of duty chargeable] decided, that some duty was clearly chargeable by the act on the sale. But they held, that as on the authority of *The King v. Bates*, the subject-matter of these assignments must be considered an interest in land, (assimilating them to port duties, which, they observed, would be an interest in land,) and as such securities on the rates and duties, imposed by the corporation for the erection and support of the docks, confer on the purchaser an interest in the soil, by whatever means such duties were directed to be raised, he must be taken to have acquired thereby an interest in land, within the meaning of the 43 Geo. III.

They therefore ordered the verdict which had been found to be set aside, and that there be entered a

Verdict for the defendant.

[190] *THE ATTORNEY-GENERAL v. ROSS* [AND PEARSE AND DAVIDSON]. Tuesday, 5th May 1820.—The Crown is entitled under the 45 Geo. III. c. 58, to an account of unclaimed balances remaining in the hands of army agents on money imprested to and received by them, on account of officers belonging to the several regiments &c., for which they are or may have been agents; and also a statement of their names and rank from such army agents, or their representatives; and that for any period of time during their agency, however remote: and the Attorney-General may compel them to furnish such an account by information in this Court.—Exceptions taken to an answer for not giving such account—offering only certain grounds as reasons why the defendant should not be called upon to do so—allowed.—Demurrer by a bankrupt army agent and his assignees, to an information praying that they might render such an account, over-ruled.—An army agent, although constituted by warrant of attorney by the colonel of the regiments, to which he is appointed, is not exclusively agent to the officers or regiments, but is, as it were, a mutual agent to both the Crown and the regiment.

This information was founded upon the 45th of Geo. III. c. 58*, for the better regulation of the Office of Paymaster General of his Majesty's Forces: and it was originally (January, 1816) filed against Ross only, praying a discovery, and an account of the arrears unclaimed remaining in his hands, on account of all officers belonging to the several regiments in his agency, from the 25th December, 1783, to 24th December, 1797, specifying the name and rank of each.

[191] It stated that Ross was in partnership with Ogilvie, as army agents, between the periods of the 25th of December, 1783, and the 24th of December, 1797—that during that time they, as such agents, had had imprested to their hands, and received various large sums of money from his Majesty's Government, amounting in the whole to several thousand pounds for the pay of the several corps of his Majesty's Land

Section 25.—Whereby it is enacted, that it should be lawful for the Secretary at War, and also the Paymaster General of his Majesty's Forces, whenever they should think fit to require any agent or agents to make up, in the course of any year, such account or accounts as the Secretary at War, or the Paymaster General of his Majesty's Forces, may have occasion for, and also to require any person or persons who shall have been an agent or agents, but who shall have ceased to be such, or the representatives of such agent or agents, to make up and transmit such accounts for the whole or any part of the periods during which he or they shall have been an agent or agents, and which shall not have been finally settled, as the Secretary at War or Paymaster General may have occasion for.

Forces, to which during the time aforesaid they were such agents—that some parts of such sums had been paid or accounted for to the several officers, for whom and for whose corps the defendant had received the same? but that other parts, to a considerable amount, had not been accounted for to the officers &c., for whom and for whose corps the same had been imprested to the said Ross and Ogilvie—that his Majesty was unable to ascertain what sum was in the hands of Ross, as surviving partner of the firm, without such account rendered by them as thereafter mentioned.

It then stated [as the ground of the proceeding, following the words of the act of parliament] that in the year 1813 his Majesty's Secretary at War, having occasion for an account of the arrears unclaimed remaining in the hands of Ross and Ogilvie, on account of officers belonging to the several regiments in their agency, in pursuance of the act, the Secretary at War caused a letter to be written to them, demanding an account of such arrears, and a statement of the name and rank of each of such officers.

[192] The first and principal interrogatory was, Whether, during the time Ross and Ogilvie were such agents, such money, or some and what parts thereof respectively, was not imprested to their hands for the use of the several regiments, troops, and companies, and which in particular, in his Majesty's service to which they were agents—and the bill required that Ross might set forth the particulars thereof, in the words of the exceptions (p. 196) taken to the answer.

The answer of the then defendant [Ross] admitted, that he and Ogilvie, his partner, since deceased, were agents for his Majesty's regiments &c. by virtue of powers of attorney from the colonels, for the period mentioned in the information, and that during such time there were imprested to their hands, and they had received various large sums of money from his Majesty's Paymaster General of the Forces, amounting in the whole to several thousand pounds, for the pay of the several corps to which during the time aforesaid they were such agents—but he denied that the monies so issued or imprested, to them or any part thereof were for the use of the several regiments, troops, and companies to which the defendant and Ogilvie were agents, or any of them save as aforesaid, and as thereafter mentioned. He stated that, in pursuance of the directions contained in the 23 Geo. III. c. 50, and Ogilvie did, from time to time, for the period between the 25th of December, 1783, and the 24th of December, 1797, render to his Majesty's Secretary at War, for the time being, [193] such annual accounts as were required by the said act, and, amongst other things, charge in such annual accounts the arrears due to the several officers, and strike the balances as by the said act directed, and such arrears due to the several officers were from time to time carried to the credit of such officers in their accounts with the defendant and Ogilvie, and the greater part of such annual accounts so rendered were settled by his Majesty's Secretary at War, and certificates of the amount due thereon, including the sums due for arrears, were transmitted by his Majesty's Secretary at War to the office of the Paymaster General of his Majesty's Land Forces, and thereupon warrants were issued under his Majesty's sign manual, directed to his Majesty's Paymaster General of the Forces, commanding him to pay to the colonel or commanding officer of such regiments, troops, or companies, the sum in such warrants expressed, being the adjusted balance of the accounts so settled as aforesaid, including the arrears charged as aforesaid—a copy of one of which he set forth in a schedule. The answer then stated, that such system of passing army agents' accounts, as is directed by the 23 Geo. III. was continued down to the 24th of December, 1797, and hath been since pursued in the passing of such accounts for that period as were not then finally closed; and that no claim or demand was ever made upon the defendant and Ogilvie, or either of them, to the best of defendant's knowledge and belief, or by or on the part of his Majesty's Secretary at War, until long after their [194] bankruptcy (which took place in the year 1804), for any account of unclaimed arrears in their hands—that at the time of their bankruptcy a very large sum of money, as appeared by the books of this defendant and his partner, and as the defendant believed the truth to be, was due to them as army agents from his Majesty's Government, and a very large sum was still due to their surviving assignees, to an amount more than sufficient, as defendant computed and believed, to pay all the monies which remained due to the creditors who had proved debts under the commission—that the defendant and the said assignees had made many applications to his Majesty's Secretary at War and the persons employed under him, for the purpose of having the accounts between them and the public finally proved, and the balance paid to the said assignees; and that in the correspondence which had taken

place with his Majesty's Secretary at War on the subject, it was insisted, on the part of the Secretary at War, that in the taking of the accounts between the public and the assignees, the latter were to account to his Majesty for such of the sums issued to the defendant and Ogilvie previous to their bankruptcy, for arrears for the period between the 25th of December, 1783, and 24th of December, 1797, as were not actually paid by them to the several officers for whose use the sums forming such arrears were issued: and that his Majesty's Secretary at War had accordingly required the defendant to render an account: [in the terms of the prayer of this information] whereas it was [195] contended on the part of the assignees, that under the terms of the said act of parliament, the sums received by the defendant and Ogilvie, previous to their bankruptcy, from his Majesty's Paymaster General in respect of the arrears charged in the annual accounts settled by the Secretary at War as aforesaid, were to be accounted for only to the several officers to whom such arrears were due, as money had and received by the defendant and Ogilvie to the use of such officers, and for which the estate and effects of the defendant and Ogilvie, under the commission of bankruptcy, were liable in the same degree as they are for any of the debts proved under the commission, and that many of the officers whose arrears were received by the defendant and Ogilvie had accordingly proved the amount under the said commission of bankruptcy.

The defendant finally submitted, that no person except such officers or their representatives had any right to an account of the arrears unclaimed in the hands of himself and Ogilvie at the time of their bankruptcy, and that the Secretary at War had not therefore within the true intent and meaning of the 45th of Geo. III. any occasion for such account as was now required—and that he (the defendant) was not bound and ought not to be required to set forth the names and descriptions of all the officers belonging to the regiments in the agency of the defendant and Ogilvie, between the periods mentioned in the bill, and a particular statement or account of the arrears unclaimed and remaining in their hands.

[196] To that answer of the defendant the Attorney-General filed two exceptions, first,

“For that the defendant had not set forth, to the best of his knowledge, remembrance, information, and belief, the particular sums of money received by him the said defendant and his partner Ogilvie, in the said information mentioned, of his Majesty's Government for the several regiments, troops, and companies respectively, to which he the said defendant and Ogilvie were agents.” The second was,

“For that the defendant had not, in manner aforesaid, set forth the names and descriptions of all the officers belonging to the several regiments in the agency of him the said defendant and the said Ogilvie, between the 25th of December, 1783, and the 24th of December, 1797: and a particular account or statement of the arrears unclaimed and remaining in the hands of him the said defendant and the said Ogilvie, specifying the name and rank of each officer.”

24th Jan. 1818.—Those exceptions now came on for argument, when

Dauncey, Clarke, and Mitford, supported them, submitting, that the answer was insufficient, and that the Crown was entitled to a full answer, furnishing the discovery and account which were sought by the present information.

[197] Jervis and Cullen, *contra*, contended that the defendant was not compellable to give any further answer: for that, in the answer which he had already put in, he had stated enough to satisfy the Court, that the Crown had no right to call on him for the discovery and account sought: and they submitted, that the act of parliament did not empower the Crown to demand any further disclosure than he had made. They objected, amongst other grounds, to the nature of the bill and the want of Equity in the Crown, the information not having stated any case on the part of the Crown, or shewn or suggested any interest in the subject-matter of the account sought; for all that was stated was merely the bare assertion, that the Secretary at War had occasion for such an account—that the sums of money in the hands of Ross were not due to the Crown but to the officers, for whose use they were received; and they stated that the real question was, whether the money imprested to Ross and Ogilvie not being the money of the Crown, under the circumstances disclosed by the answer, and by virtue of the existing act of parliament—the defendant was liable to be called upon to render such an account as was prayed, extending over a period of fourteen years, the last of which was nearly twenty years before the present bill was filed, and in a case too

where it was not asserted or pretended that there was a single shilling due from Ross to the Crown ; but where the fact was on the contrary, that there were many thousands due to him from the Crown ? [198] Under these circumstances the defendant having put in a short answer, had acted in conformity with the ordinary course of practice of this Court, when the liability of the party to answer is considered doubtful. The only authority which could give the Crown any right to the discovery and account prayed, they contended, must be given by this act of parliament ; and if the act had not expressly empowered the Attorney General to call for these accounts, the Court could not decree in the terms of the prayer of the information. The condition which the act annexes is, that the accounts shall not have been finally settled. The object of the information is not to see what is due from Ross to Government, but an account of every farthing in their hands unaccounted for to the several officers—a most distinct admission that the money is due to the officers, and not to Government ; so that there is not only no ground whatever for asking for the discovery claimed by the Attorney-General, but the information itself which requires it, states enough to satisfy the Court that the Crown has no right to it. They relied much on the defendant having been constituted agent to his Majesty's regiments by virtue of powers of attorney from the colonels of regiments, or the commanders of corps, and all sums due to them being regularly carried to their account ; and they urged that he was compellable therefore to account to those officers only, and to no one else.

[199] [The defendant's counsel being about to make statements regarding the merits of the defendant's case, the Court suggested, that in arguing exceptions, the question could only be, whether the plaintiff was entitled to the answer sought ; and if he were, whether the answer was in fact given, or was sufficient, and that the truth of the answer, or the merits on either side, were wholly irrelevant in this stage of the proceedings.]

They then insisted that, on what appeared from the pleadings now before the Court, these exceptions must be over-ruled.

Upon that occasion, after the question had been so very fully argued, the Court delivered the following judgment *seriatim* :

24th Jan. 1818. —RICHARDS, Lord Chief Baron. —If I had felt any difficulty in this case, I should have asked permission of the Court to have been allowed an opportunity of perusing the information and answer with more care than I can apply to them in Court ; but I have read them over, and I have not the least doubt upon the subject. Indeed, in my humble opinion, I hardly ever saw a more clear case.

This is an information filed by the Attorney-General against a person who was some years ago an army agent. It appears by the answer, that a contest existed between him and the Government upon the subject of his accounts ; and the officer of [200] the Crown states, that money had been imprested to the defendant as an army agent, which he has not applied, and therefore calls upon him by this information for an account. He insists by his answer, that the Crown is not entitled to such account, and states, as the cause of objection, that as the money was paid to him for the benefit of the officers of the different regiments, the Crown has nothing to do with the money so paid ; and that the agent has a right to hold it for his own use in case the officers should never call for payment. Under these circumstances the Crown seeks a discovery of the persons to whom arrears are now due and unclaimed. The information confines itself to that point. It does not call upon him to set forth any account of matters connected with any settled account, but for a description of those officers who were entitled to that money, but who have never received or claimed it, and perhaps never will. The counsel for the Crown applied an argument founded on the case of the Bank, and, with great propriety, for when money is paid into the Bank, or lodged there in any manner according to law, there is no question but that corporation becomes a debtor to the person so lodging it, for that amount and the dividends accruing thereon ; but if in the course of time nobody shall appear to claim it, it is supposed and assumed that nobody exists who is likely ever to demand it, and, beyond all doubt, but for the act of the legislature, nobody would have any right to take that money from the Bank.

[201] In this case, it seems to me that the information is very properly framed, being merely for a discovery in this Court, in order to aid the discussion of the subject in another place. We need not examine very minutely into the law of the case, and perhaps it may be better for us to say as little as we can upon the merits of the subject

in dispute between the parties; but it is our duty to do every thing to elucidate the question before the Court. His Lordship stated that part of the information in the first paragraph of the statement of the case, p. 191. The Attorney-General, therefore, insists that the Crown is entitled to have an account of that money, as a step to ascertain whether it belongs to the agent or to the Crown, and that the agent has no sort of title to it. With respect to the question itself, I shall content myself with saying very little upon it, because I am decidedly of opinion, that what was said by the counsel for the Crown in the supposed case of a person who may be dead, and has left no representative, and who may never be represented, is unanswerable. It was said, that that is not part of the bill. It is, however, a fair part of the argument. Supposing that there were no person to claim it, then the question would be, whether it shall remain in the hands of Ross and Ogilvie, or return to the Crown? It was put by the counsel for the Crown thus also: Suppose this money had been paid in a certain time, on account of persons who had died in the East and West Indies, that money would of course belong to the persons who are their representatives, as to that [202] part of it which had accrued due before the party died: but there might have been payments made after the death of the party to which he had no right: and are Ross and Ogilvie to receive that money for their own use, or does it belong to the Crown as money paid to their agent? Although that fact is not stated, it is a very fair argument to use. What is sought by the information is, that the party may set forth "the names and descriptions of all the officers belonging to the several regiments in the agency of the said A. Ross and J. Ogilvie, between the two periods of time stated: and also a particular statement or account of the money unclaimed and remaining in the hands of the said A. Ross and J. Ogilvie, specifying the names and amount of each officer"—that is, of the unclaimed arrears with which they have been dealing. Now, it appears from the act of Parliament, that the agent is connected with Government, and that he is accountable to Government, is part of the law: so that he is not a stranger but actually in privy with the persons who file this information on the part of the public, for the act of Parliament treats them as accountable to Government.

[His Lordship read the section of the act in the note, ante, p. 190.]

The act does not require that the "occasion" shall be stated: but it is in fact stated in this information, which says, that it is required because the agents have money of the Crown in their hands, which they are not entitled to keep.

[203] Now, can there be such an account given so as to answer the purpose in any view of the inquiry, without stating who the persons are, and answering exactly in the words of this inquiry as set forth in the exception? Then, if so, the act of Parliament permits it to be demanded for any period of time. It was urged, that as the exception is general, and the defendant had stated in his answer, that they had settled some accounts, by that statement, however, they admit necessarily, that there are some unsettled. Now, I do not know, nor does the Court know, what accounts are settled or what are not; but the interrogatory applies to the question as put in the terms of the act of Parliament, asking a discovery of such as are not settled: and the defendant says he has given by his answer all the discovery the Crown have a right to pray.

I am clearly of opinion, that we must allow the exception,—we cannot sever it in any way,—we cannot declare the Crown only entitled to so much or so much. The defendant must answer it, covering himself as he can with the answer which he may be advised to put in; but he must put in an answer according to the interrogatory, protecting himself as best he may under the provisions of the act of Parliament.

I avoid entering into the discussion here (as the counsel have not thought it necessary), as to the effect of so much of the answer as has been given, and whether it has not made it necessary for the [204] defendant to answer further; but I am desirous that it may not be understood that I consider the defendant has protected himself by the answer which he has put in, from answering further and more fully.

In the opinion which I am now giving, I proceed upon this, that they have a right under this act of Parliament to make the inquiry which they make, and here the defendant admits necessarily, that he is in possession of money (that is, he does not deny it) which he has no right to keep, if the Crown is right upon the law of the case. We are not now however to decide upon the law, but merely to give the party seeking the disclosure all the facility which is requisite to discuss the intended question before the right tribunal: yet I may say it would be difficult to persuade me, if I give a sum

of money to one individual to pay over to another, and that other person does not demand it, that it is by law to be considered as a gift from me to the person to whom I handed it. Under these circumstances, I am clearly of opinion that this information is not answered, and that it ought to be answered.

GRAHAM, Baron. Notwithstanding the respect which is due to the arguments urged by the counsel for the defendant, I have no sort of difficulty in delivering the opinion which I have been enabled to form upon the subject, and which is perfectly in conformity with that of the Lord [205] Chief Baron, and I shall not take up much time in explaining the grounds of that opinion :

This is an information which struck me at first as not pointing out specifically the sort of proceeding in law or in equity which it was intended to be subservient and ancillary to : but it seems to me to be quite a sufficient answer, that the party called upon to answer has not so considered it, or treated it as defective in that respect at all, or instead of answering in this indefinite manner, the better course would have been to have demurred to this information : although if a demurrer had been put in, I think I should have satisfied myself upon the present occasion, that it ought to have been over-ruled, because it appears to me that the obvious purpose of the requisition is to ascertain whether the public have a right to recover money passed out of the Treasury to an agent, and not accounted for : and, therefore, I think the Court is at liberty to say that a discovery like this, subservient to such an obvious purpose as this is, is a proper ground for an information at the suit of the Crown for a discovery, as applicable to such purpose.

[His Lordship then entered into a very minute investigation of the objects and principles of the various acts of Parliament connected with the subject, observing, that the result was, that they had given the Crown the power to require the amount sought by the information ; delivering his opinion much to the same effect as that of the Lord Chief Baron.]

[206] I shall not give a decided opinion on the subject of the ultimate object of the Crown, but it is quite enough for the present purpose, if there be any doubt on the subject, that Government have a right to go to the discussion of it with all the advantages they ought to have. I have great difficulty in supposing that any man can entertain a doubt that the King has a right to every portion of this money so imprested to the hands of an agent, which has not been brought home. What is the case of those imprests, where Government advances on the character of the agent, as they do, immense sums of money to army agents, on the score of debtor and creditor ? The Crown is creditor for every pound delivered into the hands of that army agent, —the Government of this country has a right to know, and the King, by his Attorney-General has a right to enquire, how they have employed every shilling of this money, and as to what is said upon this occasion, that some of these accounts are settled, and some not, the Crown has a right to be shewn the truth and to be satisfied of that. If they say, we have paid to a particular Colonel a stated sum, —Government may say they have not received it, —and which of the accounts are to be taken as correct ? I will point out another instance, —you state yourself to have paid money to officers who have died abroad, but whose representatives have not received a single penny of that money, and are at this moment clamorous upon Government for the payment of that which they have never received —has not the Crown a right to inquire of the agents [207] into that fact ? Can it be said, that such vague accounts are conclusive, and that the Crown has not a right to make further inquiry into them ? I am sorry to have felt it necessary to have said so much upon the subject : for it appears to me so clear a case, that I rather wonder that ingenuity could have furnished any doubt.

WOOD, Baron. This case has been so fully discussed, it is scarcely necessary for me to say any thing, but that I concur in the opinion already given. It is not necessary for us to decide whether this money belongs to the agent or to Government, that is not now the question before us ; that question is not yet ripe for discussion, and probably, some application to Parliament may be necessary and in contemplation. I throw all that out of the question, for I am of opinion, that upon the authority of this act, the Attorney General, on the part of the Crown, has a right to the discovery claimed by this information, and to have an account of the arrears of money imprested to the hands of this army agent, to be paid to those officers, and to know which of those officers have been paid : and that is the object which this information seeks. Now, one answer given to that is, that you are not entitled to that discovery, because

those persons to whom the money was imprested, are not the agents of Government, but the agents of the officers: and, therefore, they are accountable only to the officers, and not to Government. I consider them, however, as being in the nature of mixed agents of both. But call [208] them what we may, it is clear that they are agents within this act of Parliament; and it is not indeed contended that they are not. Then the sole question is, does this act require such agents to give the account now sought from the defendant by this information? We have been referred to the 21st section (and it is necessary to look at the 21st in order to understand the 25th). By that section, the agents are directed and required to make up annual accounts of every regiment, it is true, but still they are required to make up the accounts which Government may have occasion for in the course of the year, to see how the account stands: they may be called upon by Parliament to give an account of the state of the army and navy, and this is the occasion, principally, to which this statute relates; and, therefore, it says, although you are directed to make out annual accounts, yet if the Secretary at War shall think fit to require of you, in the course of any year, to make up such account as he shall have occasion for, you shall do it,—that applies to the acting agent for the time being. Then there occurs, afterwards, a subsequent provision with respect to those who may have ceased to be agents; “and where any such agent shall have ceased to be such, the representatives of such agent or agents shall, if the Secretary at War requires them, make up and transmit such account or accounts for the whole or any part of the periods during which he or they shall have been an agent or agents:” and, therefore, if he had not been agent for thirty years, most undoubtedly, he might still be called upon to furnish [209] such accounts as have not been finally settled. Now, it appears upon these pleadings, that part of the accounts had not been finally settled: for they say that some are, and therefore we may take it for granted that some are not,—and this becomes, consequently, a case in which the Secretary at War, in respect of such as have not been finally settled, has an occasion and a right to call upon the agent to give an account of them. Then, what account is he to give but an account of the money unclaimed in his hands, and to whom it is due? All this is necessary to be known, and without that he gives nothing by his answer to this information, the object of which is to have an account of all that is unclaimed, probably with a view to some parliamentary application. I do not know what the object is; but whether Government have an immediate interest in it or not, or whatever the object be, the Secretary at War has a right to call for the accounts sought. We are not to judge of the occasion: he is the sole judge of that, and he has called for them. I am of opinion they are such as he had a right to call for, and that they ought to be furnished.

GARROW, Baron. If the Lord Chief Baron, or either of my Brothers, had entertained a doubt upon this subject, I should not have interfered at all. I am quite aware that if I went into the subject, I should not strengthen the argument: but as the Court is full, it seems to me not inconvenient—as the case may be an authority on some future occasion, lest it should be supposed I [210] entertained a doubt—to say I entirely concur in the opinion delivered by the Lord Chief Baron, and I think the case an extremely clear one.

The Court, therefore, pronounced the
Exceptions allowed.

The defendant Ross then put in an answer, in which he stated in substance, that he could not state or set forth the matters enquired of by the information, because the now other defendants, the assignees of himself and partner under their commission, were possessed of all the books kept by them, and that they had refused him access to them.

The information was thereupon amended, making the assignees parties defendant, and adding all necessary statements, charges, &c., and requiring the assignees to produce books, papers, and writings: to that amended information the assignees demurred.

5th May.—The demurrer now came on to be argued, and the same topics were pressed on the Court, in support of the demurrer, as had been urged against the exceptions: and on the other hand, the judgment of the Court, on over-ruling the exceptions, was wholly relied on in support of the amended information.

[211] Jervis, Pepys, and Richards, argued in support of the demurrer: and

Roupell for the Crown, who relied principally on the judgment delivered on the former occasion—when

The Court delivered judgment immediately:—overruling the demurrer, for the same reasons as they had already given for allowing the exceptions. They said, that they had upon that occasion decided entirely on the merits of the case: and the only difference in the present case was, that the discovery was sought from assignees of bankrupts; but, they held, that whatever discovery might have been required from the bankrupts, might also be demanded from the assignees, who, by voluntarily taking the means of discovery from the bankrupt, as they were entitled to do, whereby they had disabled him from rendering the account, and had enabled themselves to do it, were compellable to make the discovery by the terms of the act of Parliament: and were it not so, the act would be rendered nugatory by the facility of evasion which might be afforded by concerted commissions.

Per Curiam. Demurrer over-ruled.

[212] ANDREWS, Assignee of Pain, an Insolvent Debtor, *v.* SEALY. Saturday, 6th May 1820.—A plaintiff suing as assignee of an insolvent debtor, is not by analogy to the case of executors and administrators within the exemption from the 23 Hen. VIII. c. 15; but if non suited, must pay the defendant's costs. Nor will the Court suspend the payment of costs on an affidavit that the plaintiff has not received sufficient assets, to be paid *quando acciderint*.

The plaintiff having been nonsuited on the trial of this action of assumpsit,

Merewether moved that the Master might be restrained from taxing the costs of the nonsuit, on the ground, that the plaintiff having sued in this instance in a representative character merely, was within the implied exemption from the operation of the statute of the 23 Hen. VIII. c. 15, which it had constantly been held protected administrators and executors suing in their representative character from the costs, payable to the defendant by that statute—but

The Court, saying that neither the assignee of an insolvent, nor the assignees of a bankrupt, had ever been considered within the exemption—refused the motion.

Application was then made, on an affidavit stating that the plaintiff had no assets—that the payment of the costs might be suspended until assets should be received by the assignee, to be paid *quando acciderint*: but that the Court also

Refused.

[213] ANDREWS, Assignee of Pain, an Insolvent Debtor, *v.* BOND. Tuesday, 9th May 1820.—Effect of particulars of notice of set off.—In an action by an assignee of an insolvent, for goods sold and delivered by the insolvent, the defendant relied on a defence of set off; and in the notice thereof delivered by him, he set forth a composition deed of assignment by a former creditor of the defendant to the insolvent, in which there was a covenant by the latter, guaranteeing to the defendant the payment of a dividend agreed to be paid on that occasion: the notice also stated as other grounds of set off, money had and received, and an account stated; but in the particular of the set off, the defendant stated the subject matter to be a sum of 34*l.*, “the amount of the two several dividends of 5*s.* in the pound upon a debt of 68*l.*, due from Simon Pain to the defendant, which said dividends are directed to be paid by the said T. L. Pain, as in the said notice of set off particularly mentioned:”—Held, that the particulars of the set off confined the defendant to proof of the demand under the covenant in the deed of assignment, as the sole ground of his defence, and precluded him from giving evidence of satisfaction of the demand of Pain, either by money had and received, or an account stated, according to the terms of the notice of set off, or by any other means. A nonsuit directed, on the ground, that the notice of set off gave sufficient intimation of the sum intended to be set off, and that if there had been no notice of set off, there would have been a good defence by

proof of the demand being satisfied, set aside.—*Quære*, Whether notice of set-off necessary in such a case?

[For further proceedings see p. 538, post.]

This was an action of assumpsit, for goods sold and delivered by Pain the insolvent to the defendant. Plea, Non-assumpsit, with notice of set-off^{*1}. It came on to be tried before Mr. Justice [214] Burrough, at the last Lent Assizes for the county of Somerset, who nonsuited the plaintiff for the reasons stated in his report.

Pell, Serjeant, obtained a rule to shew cause why that nonsuit should not be set aside, on the ground, that the defendant had been permitted at the trial to go into evidence to establish a case not within the terms of his notice of set-off, and the particulars of that notice, as delivered by him.

The learned Judge now reported that all the preliminary matters necessary to enable the plaintiff to sue as assignee having been admitted or proved, it was then proved that Pain had sold three quantities of wheat to the defendant to the amount of 94l.; and it was also proved, that the defendant had by payments reduced Pain's demand to 34l.

[215] The defendant then produced the deed of assignment [mentioned in the notice of set-off]. There was a proviso in that deed, that if so many of the creditors, whose debts in the whole amounted to 200l., should not have signed and sealed the indenture before the 1st of August, the indenture and all the covenants were to be void.

The defendant then gave evidence [in substance], that he had not paid the remaining balance of 34l., due on the account of the wheat sold, because that sum was then due to him from Pain under his covenant in the deed of assignment^{*2}; and that it had been so considered by him and the solicitor concerned for the parties—that when the next dividend was afterwards made, at which the defendant was present, he received nothing, for that reason; and also that, in point of fact, the wheat sold was part of the assigned property and effects of the first insolvent.

Upon that evidence the learned Judge reported, that he had considered that the plaintiff, as assignee of the insolvent, could be in no better situation than the insolvent himself; and that as Pain (the assignee) had acted under the deed of composition, by receiving the produce of the effects of the assignor, and dividing it amongst his

^{*1} The material parts of the notice of set-off were these—

“Take notice that the above-named defendant, on the trial of this cause, will give in evidence, and insist that the said Thomas Love [Pain] before and at the time of his discharge as such insolvent as aforesaid, was indebted to the said defendant in a sum of money, to wit, the sum of 250l. upon and by virtue of a certain indenture” [of assignment to T. L. Pain of the property of Simon Pain, setting it out, viz. the parties, the subject-matter, and the trust to pay 10s. in the pound by two instalments, the first to be paid in October, and the second in December, 1815, to the creditors of Simon Pain, who should sign the deed]. “And the said defendant further saith, that the said T. L. Pain did covenant with the other parties that the said two dividends respectively should be in all events paid to the creditors of Simon Pain,” parties thereto—and that he (defendant) was, at the time (&c.), creditor to the amount of 500l., and a party subscribing them a deed, and that the two dividends amounted to 250l.

There was a further set-off stated, for money (200l.) had and received, and upon an account stated.

The defendant had also furnished the following particulars of set-off—

In the Exchequer, between (&c.).

The particulars of the defendant's set-off are as follows, that is to say, the sum of 34l., being the amount of two several dividends of 5s. in the pound upon a debt of 68l., due from Simon Pain to the said defendant, and which said dividends are directed to be paid by the said T. L. Pain, as in the said notice of set-off particularly mentioned.—Dated &c.

Signed by the defendant's clerk in Court.

^{*2} He had been assignee of the effects of another insolvent person, and had covenanted by the deed in question to pay the instalments. See the note, ante, p. 213.

creditors: and had sold part of the effects to the [216] defendant, and assented to the application of the dividend in his hands to pay the defendant's debt to the satisfaction of the demand for 34l. he could not have recovered that sum, he thought the plaintiff could not recover it.

His Lordship added, that there was no suggestion that Simon Pain had ever insisted on the deed being void: and that after his Lordship had stated that there ought to be a nonsuit, it was objected that the notice of set-off was not adapted to the defendant's case, because it gave notice of a demand by virtue of the covenant in the deed of composition; but that it had appeared to him that the notice gave very sufficient information of the sum intended to be set off: and that even if there had been no notice of set off, there would have been a good defence on the general issue, as it had appeared that the demand was satisfied.

Gaselee and Moore, A., now shewed cause.—They submitted that this was a case in which notice of set-off was not necessary, and that if it were, that which had been given by the defendant was amply sufficient. They urged that a defendant was not so strictly bound by the terms of the particulars of his notice of set off as to be precluded where his notice so fully apprized the plaintiff of the ground of his defence, from proving satisfaction, for that might be given in evidence under the general issue in *assumpsit*—or a notice of set-off might be used by a plain-[217] tiff to entrap a defendant in mere technicality. In this case the defence was founded on satisfaction: the defendant's counter demand rested on the deed; and that had been previously agreed, and was understood to be considered by both parties as the only question between them. The plaintiff meant to rely on that deed being void, because the proviso had not been effected, creditors to the amount of 200l. not having executed the deed before August. In answer to that it was shewn, that the plaintiff had afterwards continued to act on the deed by receiving the produce of Simon Pain's effects and making dividends: and if this deed should be held to be void under such circumstances, all who have received any thing from the first insolvent's estate will be liable to be called on to refund, which after the conduct of the assignee ought not to be endured. The deed therefore being only voidable at the utmost, and not void—the assignee having acted upon it after August—and the wheat being really the property of the assignor, they contended this nonsuit was rightly directed.

The particulars of the notice of set-off, they submitted, related merely to the amount of the defendant's real demand, referring to the deed only collaterally: and that it could not have the effect of depriving the defendant of making a case on an account stated under the general issue pleaded by him, and which was also mentioned in the notice as one of the grounds of set off; and therefore there could be no surprise.

[218] Pell, Serjeant, and Merewether, in support of the rule, contended that the nonsuit could not be supported: for even if the defendant had merits on the case set up by him, the notice of set-off and particulars had precluded him; for it had reduced the question between the parties to the narrow point of the validity of the composition deed, and that was the object of permitting a set off in principle and practice, in order to protect the parties from the expence of superfluous proof. If then a party were allowed to shift his ground at the trial, or give evidence of any thing as a ground of set off, not embraced by the particulars of his notice, otherwise it would be calculated to mislead the plaintiff, as was the result of it in the present case. Here the effect of the deed was the only ostensible question. Had the particulars set out such a ground as an account stated, the plaintiff could have met that defence; but in consequence of these particulars he had gone to the assizes, prepared only to prove, that the deed had become void: and therefore he was nonsuited on the strength of the defendant's new case, which had come upon him by surprise.

Under these circumstances therefore, they submitted that the nonsuit ought to be set aside.

The Court (giving their opinion severally) determined that a notice of set off having been given in this case, when particulars of the set off were afterwards delivered by the defendant, he must be considered as having confined himself to [219] the proof of the subject matter comprised in the particulars. By those it appeared quite clearly that the defendant meant to rely on the demand raised by virtue of Pain's covenant in the composition deed; and if on the trial it should turn out that that covenant was void, the defence of set off must have failed. That deed then having been stated in effect by the particulars of the notice to be the foundation of the defence intended

to be set up, it became the only matter to be discussed: yet another ground of defence was set up at the trial which ought not to have been permitted. They therefore decided that there ought to be a new trial; and accordingly made the rule, which had been obtained for setting aside the nonsuit, absolute.

Per curiam. Rule absolute.

[220] THE ATTORNEY-GENERAL v. GOODMAN. Wednesday, 10th May 1820.—Where it is shewn to the satisfaction of the Court on a statement of facts by affidavit, that in the reduced list of Special Jurymen, there are persons non-resident or exempt, or that from other causes it is clear that there are less than twenty-four effective Jurymen remaining on the panel, and that it is probable that a sufficient number cannot be had to attend at the trial of a pending information, they will, on motion, order a new Jury to be impanelled.

Walton moved, in the early part of the Term, that a new Jury might be impanelled to try this cause in Middlesex. It was an information for the recovery of a penalty of treble the value of foreign plate glass, which had come to the hands of the defendant without payment of the duties.

The affidavit, which was made by an officer of the Customs, stated that the deponent examined the panel of the Jury named in this cause, in the Exchequer Office, and made inquiries at their stated residences as to the probability of their attending on the trial at the Sittings after Term, when he found that six of the Jury did not reside at the places named in the panel as their residence, and that none of those could be found except one who resided at Bristol—that another (making seven) was in Scotland, in consequence of ill health, and his return uncertain—that an eighth was ill, and his attendance had been dispensed with, in consequence, by one of the Barons—that a ninth claimed to be exempt, being Accountant-General of the Court of Chancery—that two others had stated that they should not be in London at the time of the trial—and two, that their being in town then was uncertain—and that two more did not reside at the places mentioned in the panel, but in the country.

[221] It was stated that notice of trial had been given in Hilary Term; and that upon the usual motion an order had been obtained for trying the issue by Special Jury, when forty-eight were named, and reduced in the usual manner to twenty-four. When the cause came on, only three Special Jurymen attended; and the Attorney-General, in consideration of the great importance of the case, declining to pray a tales, the cause stood over.

Under these circumstances the Court granted a rule to shew cause why a new Jury should not be named.

Hill now shewed cause, insisting that the present application could not be granted consistently with the rules and principles of law; and that there was also express authority against it in the case of *The King v. Perry* (5 T. R. 453), founded on that of *The King v. Franklin*, in which it was decided, that if after a Special Jury has been struck, the cause goes off for default of Jurors, no new Jury can be struck, but the cause must be tried by the Jury first appointed.

He then took the following objections to the affidavit on which the rule had been obtained—that it was not shewn that the residences of the six Jurors who, it was stated, could not be found, [222] were not correctly given, when the Jury were struck—and that it did not rest on any imperfection in the venire itself, or in the return. He submitted also, that the principal facts stated in the affidavit would be good cause for challenge, and if a party were entitled to set aside a Jury-list on such grounds as non-residence, he would be entitled to do so on any other ground, such as that there was reason to believe that the Jury were not impartial from circumstances which the party had obtained knowledge of by enquiry, (which was itself, if not a contempt, a dangerous practice to encourage:)—that many of the causes were obviously insufficient for calling on the Court to require other gentlemen to attend as Jurors—and that at all events the only proper course left to the Crown in case of an insufficient number appearing on the trial was to pray a tales in the usual manner.

Walton, in support of the rule, distinguished the case of *The King v. Perry*, from the present, because the Jurors there were all residents, liable to be summoned, and to be fined for non-attendance: and there no affidavit was made, from which it was shewn, that a sufficient number could not be found, or could not attend. And, he

urged that it was admitted, in that case, that a subject might have a new venire de novo. Such is the constant practice in cases of new trials, where an alias distringas is considered quite sufficient to supersede the necessity of again going through the whole process.

[223] He also urged that the return of non-residents was a sufficient irregularity to warrant the naming a new Jury.

THE LORD CHIEF BARON.—The law, without doubt, is that a list of twenty-four Jurymen shall be returned, in order to secure the attendance of twelve. In this particular case, there are five named, whose residence cannot be found, and there is another who is shewn to reside at a considerable distance. One gentleman is named who, as we all well know, could not attend, by reason of the public duty which he has to perform. The number is thereby reduced to seventeen, and it was shewn that the attendance of several others was very improbable. It is quite certain that there are only seventeen Jurymen left on this list, instead of twenty-four, and that is sufficient to make it the duty of the Court to interpose in order to prevent this cause going down to trial under such circumstances as might defeat the purposes of justice. I have therefore no doubt at all, that on the facts disclosed to us, a new venire ought to go.

The rest of the Court concurred.

Per Curiam. Rule absolute.

End of Easter Term.

[225] CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, TRINITY TERM, 1 GEO. IV. AND SITTINGS AFTER.

IN THE EXCHEQUER CHAMBER. [ERROR FROM THE KING'S BENCH.]

HOME v. LORD F. C. BENTINCK. Saturday, 17th June 1820. Evidence. In an action by one military officer (for libel) against another,—who, as President of a Court of Inquiry composed of military officers, held under the directions of the Commander in Chief of the Forces, for the purpose of investigating the doubtful conduct of the Plaintiff, and to determine whether it were a fit subject for a Court Martial—delivered in person to the Commander in Chief, a transcript of the minutes of the proceedings, evidence, and judgment of the Court, in the form of an official report containing the alleged libellous matter; the Chief Justice of the King's Bench refused to permit the report, or a copy of it obtained from the office of the Commander in Chief, the regular place of deposit for such documents, to be given in evidence on the part of the Plaintiff: Held, by the Court of Error, on argument of a bill of exceptions tendered against the exclusion of the evidence offered, that such evidence was rightly excluded; because the interests of the State require that such documents should be kept inviolably secret, and that their disclosure, by production as evidence in Courts of Law, should not be compellable by a party, or allowable by the Judge—not on any consideration merely affecting the rights of the parties, but because it is his duty judicially to exclude, as guardian of the public good, all such matters as might tend to injure the general welfare—lest political secrets might be thereby betrayed to the injury of the State. Semble, Military Courts of Inquiry, constituted and held as in this case, are not illegal, nor contrary to the provisions of the Mutiny Act.

[S. C. 2 Br. & B. 130; 4 Moore, C. P. 563. Applied, *M'Eleenay v. Concallan*, 1864, 17 Ir. C. L. R. 55; *Darkeins v. Rokley*, 1873, L. R. 8 Q. B. 268, affirmed 1875, L. R. 7 H. L. 744. Discussed, *Hennessey v. Wright* (No. 1), 1888, 21 Q. B. D. 513. *Chatterton v. Secretary of State for India*, [1895] 2 Q. B. 192.]

This writ of error was brought on a judgment given for the defendant in an action against him for a libel in the publication of a document.

[226] On the trial, before Abbott, Lord Chief Justice, at the Sittings before Michaelmas 1819, at Guildhall, the counsel for the Plaintiff tendered an exception to the learned Judge's exclusion of certain evidence offered on the part of the Plaintiff

in support of his case. A bill of exceptions (having been sealed by the learned Judge) was now brought into the Court of Error, setting out the whole record, and the subject matter of the evidence which his Lordship would not permit to be read.

In the first count of the declaration it was alleged, that the Plaintiff being a lieutenant-colonel in the army, and having a commission of captain &c. &c. the defendant published a libel of and respecting said Plaintiff. The last and most material count stated, that the Defendant had been appointed, with six other persons, by His Royal Highness the Duke of York, Commander in Chief &c. to enquire into the conduct of the Plaintiff (in respect of certain charges imputed to him in matters relating to a mining adventure in which he had been engaged, supposed to be derogatory to him as a military officer) and that the Defendant was appointed to preside at the deliberations of the said persons, and to report to His Royal Highness the opinion of the said persons, touching &c.; [the Plaintiff's conduct in the mining adventure,] and that, although it was the duty of the said Defendant to report truly the opinions of the said persons, yet the Defendant well knowing, &c. but wrongfully and unjustly intending to injure [227] the said Plaintiff in that behalf, and to deprive him of the countenance and good opinion of his said Royal Highness, Frederick, Duke of York, did afterwards, to wit, &c. falsely, deceitfully, and injuriously, publish, suggest and represent to his said Royal Highness, that the said persons so appointed as aforesaid, had unanimously agreed in certain opinions there following, of and concerning the Plaintiff, as such officer as aforesaid. [Then followed the statement in the report of the matters complained of, on which this action for the alleged libel was founded: but upon that no part of the present question depended.] The declaration concluded by denying that the said persons had unanimously agreed in the said opinion: and after the usual averment of general injury, averred that, by reason thereof, His Royal Highness George &c. Regent &c. acting &c. did deprive the Plaintiff of his rank of lieutenant colonel in the service of His Majesty, and of his commission of captain in the 3d foot guards, and the profits, &c. —Plea, the general issue.

In support of the plaintiff's case, Sir Henry Torrens was called as a witness and to produce certain minutes which were stated to contain the subject-matter of the alleged libel. On his examination, he stated that he was military secretary of His Royal Highness the Duke of York: and, after having proved the military appointments which the Plaintiff had enjoyed in the service of the King, he stated, in substance, that [228] he, as such military secretary, was in possession of the minutes of a Court of Inquiry, held by the direction of the Commander in Chief, of which the Defendant was President—that the Court of Inquiry consisted of several other military officers as well as the Defendant, and that the enquiry was directed by the Commander in Chief to be made by such Court upon the conduct of the said Plaintiff—that the minutes so in possession of Sir Henry Torrens (the witness), were the proceedings, evidence and judgment of the said Court of Inquiry, and were delivered by the Defendant as President of the said Court, personally, to the Commander in Chief, as the report of the said Court upon that inquiry—and that those minutes were deposited in the office of the Commander in Chief, and the same, by being so deposited, became and were under the care, and in the custody of the witness, as military secretary.

[The counsel for the Plaintiff then offered in evidence first the original report of the Court of Inquiry, and also a transcript of those minutes which had been obtained from the office of the Commander in Chief.]

The Bill of exceptions having stated thus much, then set forth that the Counsel for the Defendant insisted that the said minutes could not be admitted and allowed to be read in evidence, and that the counsel on the part of the Plaintiff insisted that they ought—whereupon the Chief Justice then and there de-[229]-clared and delivered his opinion that the minutes ought not to be read in evidence: and thereupon the Plaintiff's Counsel offered and tendered a copy of the said minutes as evidence delivered from the office of His Royal Highness the Commander in Chief, which was also not allowed to be read—that afterwards at the trial, the Jury, under the directions of the said Chief Justice, found a verdict for the Defendant: whereupon the Counsel for the Plaintiff proposed the aforesaid exception: and that was now the material error assigned.

Evans, Joshua, for the Plaintiff, submitted, in support of the exception, that the evidence ought to have been admitted: for that otherwise, however clearly libellous

and actionable the matter of the report, as set out in the declaration, might be, the Court, by rejecting the evidence of the minutes of the proceedings of the Court of Inquiry forming their report, which had been tendered in evidence, would, by thus excluding the only proof which could be given in support of a case of this sort, altogether shut out the injured party from any remedy which he might otherwise have obtained by having recourse to law.

[Having cited a great number of cases to shew that such publications were, in themselves, libellous, and in their consequences actionable he submitted, that the statement in question was not within any class of privileged publications, or of conscientious statements made without malice, or of confidential communications.]

[230] First, he insisted, that this was not a confidential communication. In all cases of confidential communication, he urged, it has been held to be necessary that the party enquiring should have some interest in putting the question, and that the person enquired of should communicate only matters within his own knowledge: and that he should disclose it to the party enquiring alone, taking care, on his peril, to avoid stating any irrelevant matter tending to defamation: whereas in this case the enquiry was not made by persons interested in the subject matter: and the answer made by the report was not confined to matters within the communicator's knowledge, but was the result of a gratuitous enquiry, in itself defamatory, and was composed of matter of irrelevant censure and reproach, relating to conduct in no respect connected with the Plaintiff's military duties: and it was moreover so far from being secret, and confidential, that it was the result of a public course and mode of enquiry instituted by several unauthorised persons combining together for the purpose, and proceeded in and completed by information collected from any persons who might be disposed to contribute to it: and the Defendant was sued as an individual who had ventured to publish the libellous result.

He then proceeded to shew that the report could derive no sanction nor protection of privilege as a document purporting to be the judgment of a Court: for that there was no such [231] Court known to the law, as that of a Court of Inquiry into the conduct of individual members of any class of the King's subjects in this country: and that therefore anything libellous, emanating from persons professing to compose such a Court, in which neither members nor witnesses are sworn, would be rather aggravated than extenuated by such a pretence. He urged, that no Subject of any rank or station can have power to authorise the holding of any such Court, nor could even the Sovereign himself, by commission or otherwise, legally erect a tribunal of persons who might be entitled to call themselves a Court of Inquiry, and to proceed thereupon to investigate the private conduct of any individual Subject of the Realm: and that therefore calumnies collected and published under any such pretence, would be libellous and actionable, and the documents so published could not be privileged from production in Courts of Law as evidence in actions brought for the publishing them.

In Symes's Military Dictionary (verbum "Court,") this custom of holding such Courts is complained of, as having a tendency to prejudice the legal Court Martial: and they are there said not to be authorised by the articles of war.

If then, this species of Court be not authorised by the common law, it cannot be erected by the King by charter or commission, or by any [232] other authority than that of Parliament. It is so stated in Comyns's Digest (tit. Prerogative, D. 28), and in Rot. Parl. 15 Edw. 3 (2 Roll. Abr. 164, pl. 14), commissions of enquiry were prayed to be repealed, because it was not lawful to grant them without assent of Parliament. By the 42 Edw. 2, ch. 3, confirmed by 16 Car. 1, ch. 10, it is enacted, "that no man be put to answer without presentment before justices or matter of record, or by due process and writ original, according to the old law of the land: and if any thing from henceforth be done to the contrary, it shall be void in the law and holden for error." By 1 W. & M. (cap. 2, s. 2) it is enacted, "that the commission for erecting the late court of commission for ecclesiastical causes, and all other commissions and courts of like nature, were illegal and pernicious." In the case of *Commissions of Enquiry* (12 Co. 31), it was resolved, that those commissions which were to enquire only of depopulation of houses, &c. without power to hear and determine, were against law, because (amongst other reasons) "that the Commissioners were only to enquire, which is against law, because, by this, a man may be unjustly accused by perjury, and he shall not have any remedy;" and it is there further said, "also

the party may be defamed, and shall not have any traverse to it; such a commission can only be to enquire of treason, felony committed, &c.; and no such commission ever was seen to enquire [233] only (i.e. of crimes);" and the same doctrine is to be found in 2 Hale, 21, s. 5, and 4th Inst. 163, where it is said, "The second conclusion is, that commissions are like to allowance to the King's writs, such are to be allowed which have warrant of law, and continual allowance in Courts of Justice. For all commissions of new invention are against law until they have allowance by act of Parliament. Commissions of novell inquiries are declared to be void."

Nor can these Courts be legalized by immemorial custom in point of fact; because the existence of the army is dependent on the Mutiny Acts: but, if it were not, immemorial custom cannot legalize an usage essentially bad in law: *Tredymmock v. Perryman* (Cro. Car. 259), *Leach v. Money* (1 Bl. 555). The express provisions of the Mutiny Acts operate to exclude all other modes of trial and punishment than are there authorised from being practiced with regard to soldiers, by the express and minute enactments there provided for every possible case. The object of the act is stated in the preamble. By that act the King is authorised to erect and constitute Courts Martial, and the mode of proceeding in such Courts is particularly prescribed by the statute, and amongst other important requisitions, the members are directed to be sworn; but that act gives no power to establish Courts of Inquiry. The power given to make articles of war, however large and [234] ample it may be in respect of multiplying prohibitions and offences, does not allow the constituting any such intermediate tribunal as that of a Court of Inquiry, to try, much less to enquire of them. There are cases establishing that martial law can only be exercised in this country under the authority of the mutiny act and the articles of war, or by the judgment of a Court Martial, *Grant v. Gould* (2 Hen. Bl. 95), *Johnstone v. Sutton* (1 T. R. 549): and it cannot be said that the disgrace to the Plaintiff, and loss of his commission by the result of this Court of Inquiry, is not a punishment inflicted by that Court. If it be true, as said in Comyns's Digest (tit. Prerogative, D. 28), that the prerogative can only be exercised for the benefit of the subject, an officer who obtains his commission by service of danger and hardship, cannot be dismissed by prerogative without cause: and that cause ought to be assigned,—*Oliver v. Lord W. Bentinck* (3 Taunt. 459)—and, in the case of a soldier, to be established, by the only legal mode of enquiry, the sentence of a court martial. The Crown cannot appoint such a court as this, and it would indeed be much better for the officer that he should be arbitrarily dismissed the service at once than have his character thus destroyed.

It will, perhaps, be urged that, by some writers, Courts of Inquiry are said to bear an analogy, in respect of their nature and duties, to the institu-[235]-tion of grand juries, and that their business is to determine whether there are sufficient grounds in the charge for ordering a court martial. Admitting that to be so, the duty of the court in this instance would have been to have referred the case to a court martial; but they have not done any such thing: they have merely slandered him by what they term a judgment, and the consequence has been, that the Plaintiff, after years of important service, has been deprived of his rank and commission without an opportunity of being heard.

[Being about to comment on the contents of the report, the Court intimated, that as it had not been received in evidence, they could not hear any part of the subject-matter of the statement.]

He then submitted, that if the Court of Inquiry was an illegal body, the members were reduced to the situation of ordinary persons, and responsible for the libel: and that the party in whose possession or custody it might be, is compellable to produce it.

If, on the contrary, it were a legal court or commission, and the paper in question were a confidential communication, still, he contended, it ought to have been received in evidence in support of the Plaintiff's action; nor is there any instance to be found where such a document, or a copy, has been rejected, as not admissible in evidence. If such doctrine were correct, the writer [236] of a false and malicious communication, professing to be confidential, would be screened from the consequences of an action. Although it be a rule, that in cases of acquittal of felony, a copy of the indictment will not be furnished without a Judge's order, yet if a copy or the original, however obtained, be tendered in evidence, it must be received—*Legatt v. Tolleray* (14 East, 302). In cases of misdemeanor, the Defendant is entitled to a copy of the indictment as matter of right; and it is provided by the Mutiny Act, that the soldier shall be

furnished with a copy of the proceedings of a court martial appointed to try him, if he require it.

It may be contended that the paper in question is privileged, as being a mere confidential communication respecting the conduct of an inferior military officer to his superior in command; but if that communication be a false and malicious libel, followed by an injury, the officer libelled is entitled to redress—and that even though the enquiry were set on foot by the direction of the superior officer.

[He then cited the following cases, on the proposition, that evidence of the subject-matter of such communications is admissible in evidence: and that the parties to whom they were made are bound to disclose them, if subpoenaed as witnesses, in a Court of Law. Case of *The Seven Bishops* (4 St. Tr. 342), *Lord Stafford's case* (ibid. 727), [237] *Lee v. Birrell* (3 Campb. 337), *Robinson v. May* (2 Smith, 3), *Attorney-General v. Le Merchant* (2 T. R. 201), and *Rex v. Archer* (ibid. 203.)]

Adverting to the case of *Cooke v. Maxwell* (2 Stark. N. P. C. 183), cited in support of the inadmissibility of the evidence in this case, at *Nisi Prius*, and which was stated to have had great weight with the learned Judge, it was mentioned that in a fuller report of that case, of which as it had been taken by a short-hand writer, Mr. Justice Bayley was represented to have said, after ruling that the commission could not be received in evidence, but that the Plaintiff might therefore give in evidence, not the contents of the paper, but the order of the Defendant for what had been done. "But in this case I do not know that that which was issued by Governor Maxwell, was at all within the scope of his authority,"—obviously intimating that the document ought to have been produced at least, in order to enable the Court to determine upon its admissibility. At all events, that determination establishes, that a Plaintiff may give secondary evidence upon that part of his case, which, by the non-production of a document rendered inadmissible by a positive rule of law, is injured or weakened.

On the argument (anticipated from its having been urged at *Nisi Prius*) founded on the ne-[238]cessity of such inquiries as these, and the necessity for the concealment of what disclosures they might elicit, he submitted, that a military officer, subject to a Court Martial for every offence which could be committed by him, ought not to be deprived of his right, as a subject, to redress for injuries by means of calumny, against their authors, in Courts of Law, on any such pretence as necessity for secrecy, which would debar him of his right to a trial by Court Martial, where he would have an opportunity of defending himself against falsehood and malice. Recapitulating the heads of his argument, he finally submitted, that if the result of such proceedings as these could not be given in evidence, the highest subjects in the Kingdom, who were subject to military control, might be libelled and injured without any means of redress.

Littledale, in support of the judgment (having protested against the course which had been pursued by the counsel for the Plaintiff, in not having confined his observations to the facts appearing upon the record), submitted that the only question now to be discussed would be, whether the documents which were attempted to be given in evidence, were admissible or not? Then (after stating the circumstances respecting the holding of the Court of Inquiry), he contended that the minutes forming the report which had been made by the President upon that occasion, to the Commander in Chief of the Forces, were a confidential communication, the publication [239] of which might endanger the safety and security of the State, and therefore, on principles of public policy adopted in Courts of Law, ought not to be made evidence in a case of this sort, or to be permitted by the Court to be read. He urged that, at common law, it was a prerogative of the King, to have the command of the army, which was, and would be, in all respects, supreme, but for the intervention of the Mutiny Act, which restrains him only in a mode of exercising it. The King's will is absolute by the prerogative, in all matters which regard the State Departments both abroad and at home, and he may address to them what commands he thinks fit: and on principles of State policy, those commands, and their resulting communications, ought to be guarded by secrecy; or infinite inconvenience and mischief might be the consequence of their disclosure and publication. His Majesty has power equally absolute in all matters which relate to the army and navy. He has not, indeed, a power of life and limb, but in all minor matters he is arbitrary, and as the commissions of His Majesty's officers are held at the pleasure of the Crown, he may institute, by any means he thinks proper, an inquiry into their conduct, for his guidance as to ulterior measures.

The usual mode of instituting such inquiries has uniformly been by means of the intervention of a body of officers, constituting what has been commonly called a Court of Inquiry, having, for its object, to furnish the Commander in Chief with information on the particular subject-matter submitted to them. Such Courts have been held [240] from time immemorial, but the earliest accessible instance on record which has come down to us, of which there is any particular account, is in 1757, and that was directed to be held to enquire into the causes of the failure of the expedition to Quiberon Bay (*a*). He submitted that, in a case of which the subject-matter was a question as to the existence of a prerogative of the Crown, it could not be expected that authorities should be furnished from the books—that the prerogative was a claim, the right to which could only be shewn by the constant exercise of it; and in this instance, in support of that exercise of it, for at least so far back, there was the authority of the King's warrant for holding the Court of Inquiry on the expedition to Quiberon Bay. It is the sole object of such Courts to ascertain whether there is any foundation for ordering a Court Martial or not, and it resembles the Inquest by a Grand Jury in one very beneficial respect, in relieving, by means of a previous enquiry, the person who is the object of the investigation, from the odium and inconvenience of a trial on a criminal charge, if it should be found that there was no ground for instituting such a proceeding. Its object being similar, the propriety and necessity of secrecy which exists in the one case, is founded upon the same principles which impose and justify the same obligation in the other. A still more material and important reason is, that Courts of Inquiry most usually embrace topics of State emer-[241]-gency as connected with the conduct of military officers in the particular case, which must often render it imperative that the subject-matters of enquiry be not on any account disclosed; and in case of enquiry instituted as to the state of a garrison abroad, in the course of which matters may have been communicated, reflecting on the conduct of individual officers, a desire, on the part of such officers, to be afforded an opportunity of vindicating themselves, should on no account be deemed a paramount consideration to the necessity of not disadvantageously exposing the internal weakness or insubordination of the garrison to the knowledge of the world. The same argument might be used in the case of any of His Majesty's ships, the actual state of which may have necessarily become a fit subject-matter for enquiry: and whether the conduct of an officer should or should not be connected with any other subject-matter of enquiry, the principle would be the same, and no nice distinction should affect the general necessity of secrecy in regard of such enquiries. In the case of the House of Lords or Commons making a report, if a party implicated in such report were to subpoena the clerk of either House to bring it up to be produced as evidence, he would be committed for a contempt; and it cannot be contended that the Crown has not an equal privilege with the Houses of Parliament to withhold the production of a report, made by its officers, from that publicity which would be the necessary effect of being obliged to produce it in evidence at the [242] instance of an individual: and if the right of the Crown to form such a Court for the institution of enquiries, were doubtful, that would not the more entitle a person who should be mentioned in any particular report, to have it produced in evidence on his part.

He then submitted that, in all the cases which had been cited to shew that commissions of inquiry were not legal, the property or liberty of the public at large were in some measure liable to be affected by the consequences: whereas, in the case of the members of the army in particular, the King has a right to adopt such a course of proceeding by the very constitution of the military establishment, to the regulations for the good government of which, every individual who enters into it voluntarily submits himself *ipso facto*: and amongst these, the instituting of such Courts of Inquiry is a very prominent and useful one. If the persons who should be appointed for the purpose of the investigation were merely directed to make an enquiry, and they were not called a Court, no one can deny that the King might depute them to the performance of such a duty: and that, as the head of any other body of persons might do in his particular department. For instance, the Archbishop of a Province, or the Bishop of a Diocese, might appoint a select number of the clergy to make enquiry with respect to the conduct of any clergyman under his particular authority, with a view to his punishment by suspension or removal; and their report [243] would be

protected as being a confidential communication, the disclosure of which could not be compelled on the occasion of any proceedings instituted in consequence of it in a Court of Law, on the principle of its being a document drawn up as a communication required to be made by superior authority. A fortiori, therefore, should a report relating to matters of State, made under the command of the King, or the heads of the particular departments of the State, be suffered to be disclosed.

Passing over the cases cited in the early part of the argument, as not applicable to the question before the Court, he distinguished the case of *Robinson v. May* from the present, in that the communication there was voluntary, and was given by an individual. He then cited *Atherfold v. Board* (2 Term Rep. 610), where Mr. Justice Buller held, that on a wager respecting the duties on hops for a given year, the revenue officers were not bound to produce their books; and he relied particularly on the case of *Wyll v. Gore* (Holt, N. P. C. 299), where a communication to the Attorney-General of the province by the defendant as governor, reflecting on an individual was not allowed to be given in evidence, on the sole ground of the impropriety of disclosing a communication made to him respecting the party proceeding by action against the communicator; and he observed that that was a very strong instance of the privilege of such communications, [244] because it did not appear from the report, that the communication was made in consequence of any proceeding directed by the Governor of the Province; whereas in the present case the communication was made by military officers, who had been ordered to make enquiries respecting the conduct of the party by the Commander in Chief of the Forces, whose orders, whether right or wrong, they could not disobey. In *Cooke v. Maxwell* (2 Starkie, N. P. C. 183), Mr. Justice Bayley would not permit similar evidence to be given, and the case proceeded, only because the plaintiff was able to bring forward other evidence. He cited also a case of *Anderson v. Hamilton* * (Middlesexittings [245] after Trinity Term, 1816), in which

* Coram Ellenborough, Lord Chief Justice. Middlesexittings after Hilary, 1816.

Anderson v. Sir W. O. Hamilton, Knt. 23d February 1816.—Communications in official correspondence relating to matters of State, cannot be produced in evidence in an action by an individual against a person holding an office, for an injury charged to have been done in the exercise of the power given to him as such officer—not only because such communications are confidential, but because their disclosure might betray secrets of State policy, which might be injurious to the interests of the country.—Nor can an extract be admitted relating to the particular matter, because the whole must be read or none.

On the trial of this cause (which was an action against the Governor of Heligoland, for false imprisonment), the Plaintiff's counsel called as a witness Henry Goulburn, Esq. one of the under Secretaries of State for the Colonial Department, of whom questions were asked respecting a letter which had been addressed to the Earl of Liverpool, (at the time of the transaction in question, Secretary of State for that department) complaining of the conduct of the Defendant towards the Plaintiff—and also, whether he had certain letters, and copies of letters, in Court, which were kept in the office, forming part of a correspondence between the Earl of Liverpool and the Defendant, on the subject of the Plaintiff's letter to his Lordship.

The Attorney General objected to all such letters being received in evidence:—as to the first, on the ground of its not having been shewn or stated to have been written with the knowledge of the Defendant, and because it had been represented to contain a complaint on the part of the Plaintiff against him, holding, as he then did, an office in one of the dependencies of the country, to the person representing that department of the government at home which had power and authority over those dependencies; and that it would be too mischievous a course of proceeding to be permitted.

As to the other letters, he objected that would be of dangerous consequence to permit Plaintiffs, in cases of this sort, to call for their production in evidence; because such production was unanswerably objectionable, on the ground of the Defendant being no further a party to such correspondence than as a person representing the Majesty in the government of his dependencies abroad who had been called upon, as governor, to make communications to the head of the department at home, of the most confidential nature, and which the policy of the state, and the interests of the country, made it necessary that they should not be, on any occasion of a personal

Lord Ellenborough would not suffer a letter written to Lord [246] Liverpool (at that time Secretary of State for the Colonial Department), by an agent of the British [247] Government at one of the Colonies (Heligoland), to be produced in evidence, or Lord Liverpool's answer, his Lordship holding that all official letters were of a nature not to be allowed to be so made public, in consideration of their contents relating to matters of State. The same doctrine was held in the cases of Hardy (24 Howell's St. Tr. 753), and Tooke, and that is the result of all the cases which are collected in Phillipps's Treatise on the Law of Evidence (vol. i. p. 284 to 288, 5th edition).

He then submitted that although there were cases where, when an original document could not be given in evidence, a copy might be put in; yet in this case, the objection, which applied to the production and reading of the original, and the reasons on which it was founded, applied with equal force to the production of the copy, and therefore, he contended, that both must be excluded.

Evans, in reply, urged that the Sovereign has no greater power over the soldier than over the citizen, beyond what was conferred on him by the Mutiny Act; and therefore, as the direction, to [248] hold the Court of Inquiry for the purpose of canvassing the Plaintiff's conduct, was illegal, it might have been disobeyed: at all

complaint made by an individual against the governor, and brought into a Court of Law, by means of an action, disclosed and made public in the manner proposed.

The Plaintiff's counsel attempted to remove the first objection, by saying that they only required its production to lay the foundation for requiring the answer; and as to the second ground of objection, they stated that they did not require the whole of the correspondence, but merely the answer to the Plaintiff's letter of complaint.

Lord Ellenborough. That is a much more objectionable document than the other; for that is an official letter, the other is a complaint against an individual. If objection had been made by the noble Earl to the production of this correspondence, as relating to a matter of State, I should have given the fullest effect to it. I remember upon some of the State Trials, Lord Grenville was called upon to produce some letter which was supposed to have come to his hands, having been intercepted in the course of the post, or something of that kind—speaking from recollection, I know not whether I am quite correct as to the fact—but upon an objection being taken, it was considered that secrets of State were not to be so taken out of the hands of His Majesty's confidential servants. Now I am very unwilling to receive evidence of what Lord Liverpool may have written by way of observation on the subject of the Plaintiff's complaint, for it might have the effect of a collateral condemnation of the party, independently of the facts of the case. If it was to be used merely to prove a fact, it would be a different matter.

It was then suggested that the object of it was to prove a fact—the fact of the complaint to Lord Liverpool.

Lord Ellenborough.—I do not like the breaking in upon this correspondence. A letter which he himself may have written, there would perhaps be no objection to his communicating; but in this correspondence there might be a thousand things of the utmost consequence respecting the views of the government, the connection of parties, the state of politics, and suspicions of foreign powers with whom we might be in alliance; and therefore if the fact you wish to establish can only be proved by giving in evidence part of what is embodied in an official letter, it cannot be got at at all.

The Plaintiff's Counsel then stated that their object was also to prove that Lord Liverpool had given orders for the release of the Plaintiff, and that that order had reached the Defendant, and that he had denied the order, and continued to keep the Plaintiff in custody, all which a single extract would prove.

Lord Ellenborough.—That would open a different ground of complaint, which the declaration is not framed to include: for it does not state that the Defendant imprisoned the Plaintiff at a particular time, and continued him in custody after an order had been given for his release. Then the reading an extract is objectionable; for the whole must be admitted or none: and I am of opinion that the whole is not admissible, on the ground of the objections which have been taken. It is also observable that the foundation of the order for his release is but the judgment of a third person, which, however high his rank, might be erroneous. On all these grounds I do not think the letters are admissible.

events it could afford neither the members themselves nor their proceeding: any protection under pretence of privilege—that if a Court of Inquiry were analogous to a Grand Jury, its judgment could have no effect against the party whose conduct was before it, other than that of referring it to the efficient tribunal, a Court Martial; and on such a judgment, a dismissal from the service could not have been legally founded. A Court Martial followed the judgment of the Court of Inquiry in *Sir John Morlaunt's case* (a), and he complained that that judgment operated to prejudice his case on the minds of the members of the Court Martial. He urged, to pursue the analogy between the case of military and ecclesiastical persons, that an Archbishop could not, on the unfavorable report of a Committee of Inquiry, illegally deprive a Churchman of his dignities or emoluments.

As to the argument founded on the State advantages of secrecy in its proceedings, he submitted, that that could not apply in this case: because the Plaintiff had actually been served with a copy of the very report in question; and that copy the Plaintiff had ready to produce at the trial, if it had not been excluded. He therefore contended [249] that the judgment was erroneous, and could not be supported.

DALLAS, Chief Justice. A great many topics have been discussed in the argument at the bar, respecting matters which appear to us not to be immediately connected with the point before the Court. The only question now before us is, whether the minutes of the Court of Inquiry, which were offered in evidence on the trial of this action, were properly rejected: and that depends upon the nature of the proceeding. It therefore becomes necessary to examine what that proceeding was, and also the occasion on which it has been attempted to produce the minutes of it in evidence. The action was brought for a libel by the Plaintiff, at one time a lieutenant-colonel in the army and a captain in the third regiment of foot guards, against the Defendant, a major-general, and who, at the time of the transaction in question, was a colonel in the army. In consequence of certain transactions, or a suspicion of such transactions, for I will use the latter mode of expression, supposed to be derogatory to the character of the Plaintiff as a gentleman and an officer, His Royal Highness the Commander in Chief gave certain directions, such as are frequently given upon such occasions, and which I think are of most beneficial effect; because, instead of being an exercise of a measure of severity, it is always so far from it, as to be on the contrary, an act of delicacy and mercy towards the party who is the subject of it. His Royal Highness directed an enquiry to be made by a certain selection of officers, forming a Court for that purpose, into the facts upon which such suspicions were said to be founded, instead of bringing the Plaintiff formally, in the first instance, before a Court Martial for trial, upon the mere charge or rumour. The proceeding was, therefore, in its very nature and object, an official proceeding; and it was authorised and directed by the Commander in Chief, for the purpose of obtaining that information, which he has a right and it is his duty to obtain, as to the doubtful conduct of every officer holding a commission in His Majesty's army, in furtherance of the exercise of his public duty, in deciding upon the result of such enquiry, whether the investigation was to cease in the first instance on a favorable result, or whether, if it were not favorable, the suspicion were of such a nature as to require recourse to any ulterior measure. The consequence of those directions was, that a Court of Inquiry was accordingly held, and the Defendant in this action acted as the presiding officer of that Court; but he did so in consequence of a duty created and imposed upon him by the order of the Commander in Chief, which was imperative upon him. A report, which was the result of that enquiry, was in consequence made by the Defendant, in conjunction and co-operation with the other Officers, in the performance of that act of duty so cast upon him and them as military men, by the order of their superior officer, the Commander in Chief, whose orders they were bound to obey. We have heard very [251] much argument, founded on what has been supposed to be the nature of Courts of Inquiry, their mode of proceeding, and their origin; but I cannot see the effect of that: for—however constituted such Courts may now be, or whether they were first held in the year 1757, or before, all such considerations are entirely immaterial in my view of it, in determining the question in this case. We all well know to what a height of greatness and glory the armies of this country have risen, under the influence of the existing regulations. It is not to be denied, that from the

(a) M'Arthur, on Courts Martial, vol. i. p. 412.

earliest period up to the hour when this Court of Inquiry was held, the inconvenience attached to this mode of proceeding has been so little estimated, that no man has ever yet been deterred from entering into the British army on that account. It is quite impossible to refuse assent to the proposition, that as the present Plaintiff, when he first became an officer in the army, must have known all the regulations of the service, he therefore, in point of fact, voluntarily, and of his own choice, subjected himself to these proceedings by means of a Court of Inquiry, to which, as to all other rules of military discipline, he must have known that he was, like all other officers, rendering himself amenable.

The evidence attempted to be used upon the trial was the written result of the enquiry made by the Court, and delivered by the Defendant, as President, in the exercise of his military duty, to the Commander in Chief, and by him transferred [252] as an official document into the custody of Sir Henry Torrens, his military secretary. It was therefore created by and originated in a military order issued by a person holding a high and responsible office under the Crown: and the duty which produced it, was executed in consequence of that order. It was afterwards returned to that officer of the Crown, and deposited by him in that place, in which all official acts of such description are properly deposited. I will not enquire whether (even if it were admissible) Sir Henry Torrens could have been compelled to produce this report; for that is no part of the question now for our consideration: the question is whether, even if he should have been willing to do so, it was not the bounden duty of the learned Judge before whom the cause was tried, on the sole consideration that this was a secret state document—and that not in virtue of any privilege on behalf of the parties immediately connected with it, but of the public, for whom the holder is a trustee—to have interposed and prevented the production of it with a view to being read publicly in evidence. Before I consider the few instances which have been alluded to as furnishing precedents applying to cases of this description, I will examine upon what ground and principle the objection in the particular case rests. It is agreed that there are a number of cases of documents of a certain description, in respect of which for reasons of state policy, the information that they contain is not permitted to be disclosed. In Courts of Justice, for reasons of public policy, persons—to instance one of the ordinary cases of [253] most frequent recurrence—are not to be asked the names of those from whom they receive information as to frauds committed on the revenue. In all the trials for high treason of late years, the same course has been adopted: and if parties were willing to disclose the sources of their information, they should not be suffered by the Judges to do so. The ground upon which these cases stand is, that such disclosures would be attended with danger to public justice; for no person would give information if his name might be disclosed in a Court of Justice, by which he would be subjected to the resentment of the party against whom he had informed. Does not this reasoning apply closely to the case now before us? This was an enquiry directed to be made by the Commander in Chief, with a view to investigate the conduct of, or some ground of suspicion respecting an individual, in the course of which, a number of persons may have been called before the Court to give information as witnesses, who might not choose to have their names disclosed; but if the minutes of such Court of Inquiry are to be produced on an action brought by the party, they might reveal the names of every witness examined, and the evidence given by each, and they might also reveal what had been said and done by each and every individual member of the Court of Inquiry. It is clear therefore, that the admission of these minutes in evidence must tend directly to disclose what ought not to be permitted to be disclosed; and therefore, independently of the character and constitution and object of these Courts, I should [254] say, on the broad rule of public policy and convenience, that the disclosure of these proceedings, secret in their nature, and involving matter of delicate enquiry, and the names of persons giving information, is in all cases to be prohibited.

The only case of those that have been referred to, which is more immediately in point, is that of *Wyatt v. Gore*, which was decided by the late Chief Justice Gibbs (*a*). In that case the Attorney General of the province was proposed to be examined as a witness upon the subject of communications made to him by the Defendant, relative

to Mr. Wyatt's conduct. Mr. Serjeant Lens, for the Defendant, objected to that evidence; for that it would be highly improper for a public officer to disclose what passed between him and the governor upon such an occasion, and that it was a confidential communication. The evidence was thereupon rejected. Now what was this report at present under consideration but a communication, in its very nature, confidential, made in consequence of a direction by the Commander in Chief, for the information of his conscience, in the exercise of his public duty, whether he ought to suffer an officer to continue in the service or not? and that in the case of a soldier whom it must be admitted that, independently of any such enquiry, His Majesty, in the exercise of his prerogative, might have dismissed at any time. In giving his reasons for the validity of the objec-[255]-tion made in the case to which I have adverted, the Chief Justice said, "The witness is not bound to answer, and in delicacy he will not answer, such questions. Whether the conversations in which reference was made to Mr. Wyatt's conduct as surveyor-general, were on public or private business, they ought not to be disclosed. The governor consults with a high legal officer on the state of his colony; what passes between them is confidential; no office of this kind could be executed with safety, if conversations between the governor of a distant province and his attorney-general, who is the only person upon whom such governor can lean for advice, were suffered to be disclosed." Now what was this proceeding but consulting with those who were bound to give the advice required, in the exercise of a public duty? and whether the case be that of the attorney-general of a province advising the governor, or of a member of a Court of Inquiry directed to be held by the Commander in Chief for his information and guidance; it is equally a case of advice and information given for the regulation of the conduct of a public officer. It seems, therefore, to us, upon the broad principles of State policy and public convenience, and also upon the principle of all the cases cited, that the Chief Justice of the Court of King's Bench acted perfectly right in not suffering these minutes to be brought forward at the trial: and that this judgment must be consequently affirmed.

Judgment affirmed.

[256] IN THE EXCHEQUER CHAMBER. [IN ERROR FROM THE KING'S BENCH.]

MONKHOUSE, WRIGHT, AND FAIRBAIRN v. HAY AND OTHERS, Assignees of Matthews, a Bankrupt. Saturday, 17th June 1820.—The Registry Acts (26 Geo. 3, ch. 60, and 34 Geo. 3, ch. 68), requiring ships to be registered in the owner's name, do not affect the provision of the 11th section of ch. 19 of 21 Jac. 1, respecting the effect of reputed ownership of goods and chattels: There may, therefore, be a reputed ownership in ships within that statute, notwithstanding the provisions of the register acts require the transfer of title to be so made as to render the real ownership conspicuous on the registry to any one who will inform himself of the truth.—Thus, where a trader on the brink of bankruptcy, assigned his ship, then at sea, to a creditor with power to sell her, in order to pay his own debt out of the proceeds, (unless it should be satisfied in the mean time),—the creditor covenanting, by the deed of assignment, to permit the assignor in the mean time to have, hold, and enjoy the ship, and take the gains and profits thereof for his own use and benefit; and the trader accordingly from that time continued to keep possession of her, and exercise acts of ownership, appointing captains, dispatching her on voyages, repairing, insuring, &c. up to the time of the act of bankruptcy, and long after, and when the commission of bankruptcy is sued against him.—Held, that the bankrupt had the possession, order, and disposition of the ship, with the consent of the true owner and proprietor, and was the reputed owner within the statute, at the time of his bankruptcy; and that the property in her passed to the bankrupt's assignees, under the commission, notwithstanding the transferree had immediately after the assignment, procured the certificate of registry to be properly endorsed; and a new register was very shortly afterwards obtained in his own name, and he had done every thing in his power which was

necessary to render himself the registered owner of the ship.—If a special verdict on a mixed question of fact and law, find facts from which the Court can draw clear conclusions, it is no objection to the verdict that the Jury have not themselves drawn such conclusions, and stated them as facts in the case.

The Defendants (Plaintiffs below) who were partners in trade, had recovered a verdict in an action against the now Plaintiffs for money had and received to the Defendants' use as assignees of a bankrupt. The object of the action was to recover from the Plaintiffs, creditors of the bankrupt, a sum of money received by them, being the proceeds of the sale of a ship assigned to them by the bankrupt before his bankruptcy [257] for the purpose of being sold, in order to pay a debt due to them. There being a covenant in the deed of assignment, that the assignor was to have the ship and the profits made by her till the sale, under which the bankrupt continued to retain the possession and the use of the ship till long after he was declared a bankrupt; it was upon the ground of permitting the bankrupt to have the apparent possession and ownership of the vessel that this action had been brought, under the statute of the 21 Jac. I. c. 19, s. 11. The Defendants (Plaintiffs below) obtained a verdict, subject to a case upon which the Court of King's Bench after argument gave judgment in their favour (a). That case was afterwards turned into a special verdict. The material facts found were as follows:

That Matthews had been duly declared a bankrupt under a commission of bankruptcy, issued on the 11th of May, 1816, founded on an act committed in the month of December, 1815; and that on the 19th of June, 1816, the Defendants were appointed his assignees—that on the 22d November, 1815, Matthews (who was at that time the owner of a ship called the "Dolphin," which was duly registered in his name, according to the provisions of the 26 Geo. III. c. 60, and 34 Geo. III. c. 68, at the Custom-house at Sunderland) by indenture reciting that he owed the Plaintiffs' firm 795l. 14s. 3d., assigned the said ship, stated [258] to be then at sea, to the Defendant Fairbairn, as a security for the said debt due to him and his co-partners: in trust to sell the said ship, after the 22d May then next, if the said debt was not paid in the mean time: and they were to pay themselves out of the proceeds their said debt, and to pay over the surplus, if any, to the bankrupt—that the bankrupt covenanted to keep the ship insured: the policies to be, in the first place, in trust for the Plaintiffs, so long as any thing should be due to the Plaintiffs—that the deed contained a covenant by Fairbairn to re-assign the ship to the bankrupt on payment of the debt before the sale:—that it was agreed between the said parties that in the mean time, and until the said ship should be sold under the trusts of the deed, the bankrupt should be permitted peaceably and quietly to have, hold, and enjoy the same, and to receive and take the gains and profits thereof for his own use and benefit without the lawful let &c. —that a copy of that deed of assignment was delivered on the 22d November, 1815, to the proper officer of the Custom-house at Sunderland, who made the entries required by the statutes—that at the time of the execution of the said deed, the said ship was at sea, but returned in a few days afterwards—that on the 29th November, 1815, (within ten days after the ship returned from sea) the proper indorsement was made on the certificate of registry of the ship, and a copy delivered to the proper officer at Sunderland, who made the due entries—that on the 31st January, 1816, the ship being brought to the port of Newcastle, where Fairbairn resided, he procured a new registry for [259] her in his own name, and gave due notice to the officer at Sunderland, and the old certificate was delivered up and cancelled—that at the time of the execution of the said assignment, the bankrupt had possession of the ship, which was then at sea, under the command of a captain appointed by the bankrupt, and he (the bankrupt) continued from that time until the 1st June, 1816, to exercise all the acts of ownership, by appointing successive captains, employing and chartering the ship on different voyages, and receiving the freight from January to April, 1816—that during that time the bankrupt, from time to time, repaired and insured the said ship at his own expence: but she was navigated under the certificate of registry which had been so indorsed and granted to Fairbairn as aforesaid.

The verdict also found that neither of the Plaintiffs had ever interfered in any

(a) *Hay and Others, Assignees, &c. v. Fairbairn*, 2 Barn. & Ald. 193.

way with the possession, conduct, or management of the ship, until the 1st June, 1846, when, on the arrival of the ship in the port of London, the agents of the Plaintiffs took possession of her, and displaced the master from his command, and re-appointed him under themselves, and sent the ship to Newcastle, and that they then sold the ship. The verdict then found that the demand of the Plaintiffs (Defendants below) upon the ship had been reduced by payments by the bankrupt before his bankruptcy to 595l., and that the clear proceeds of the sale remaining in their hands at the commencement of this suit amounted to 585l.; but whether &c.

[260] The Court of King's Bench gave judgment for the Plaintiffs below, upon which the then Defendants brought the present writ of error.

Purke, for the Plaintiffs in Error - having stated the special verdict, and apprized the Court that the object of this writ of error was to bring under review the determinations of the Court of King's Bench, in the cases of *Robinson v. M'Donnell* (a), and *Hay v. Fairbairn* (2 Barn. & Ald. 193) - submitted, that by the effect of the register acts, the provision of the 11th section of the statute 21 Jac. I. c. 19, could not be applied to British ships. He also urged that the finding of the jury on the special verdict was not sufficient, as to the fact of the reputed ownership, to entitle the Defendants in Error to recover; and that therefore as that was a question for the Jury, and they have not determined it, there ought to be a *Venire de novo* awarded.

On the first (the material) point, he contended that, with reference to the chattel in question, mere possession by the bankrupt, at the time of bankruptcy, could not entitle the assignees to recover in this action; because as the bankrupt must have an apparent ownership in the thing possessed, and it must be shewn by the exercise of acts of ownership over the particular chattel, that he had taken upon himself the sale, alteration, or disposition of it as owner, this action cannot be maintained: for that cannot now be done [261] with respect to ships: it can only be of such things as may be completely transferred by parol sale, and delivery, as household furniture, horses, and other such chattels as those, of which the use indicates the property, or may create a reputation of property, although it might be destroyed by evidence. Eyre, C. J. has, in the case of *Lanham v. Riggs* (1 Bos. & Pul. 87), given the true construction to be put on the words of the statute, "order and disposition," and "reputed owner." He says, "They are to be understood thus. Being allowed to have the possession of goods under circumstances which give the reputation of ownership, brings the case within the statute." The possession therefore must be accompanied with circumstances indicative of apparent ownership and the power of selling. Since the passing of the registry acts (26 Geo. III. c. 60, and 34 Geo. III. c. 68) that cannot happen in the case of British registered ships: for they cannot be transferred without a documentary title: and therefore actual possession, or even acts of ownership, cannot now be considered as affording, in the case of ships, any presumption that the possessor has power to dispose of such ships as in the case of the possession of chattels in general. A chattel interest in land has been held not to be within the statute, in *Ex parte Marsh* (1 Atk. 159), and *Ruall v. Howles* (1 Vez. 360, and 1 Atk. 165, S. C. - S. P.) - and the judgment of Burnet, J. in the latter case, states the reason to be, because "Possession is no otherwise a badge of fraud, unless as calculated to deceive creditors. There is no way of coming at [262] the knowledge of who is owner of goods but by seeing in whose possession they are: the possession of lands is of a different nature; there may be a possession as tenant at will; as every mortgagor is of a mortgagee before the condition is broken;" and in the report by Atkins, he adds, "A purchaser may call for the title deeds, and need not be deceived unless he will." The same distinction is taken by Lord Kenyon, in the case of *Gordon v. The East India Company* (7 T. R. 234): he observes, "The case of real property is in a different situation - no purchaser is satisfied with the mere possession of an estate; before he purchases he calls for the title deeds, and examines whether or not the possessor is entitled to the estate; but the possession of personal property is generally the title on which the world relies." That doctrine is now peculiarly applicable to the case of ships which is even a stronger case. In *Ex parte Yallap* (15 Ves. 60), the Lord Chancellor decided that since the registry acts, the registry is the only evidence of property even amongst creditors. He therefore urged, that the Court should not extend the letter of the

(a) At that time not in print, but since published in 5 Mule & Selw. 228.

statute of James (which had been found to be productive of hardship, not only to the owners of goods, but to the bankrupt himself) so as to apply it to a case of this description: for though it might have been formerly an useful act, when the operations of trade were few and simple, the case is very different now, when the mere possession does not confer the credit which it formerly did. The sound distinction to be taken in every case, is where the title to ownership depends wholly on documentary proof, or where it may be evidenced, although only *prima facie*, by bare possession.

On the other point—that the Jury had not come to any conclusion as to the bankrupt having the reputed ownership so as to enable the Defendants in Error to recover—he contended that the fact of the reputed ownership ought to have been found; because it was rather a question of fact than of law, as was said by Eyre, C. J. in *Lingham v. Biggs*, to have been “well observed by Mr. Justice Buller, in *Walker v. Burnell*, that questions on the 21 Jac. have much more of fact than of law in them.” Had the Jury found a fact to which no other fact found were opposed, the Court might then decide on the law as applicable; but where, as here, the Jury find conflicting evidence of ownership, and do not strike the balance between them, the Court cannot do it. The effect of the finding that the ship was registered anew in the name of Fairbairn must be to negative reputed ownership in the bankrupt, or it would be of no effect at all, which would be no finding on that material part of the case. If, as in *Fraser v. Marsh* (2 Campb. 517), a ship were let for years, the Jury would be bound to decide in whom the reputed ownership was at the time of the bankruptcy: and they are equally bound to do so in the present case, where it might depend on particular circumstances, as the custom of a port, and many others. Unless therefore the case should go back to the Jury to draw some conclusion, he submitted no judgment could be given on this record: and in *Muller v. Moss* (1 Maule & Selw. 335), Lord Ellenborough distinctly said, that reputed ownership was a fact which ought to have been found.

As to the authority of the cases determined in the Court of King’s Bench, he observed, that the case of *Hay v. Fairbairn* was given up, notwithstanding the doubt upon it, on the counsel for the Plaintiff citing the case of *Robinson v. McDonnell*:—and therefore the object of this special verdict was to obtain a review of those decisions.

He therefore submitted that the short point was, whether in this case, where there could be no such thing as delusive apparent ownership—the real and true ownership being publicly registered in pursuance of the register acts, and therefore easy of access, those acts had rendered possession no longer any criterion of ownership or capable of misleading: for now the mere possession of a ship could be in no case considered as holding forth, within the statute of James, such a reputed ownership as could give the possessor a false credit.

Tindal, for the Defendants in Error, insisted that the second point ought not to have been pressed as an objection, if it were sustainable, which it was not: for in all the cases on this subject the question has been considered to be [265] one mixt both of fact and of law: and it has been left to the Court to decide whether, under all the facts stated, a reputed ownership was in the bankrupt or not. If the Jury had found the reputed ownership to be in him, no question would have been left for the Court. It is the conflict in the mind of the Jury which makes it necessary for the Court to determine the question upon the facts found to have been proved in the case, for otherwise cadet questio. Therefore, taking the special verdict as it now stands, there is enough to enable the Court to decide that the Defendants in Error are entitled to recover in the action which they have brought: but if that objection were persisted in, the Defendant in Error might insist on his judgment.

The main point, he submitted, was whether this case falls within the statute of James, for unless the ship registry acts operate as a repeal of that statute as to ships, it does: for it is too refined a distinction to say that the prior statute is not repealed by the subsequent, but is only rendered inapplicable. The ship registry acts were passed with regard to objects entirely different from those of the statute of James. (He stated the material terms of those statutes.) The policy of the former was to exclude from competition foreign shipping, and they do not in any respect clash with the object of the provisions of the statute of James, which was simply to prevent the fraud and mischief of supplying a trader with fictitious credit, and to give the creditor the same advantage in case of a loan of goods, as he would [266] have had in case of

a loan of money. The possession and apparent ownership of ships give a false credit as effectually as that of any other species of property. The mere circumstance, therefore, of a formality in the transfer having been prescribed by a particular statute alio intuitu, cannot take ships out of the statutes of bankruptcy any more than it would any article of merchandize, the mode of disposal of which might be subject to regulations by law. If the purchase of cotton and wool, for instance, were subject in this country, as it is in some others, to prescribed ceremonials, made requisite to give validity to their sale, that would certainly not take the reputed ownership of such articles out of the statute. There can be no doubt that the possession and management of the ship, being continued to the bankrupt by covenant with the transferees for so long a period after the transfer, makes this a sufficient cause of reputed ownership: and though great part of the time of the trader's possession was after the act of bankruptcy, that so far from taking the possession out of the statute strengthens the case; because it augmented the trader's credit, and might have operated, whether it did or not, to delay this very commission. It is contrary to daily experience, that parties who supply a ship with necessaries, or furnish repairs, or otherwise give credit to the owner of a vessel, should have recourse to the documentary title: the person who puts himself forward as apparent owner is the person to be charged, and he becomes liable upon evidence of his having so held himself out to the world, and having exercised [267] acts of ownership. But if the argument for the plaintiff be well founded, parties dealing with ships in future must first always have recourse to the register, which would create great inconvenience to the facility of such dealing by the risk incurred on one side, and by the delay sustained on the other, if the reputed owner should be held not to be responsible to such claimants. No argument can be applied to this case, founded on the rule with respect to the ownership of chattel interests in land; because they are clearly not within the purview of the statute, and for this plain reason, that they rest merely and wholly in title. The register acts were determined in the case of *Robinson v. McDonnell*, not to affect titles passing by operation of law, as to executors or administrators in case of death, or to assignees generally in case of bankruptcy. "In these cases," said Lord Ellenborough, in delivering judgment in that case, "a title may be transmitted without any of the forms required by the statutes; and if a title may be transmitted without these forms in the case of bankruptcy generally, we see no reason why it may not be so done in a particular case falling within the scope and object of the statute of James." Now a case cannot be imagined which would come more completely within the spirit and very language of that act than the present; for this deed contains a provision expressed in words, bringing it within the precise evil meant to be obviated by the statute. There are several cases which apply to such possessions. In *Ex parte Matthews* (2 Ves. sen. 272), Lord Hardwicke [268] says, "A mortgage may be made of a ship at sea, and if a mortgagee takes all methods in his power to get the possession, such as bill of sale, &c. it will be out of the statute of Jac. I. as was held in *Brown v. Heathcote*, otherwise no security could be made of a ship at sea. But the suffering the ship to come back and go on another voyage made it different." In *Ex parte Bolton* (3 Bro. C. C. 362) it was decided, that although if the ship were mortgaged while at sea after having been chartered and begun her voyage, that would not be within the statute as against the mortgagee; yet if a new voyage had been commenced under the conduct of the mortgagor, his possession would then have been within the statute. Although certainly in *Ex parte Yallop*, the Lord Chancellor dismissed the petition (amongst other grounds) the principle that the registry gave the real and apparent ownership, yet he thought it so doubtful that he reserved to the petitioners leave to file a bill: and, in the case of *Master v. Gillespie* (11 Ves. 628), the Master of the Rolls intimated an opinion that a Court of Equity might compel a transfer of a ship, although the terms of the registry acts had not been complied with. But the case of *Robinson v. McDonnell* (5 M. & S. 235), he urged, was directly in point on this very question, and the judgment of the Court there, as delivered by Lord Ellenborough, was quite conclusive: so much so that as soon as the case of *Robinson v. McDonnell* was cited in *Hay v. Partridge*, the counsel who [269] was to have maintained the point now relied on by the Plaintiff in Error, gave up the question.

[Dallas, Chief Justice. The Lord Chancellor, I understand, has since expressed his approbation of that determination of the Court of King's Bench in a subsequent

case connected with the same question upon the occasion of a decision * pro [270]—nounced by his Lordship in the Court of Chancery in a suit arising out of the same bankruptcy.]

[271] Upon all the authorities, it was therefore contended that, in a case of this

* In Chancery.

In re Ship Warre. In the Matter of Robinson, Clarkson and Parker, Bankrupts, and In the Matter of Sharps, Bankrupts†. Petitions. 27th January 1817.—Semble.—The future earnings of a ship may be assigned to secure money advanced, and to be advanced on the credit of such earnings, by the assignee, distinct from the ship itself; although it be the produce of an intended whaling voyage to be undertaken at some future indefinite time: and a Court of Equity will assist the assignee in establishing a right founded on such an assignment, by which he acquires such an interest in the earnings of the vessel as is not within the purview of the registry acts. Semble, also even where the vessel may not have been purchased at the time by the assignor.

The assignees of the estate of the bankrupts, Robinson and others, presented this petition to the Lord Chancellor, praying an order for delivery to them of the exchequer bills, the amount of the proceeds of the sale of the cargo of the ship “Warre,” paid into the bank by the person appointed to sell the same, and deposited &c., to the credit of the matters of the petition.

The petition stated that a former petition had been presented, which alleged that Robinson and Co. had assigned to Sharps and Co. in consideration of and to secure money lent and advanced, several ships of which they were owners, and the freight and earnings and policies of insurance effected or to be effected thereon; and that amongst others they assigned to them by indenture of December, 1810, the freight, earnings, and profits due and payable on account of the ship “Warre,” and the benefit of all charter-parties &c. for the hire of the said ship, and the policies of insurance thereon. It then stated that the ship was, at that time, intended to proceed on a voyage then projected by Robinson and Co. to the South Seas, in May, 1812, and the articles of outfit, including casks, and whaling geer for the said voyage were purchased in their (Robinson and Co.’s) names at great expence—that the vessel returned to London from the whaling expedition in December, 1813, with a South Sea cargo—that while she was on her said voyage, in October, 1812, the Sharps became and were declared bankrupt; and that in January, 1813, Robinson and Co. were also declared bankrupt—that on the arrival of the said ship in London, the assignees of Sharps took possession by the messenger under their commission, as did also the petitioners, and they brought an action of trover against the assignees of Sharps for the cargo so withheld, which was then pending.

The petition also stated, that whilst the “Warre” was in the Thames, about to proceed on the voyage, the Hull certificate of re-loading was delivered up, and a new certificate obtained in the name of the Sharps, upon a bill of sale executed some months before for a nominal consideration, but that possession was never taken of her till after her said arrival in London from said voyage, and that till that time during the whole interval, Robinson and Co., with the privacy and knowledge of the Sharps, and their assignees, continued to act as sole owners of the ships, and the freight and earnings, and that the said assignees of Sharps had brought an action of trespass against the petitioners—that that petition had therefore prayed the appointment of a person to dispose of the cargo, the proceeds to be paid in &c. to abide the cargo of the actions, and to restrain the assignees of Sharps from selling, &c. which was ordered accordingly—that another petition was presented for the purpose of getting the pleadings in the action of trover amended, so as to cover every question between the parties, which

† This case, which is not reported, will be found to be of far too great importance to be lost, as it affords an useful contemporaneous exposition of the object and policy of the register acts, as applicable to equitable contracts, in affecting their validity, under circumstances connected with, but forming no part of their original purview. This case being intimately connected with the preceding, and bearing not only on the cases which have been decided on this point at law, but on those in equity also, here cited in support of it, requires no excuse for being introduced in this place.

sort, where the [272] very terms of the deed of assignment so completely brought the case within the sort of fraud [273]ulent, apparent, and unreal ownership, intended to be guarded against by the provisions of the [274] statute, the beneficial objects of that just act would be frustrated by a decision that the as [275] signees were not entitled to recover in this action.

[276] Parke, in reply —insisting on the objection before taken to the finding of the Jury, who had found the possessory title in one, and the documentary title in the

was also ordered, and the parties were also ordered to admit certain facts on the trial: the petition then stated the result of that trial, and that on argument of the special case in the King's Bench, judgment was given for the Plaintiffs as well for the ship as the cargo; they therefore prayed, &c.

Leach, for the assignees of the Sharps, opposed the petition, on the ground that they had a right, in equity, to the proceeds of the voyage under the original assignment, although they might have no right to recover at law; for that they had an equitable claim to the oil, &c. under the original assignment, and that the Sharps were not owners, but only assignees under a deed to secure money advanced by them on the adventure.

Hart, Bell, and Heald supported the petition.

Westminster Hall. 27th January 1817. —THE LORD CHANCELLOR now intimated (not as final judgment) his opinion on the questions thus brought before him, addressing himself to the counsel on either side, to the following effect:—

In this case I will now state my present view of the questions as far as they respect the ship "Warre," and it may also have some bearing on the case of the ship "Clarkson." Without going into all the particulars that are stated in the petition by the persons who claim now to have the benefit of those articles which are represented by themselves as intended to constitute them the mortgagees of the ship's further earnings, policies of insurance &c. — the question here is, what interest these intended mortgagees had in the ships and property.

A case was made for the opinion of the Court of King's Bench, and that case involved these two questions—in the view at least which the Court took of the case. The first question which was disposed of in judgment, according to the copy of it, which I have, was, what was the effect of this assignment in point of law, in respect to the earnings of the ship? The Court on that part of the case were of opinion that the future earnings (that is, property, the existence of which depended on future earnings) of the ship, could not pass at law.

With respect to the other question,—a question of very great importance, — they gave their reasons at large, and those reasons, upon the best opinion I can form, seem to be satisfactory. That question was, whether from the circumstance of the names of the individuals not appearing on the register, according to the provision of the register acts, yet as they continued, after the transfer, to act as the owners of the ship, the principle of the statute of James, as to the order and disposition of the ship, took effect; and whether therefore, as to the ship, the property did not pass to the assignees?

When that came back here, it was contended that though the interest in the ship did not pass to the mortgagees, yet the earnings of the ship might have passed. I take it to be settled now, whatever might have been the meaning of the Legislature in passing the Act of Parliament called Lord Liverpool's Act, that the freight and earnings of an existing voyage at least would pass.

It was suggested by Mr. Leach, that although these earnings could not be a subject of assignment at law, as the freight of the first intended voyage, if the voyage had not commenced, or the title to the freight had not become the subject of an agreement, at least some of the earnings, if not all future earnings of the ship, might become the subject of an equitable agreement.

The case of *Gillespie and Mosley* goes to the extent of shewing, that as to the freight of an immediately intended voyage, it did, in the opinion of those who had to consider that case, belong to the person to whom it was assigned, notwithstanding the interest in the ship, the subject of the same assignment might not pass. And there

other, and that it was altogether a matter for the Jury, and to be determined by them conclusively,—submitted, that this was a very different case from that of a sale or mortgage between a British subject and a foreigner; in which case there might be a reputed ownership, but here there could be no such thing; because any person might ascertain the fact by the registry, and, in this case, by no other means than by allowing the vendor to keep in his possession the certificate of registry indorsed in his own name, and in short, by risking a non-compliance with the provisions of the

are one or two words in the judgment in that case thrown in in order to save the point, how far that decision would or would not go to future earnings (*Mestarr v. Gillespie*, 11 Ves. 629). That ship was on a voyage. I did not there determine any thing as to future earnings.

There is also a case in 13 Vesey (*Speldt v. Lechmere*, p. 588), in which I am represented in the Court of King's Bench, to have thrown out an objection, that if the Defendant was to take the earnings of the ship, and not the ship itself, those earnings would separate the ship from the earnings for ever, so that they could not be reunited. Now I do not withdraw from that declaration so generally stated; for if the ship was not then also the subject of absolute assignment, it seems to be extremely difficult to maintain that the ship can be absolutely assigned to one man, and the earnings of that ship as long as that ship should exist, should be assigned to another. But it is a very different question when the assignment is made by way of security for money advanced. When the ship's future freight and earnings are intended to be assigned to A. for the purpose of securing to him 150l. or any larger sum, (the quantum of debt makes no alteration in the application of the principle,) all the freight of the voyage then existing, being already assigned, I am not aware that it has ever been ruled in equity (and I apprehend that it has not), that the freight of a voyage that was intended to be made, although not an existing voyage, may not be assigned in equity. I should find it extremely difficult in considering the question, to say that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings for ever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid.

The objection must be founded on one of these considerations—either upon some general principle of law, or upon the policy of an act of Parliament or the intention of the Legislature: and supposing it to be settled—as it is—that the registration of a ship does not prevent the effect of a fraudulent possession continuing in those who might be owners if the ship was not required to be registered, I do not see how the policy of this act of Parliament can apply to the future freight, where the assignment is to secure a debt: and where, therefore, the separation is only to be temporary,—merely because the time is longer in one case than another in point of separation. If I were asked what the Earl of Liverpool meant in preparing the Ship Registry Act, I should say that I had no doubt it would have been a great surprise upon him to hear that the freight could not be separated from the ship itself; for I know that no man could be more surprised than he was, when told that the first act did not include equitable agreements: and the consequence was, that the second act was passed for the purpose of including them. Now, if the cases are rightly decided, and perhaps there is too much authority in them for me to say they are not; I mean, that if the objection of preventing the registry acts from operating as it was intended they should, with respect to ships, would exclude the jurisdiction of a Court of Equity to relieve in cases of fraud, undoubtedly those acts will have made ravages in the administration of justice, which one cannot look at without alarm, operating, as they will operate, to produce as much injustice as any act of Parliament ever yet produced.

If future earnings may be the subject of equitable agreement (and I am now throwing out these considerations with a view that they may be attended to), the next question is, whether it is possible to deny, which I think it is not, that if those future earnings can, under any circumstances, be shewn to be remaining in the order and disposition of the assignor, as in the ordinary case of bankruptcy there would be the same objection to the assignment of those earnings as there would be to that of the ship. Now there seems to me to be a very considerable difficulty thrown in the way of Mr. Leach's client, if it is necessary for him to maintain that as to those

Registry Acts, could there be an apparent ownership in the assignor; the mere possession alone would not enable the assignor [277] to hold himself out to the world as the real owner; or a mere letting of the ship for three years would be also within the statute a permission by the true owner to have the possession and apparent ownership of the vessel, quite as much as in the case of a lease of lands, which was never thought to be within the mischief intended to be remedied by the statute; or at least it would be a question for a Jury to say whether it were a bona fide lease, or a mere colorable permission to possess for the purpose of giving an apparent ownership.

DALLAS, C. J. The general question in this case is, whether the subject matter of dispute, the ship "Dolphin," was, by the consent and permission of the true owner and proprietary, in the possession, order and disposition of the trader, at the time when he became bankrupt, so as to give him the reputation of being the owner?

Two objections have been urged against the claim of the Defendants in Error to the proceeds arising from the sale of this ship. One is preliminary, arising upon the face of the record,—that the reputed ownership should have been found by the Jury, whereas it is said, it has not only not been found, but no sufficient facts have been stated to have been found by the special verdict from which the Court can infer that there was any such reputed ownership. The other, the substantial objection, is that the possession of the bankrupt at the time of the bankruptcy, could [278] not constitute a reputed ownership under the statute of James; because, since the Registry Acts, no one can be reputed owner of a ship but he who is registered as such; and

articles of oil, blubber, and so on, the earnings and the freight of the ship, as they were not demandable but in a Court of Equity, they therefore could not be in the order and disposition of the bankrupt, because they might be in any body else; for if it turned out that every other object of the assignment was left in the order and disposition of the bankrupt, that fact would afford a conclusion in evidence that these earnings also were in the order and disposition of the persons under whom these assignees claim.

Now, in order to meet that objection, a statement has been laid before me with a view to enable me to consider whether there has not been some sanction of the subject matter of this assignment being suffered to remain in the order and disposition of the bankrupt on the part of those who claim under the assignment, which shews that, in attending to what was the agreement in case certain events should happen, the earnings could not be in the order and disposition of the bankrupt; and indeed these affidavits do afford considerable evidence as to that fact. There are, on the other hand, very weighty observations to be made, and as I have not yet heard Counsel on the other side upon these affidavits, I must hear them before I come to any determination.

Having stated my present view of the case, I will hear the parties on some future day.

I am quite sure that none of the cases alluded to decide this question of future earnings generally. I take it to be clear that, if there be an assignment made of the earnings and freight of an existing voyage, it is valid, and if that be so of a voyage in esse, why not of one in immediate posse?

Suppose that, previous to this act of Lord Liverpool, A. made an agreement to this effect with B.:—whereas I intend to buy a ship (not being bought at that time), and I intend to send her on a voyage: now I will agree to secure your debt of a 100*l*. and for that purpose I will assign to you that ship and freight. If A. had afterwards bought a ship, and nothing more had passed, I should be very glad to know whether it is quite clear, that notwithstanding he was not, at the time of the agreement, owner of the ship, he could not enter into an equitable agreement about freight, that such freight would not pass in equity? But I am as sure of this as I can be of any thing, that the late Lord Liverpool would not have permitted the Act to be so worded as it is now, if he had known it would have been so construed as to operate to defeat such an agreement; but he drew the Act with the assistance of another person who, I cannot say, was very conversant with equity doctrine. Perhaps he thought he could pen the act better with such assistance; but I am quite sure that he did not mean it should have the effect of producing such litigation as it has done.

His Lordship ultimately granted the prayer of the petition.

therefore there can be no fraudulent reputed ownership, in such cases, within the scope of the statute.

With regard to the effect of the possession which the bankrupt had at the time of the bankruptcy as giving him the reputed ownership, we think that the facts of this case, as found, are so conclusive, that it is impossible to conceive a stronger case of apparent ownership, than that which continued in the bankrupt up to the time of the bankruptcy. Independently of any considerations arising from the provisions of the Registry Acts, the property in the ship, in this case, would, without doubt, have passed to the assignees: and they have clearly done all they could to claim and give effect to their right by their conduct: for at the period when the commission of bankruptcy was sued out, the ship was at sea on a voyage: and in case of a transfer of a ship whilst on a voyage, it is impossible that the assignee can possess himself of the ship at sea. All he can do is to assert his title at the earliest possible period, and by the most available means, by taking possession. This the Defendants in Error did on the ship's return, and as soon as they were empowered to do so under the commission.

The whole question is therefore reduced to this [279] single point, whether the Registry Acts operate as a virtual repeal of the statute of James? It seems to me, as it did to the Judges below, that there is this material difference between the statutes, the former applying to rightful title, the latter to possession with apparent ownership. The Registry Acts were made with a view to objects very different from that of the statute of James, and they besides relate only to transactions between vendor and vendee, and to cases of real ownership exclusively. The statute of James was passed to protect third persons, as tradesmen, from being injured by trusting to a false credit, derived from ostensible or reputed ownership. A state of reputed ownership is, in its very terms, opposed to that of real ownership: and therefore the former cannot fall within the purview of the Registry Acts. The vessel in the present case was, notwithstanding the transfer, allowed to remain in the possession, order, and disposition of the bankrupt, with the consent of the true owner and proprietary: and he (the trader) having become thereby the reputed owner, the law operated on that possession of the bankrupt, and conveys the ship to his assignees. I cannot but agree with Lord Ellenborough, who says* that "these statutes (the Registry Acts) do not affect titles passing by operation of law, as to executors or administrators, in case of death, or to assignees generally, in case of bankruptcy. In these cases, a title may be transmitted without [280] any of the forms required by the statutes; and if a title may be transmitted without any of the forms in cases of bankruptcy generally, we see no reason why it may not be so done in a particular case, falling within the scope and object of the statute of James." That furnishes the true ground on which these cases are distinguishable in point of law: and we are not now considering a case between vendor and vendee, to which the Registry Acts would clearly apply: but a question arising to the effect of the statute of James, under circumstances creating a contest between an assignee by operation of law, and an owner who has permitted the bankrupt to retain the vessel in his possession, order, and disposition.

As to the objection founded on the terms of the verdict, being insufficient and inconclusive, it will be enough for us to say, that sufficient facts are stated on this record to refer to the Court the consideration of the question of law, whether the trader had such an apparent ownership as comes within the mischief intended to be remedied by the statute of James? and it appears to us that the conclusion to be drawn in point of law is, that the bankrupt had such a reputed ownership—having this ship in his possession, order, and disposition, with the consent of the true owner and proprietary. The cases determine that a reputed ownership in goods generally is established by the fact of the bankrupt's having the possession, order, and disposition of them with the [281] consent of the true owner. Here the bankrupt had such order and disposition of the ship; and it is upon possession and disposition, as owner, that reputation of ownership must necessarily be founded; and when we find those criteria concurring in the same person, we cannot but consider that the statute fixes the reputed ownership, and the consequences must therefore follow. We

* In delivering the judgment of the Court in the case of *Robinson v. Macdonnell*, p. 239.

are for these reasons clearly of opinion, that the judgment of the Court of King's Bench ought to be affirmed.

Judgment affirmed.

HENDERSON AND ANOTHER v. BENSON. 20th June, 1820. —A bill of exchange was drawn by a person who was an entire stranger to the acceptor and to the person for whose benefit it was afterwards accepted. It was made payable to the drawer, and was, after being indorsed generally by him, delivered over, before acceptance, to the person who had prevailed on him to draw it; and by that person given to the party for whose benefit it was ultimately accepted. It was afterwards accepted by the drawee, and delivered by him to a person to whom he (the acceptor) had lost money at play, and for that consideration. It then got into the hands of other persons who were partners in trade, and was by them indorsed and paid over to the Plaintiffs for valuable consideration, without notice:—Held to be within the statute of the 9th of Anne, ch. 14, s. 1, on the ground of the acceptance being the act which gives to the bill its validity as a negotiable instrument and completes its perfection, that the statute includes acceptances (although the words are "given, granted, drawn, or entered into") of bills drawn without any consideration,—and that therefore the Plaintiffs could not recover against the acceptor.

Upon the trial of this action (before the Lord Chief Baron, at the last Sittings) which was brought by the holder upon a bill of exchange accepted by the Defendant, the Jury, under his Lordship's direction, upon the evidence that the bill was accepted in consideration of a gambling debt, found a verdict for the Defendant.

[282] Taunton, W. E. obtained a rule to shew cause why that verdict should not be set aside, upon the ground, that the debt accruing on the bill to the Plaintiffs, who were bona fide holders for valuable consideration, was not within the statute, upon the evidence of the circumstances affecting it: because it had appeared, that the money lost at play was not the foundation of the bill, and it formed no part of the consideration of the drawing or making; and he cited the case of *Parr v. Benson and Others* (1 East, 92), as an authority that, in the hands of an innocent holder for valuable consideration, without notice, a bill of exchange cannot be avoided by the effect of usury subsequent to its original formation. *Daquell v. Wyden* (41 East, 13).

The case proved on the part of the Plaintiffs was (as appeared by the report), that they advanced 200l. on the bill to Messrs. J. and B. Greaves, Merchants, of Liverpool, who afterwards failed. The bill was drawn by a person whose name was Duckworth, payable to his order, and was first endorsed by him generally, and afterwards by J. and B. Greaves. The defence was, that the sole consideration for the acceptance, was a debt due to a Mr. O'Reilly, for money won at cards.

It was proved by the evidence of O'Reilly, that this was one of several bills, amounting [283] together to 6000l., which had been accepted by the Defendant, at O'Reilly's request, in consequence of that sum remaining due to him on the balance of an account of money won by him at cards;—that he (the witness) knew nothing of the drawer, nor had ever seen or heard of him before;—that the bills were sent to witness by one Madden, his brother-in-law, (a person who, being originally employed to raise money for the Defendant, had prevailed on Duckworth, who was clerk to a person of the name of Brown, so to draw and indorse the bills); that Madden had just before that time proposed to the witness to underwrite for him; that he, the witness, neither owed Madden nor Duckworth any thing; that those persons were both (as he believed) entire strangers to the Defendant; that the witness took the bills to the Defendant to be accepted by him on the card account, and he did accept them; that witness deposited them with Madden, at Lloyd's Coffee-house, (not indorsed by him) to get discounted, from whom he could afterwards get no more than 150l. and 90l., except various acceptances, not worth the stamps, all of which he then held; and that Duckworth's name was on the back of the bills when presented for payment.

Jervis and Comyn now shewed cause, contending that the acceptance of the bill was, within the words of the statute, a bill given in consideration of money won at cards; and that it had been drawn and entered into on that consideration. In, they submitted that, in this case, the [284] mere drawing of the bill was nothing; the

giving the bill was the acceptance, without which it would have been incomplete and of no value as a bill of exchange.

They also urged that, in this case, the holder being an innocent person did not cure the vice of the acceptance: for the acceptance was the completion of the original concoction of the bill. This bill was therefore bad in its inception, having been drawn without any consideration, and accepted in consideration of a gaming transaction.

The case of *Parr v. Eliason*, they submitted, had been since over-ruled by that of *Lowes v. Mazzarolo and Others* (1 Stark. N. P. R. 385); and they cited *Hussey v. Jacob* (12 Mod. 97, S. C. 1 Ld. Raym. 87, and 1 Salk. 344), and *Bowyer v. Brampton* (2 Str. 1155), as authorities establishing that an innocent indorsee, for valuable consideration, cannot recover against the acceptor of a bill of exchange or drawer of a promissory note, founded on a consideration of money won at play. They also cited *Lowe and Others v. Waller*, as deciding that a bill of exchange, given upon an usurious consideration, is void in the hands of an indorsee for valuable consideration, without notice of the usury. On the same principle, they insisted that this acceptance was void in the hands of the Plaintiffs.

[285] Taunton and Jones, D. F., in support of the rule, distinguished this from the cases of *Hussey v. Jacob*, and *Bowyer v. Brampton*, by the circumstance of the bill of exchange not having been drawn or made (in the language of pleading) in consideration of a gambling debt, or for any consideration that appeared; and it was not until after its inception, that it was said to be accepted upon such a consideration; and, besides, this was an acceptance made after indorsement and delivery by the payee, and not in consideration of any gaming debt due to the drawer or payee,—but if to any one, to a third person, in no way connected ostensibly with the drawer and payee, and who had not procured the bill to be drawn or made. Then, after having been accepted only, as it is said, for a gambling debt, it gets into the Plaintiffs' hands for a valuable consideration, without notice, through the medium of a second indorsement by a party not shewn to be privy to the vice, and not having been at any time indorsed by the person for whose gaming debt the bill was alleged to have been accepted. Under such circumstances they submitted that it was not within the words of the penal statute of the 9 Anne, ch. 14, sec. 1, "given, granted, drawn, or entered into," (the word accepted not being introduced into the act) in consideration of money won by gaming: and that if it were held to be so, it would endanger commercial confidence, as was said by Lord Kenyon in *Parr v. Eliason*. Under all the circumstances, they [286] contended that the instrument was not vicious in its inception, and that, whatever might have been the consequence and effect of the gaming consideration, as between the acceptor and O'Reilly, or the parties immediately privy to that fact, the Plaintiffs were entitled to recover against the acceptor as bona fide holders.

RICHARDS, Lord Chief Baron. The question, in this case, depends upon the construction which the Act of Parliament ought to receive. There were three parties concerned in this transaction:—Duckworth, the drawer, was wholly unknown to Benson, the acceptor, and to O'Reilly, the actual payee, or at least the person to whom the bill in its perfect state was delivered. Madden, who procured the bill to be drawn, and O'Reilly had, only a short time before, had some conversation with each other on the subject of an underwriting transaction. But then Duckworth, it appears, drew these several bills on Benson, a perfect stranger, for the very balance due to O'Reilly. Duckworth was not indebted to Madden, but he afterwards delivers the bills, indorsed by himself to Madden, and Madden gives them to O'Reilly, who takes them to Benson, and Benson accepts them, expressly in consideration of the gaming debt due to O'Reilly. Then, can any man doubt, under such circumstances, but that the bills were drawn for the purpose and on account of this very gambling [287] debt,—accepted by the loser and delivered over, as they were, in satisfaction of it, to the winner? Independently, however, of that palpable presumption, I think that the Act of Parliament cannot receive the narrow construction contended for on the part of the Plaintiff, that an acceptance is not within it; for the statute might be very easily evaded if it were otherwise.

GRAHAM, Baron. The question is, what was this bill drawn for? Duckworth knew nothing of Benson; nothing therefore could be due to him from the acceptor; and there is no reason given for the acceptance but on account of the gambling debt due to O'Reilly. It was, I think, concocted from the first for that consideration; but

if it were otherwise, I cannot agree that the statute is to be construed in so restrained a sense as the Plaintiffs would have it. I allow that the statute extends only to bills drawn; but a bill is only in an inchoate state before acceptance. It has no binding force as a bill of exchange until acceptance; for it is not complete till then. The statute means bills in a complete state: it is not drawn for any purpose until accepted: and when once accepted, the act of acceptance has relation to the drawing.

Wood, Baron. If this had been a new case, it might have received a different construction. The words of the statute are extremely strong: [288] they are, that "all notes, bills, bonds, judgments, mortgages or other securities or conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money (&c.) won by gaming (&c.), shall be utterly void, frustrate, and of no effect." It is admitted the acceptance was for money won at cards. Now I conceive the statute applies to all persons who are parties to a bill given on such consideration whether drawer or drawee. The first case in point, in which the question came before the Court, whether a drawee could recover against the acceptor of such a bill, is *Hussey v. Jacob*, in 12 Mod.*¹. That was on the 16 Ch. II. ch. 7. The Court in *Bowyer v. Brampton* take notice of that case, and disapprove the doctrine of the case there supposed: and they there held the bill void: for otherwise, say they, it would be a means to evade the Act. In *Hussey v. Jacob*, however, the Court held that an acceptance was within the statute. The case of *Louis and Others v. Mazarado and Others*, is the last decision in point, and that follows the other cases, which had been determined before.

I am therefore of opinion that this bill of exchange is clearly within the statute.

[289] GARROW, Baron, entertained the same opinion.

Per Curiam. Rule discharged *².

End of Trinity Term.

[290] SITTINGS AFTER TRINITY TERM, 1 GRO. IV. GRAY'S INN HALL.

EBDEN AND ANOTHER v. PRICE. Wednesday, 5th July 1820.—The Plaintiff, in a bill for discovery, in aid of a defence to an action against him at law, may have, on motion at the Sittings after Term, a commission to examine his witnesses abroad, where the cause in the Court of Law is at issue, and was entered for trial the Term before the Term immediately preceding the Sittings, where a case of defence has been stated by the bill, although the affidavit on which it be moved is in the common form. And the delay in staying of the trial is not a sufficient ground of opposition to such an application.—But the Court, in granting it, will order it only on the terms that the applicant pay into Court a very considerable part at least of the demand of the Plaintiff at law, to abide the event.

Martin, J. moved, on the part of the Plaintiffs, that two several commissions might be issued in this case for the examination of witnesses at the Cape of Good Hope, to be used on the trial of an action at law, which had been brought by the Defendant in the Court of King's Bench, to recover a sum of 1477l. 12s. 3d. the balance of an account, which cause was at issue, and notice of the trial had been given.

The Plaintiff had filed a bill for a discovery and an injunction in the mean time.

*¹ That case certainly suggests that a bona fide indorsee, for valuable consideration would not be within the statute.

*² The ground of the conflict in the cases appears to be the policy of preserving the provisions of the statutes for the suppression of ruinous gaming on the one hand, and that of protecting mercantile convenience and accommodation, founded by the prevailing currency of negotiable paper credit on the other.

The drawer and acceptor of bills of exchange stand in all respects severally in loco alterius: and all objections (except such as are merely personal, an infancy &c.) which would avail the one, may be taken by the other: therefore an evil or mendacious consideration which would vitiate a bill as against either, will discharge the other. The drawing and acceptance are as much the same act as the signature of each of several persons parties to a joint and several promissory note: but not so the endorsement.

charging that the Defendant had received the proceeds of a shipment of goods belonging to the Plaintiffs, and consigned by them to another person for sale, whereby the balance claimed by the Defendant was satisfied or greatly reduced.

[291] Beames opposed the application, on the ground that the Plaintiff's object was delay, and that the effect of it would be to postpone the trial. Affidavits were filed on the part of the Defendant, stating in substance that the cause in the Court of Law was at issue in Easter Term last, and having been entered for trial at the adjourned Sittings after that Term was, at the time of the motion, a remanet—that the present bill was filed in Trinity Term; that the Defendant had appeared, but had not been able to complete his answer; and therefore an injunction had issued to restrain him from proceeding further in the action at law. The Defendant's affidavit also denied the receipt of the produce of the sale of any goods sold on account of the Plaintiffs; and it was also sworn that the Defendant had opposed the summons, to shew cause why the trial should not be postponed, and why the Plaintiffs (the Defendants at law) should not be at liberty to examine their witnesses at the Cape in the mean time upon interrogatories, on the ground that the money claimed ought to be first paid into Court to abide the event of the trial, in which case the Defendant would have been, and was still willing to join the Plaintiffs in commission—and that the Plaintiffs were in trade, and subject to the bankrupt laws.

Upon these facts it was submitted that the Plaintiffs were not entitled to a commission which would delay the trial; for there was nothing to [292] satisfy the Court of the merits of the Plaintiffs case: the materiality of the witness, the probability of his attendance, and the absence of all imputation of laches on the part of the Plaintiff; and he cited Tidd's Practice (Tidd's Pr. 816) and the case of *The King v. The Chevalier D'Eon* (3 Burr. 1514), to shew that the rule, in such cases as this, was as stated.

He also urged that, if the Court should consider the Plaintiffs entitled to the benefit of their motion, it ought, according to the practice and the reasons on which it was founded, to be granted only upon terms of paying the sum sought to be recovered into Court, to abide the event, as was required in the case of *Foderingham v. Wilson* (Cooper's Ch. Ca. 222, in notis).

The Court granted the motion; but they ordered it upon the terms of payment by the Plaintiff of 1000*l.* into Court.

Ordered.

[293] THE KING (ON THE PROSECUTION OF GROVER AND POLLARD) v. GILES, Esq. late Sheriff of the County of Herts. Saturday, 8th July 1820.—In this case,—where the sheriff had seized the goods &c. of a defendant under a fieri facias, sued out on a judgment, recovered at the suit of a subject creditor, and after the seizure made, but before sale made of the goods by the sheriff, a writ of extent in aid issued, tested after the seizure, and founded on a commission to find debts, dated, and an inquisition taken thereon, the same day as the teste of the extent, was put into the sheriff's hands to be executed:—it was held by the Lord Chief Baron, Graham and Garrow, Barons, that the extent attached upon the goods so taken whilst remaining unsold in the sheriff's hands.—Wood, Baron, dissentiente, for that as the writ of fieri facias had been in fact and in law executed by the seizure, the Crown process coming to the sheriff after he had seized, was too late: because the property was altered and divested out of the debtor on the seizure by the sheriff, which is the perfecting of the execution, the subsequent sale being a merely formal part of the sheriff's duty.—Quere, in what stage of the execution the property in the debtor's goods is divested out of the debtor, and transferred to the judgment creditor? Or when an execution may be considered as having been executed?

[For proceedings in error see 11 Price, 594; 12 Price, 2.

Referred to, 9 Price, 383.]

The question in this case arose out of the proceedings upon an information which had been filed by the Attorney-General against the defendant, in the nature of an action for a false return to a certain writ of extent. That writ had been delivered to the sheriff in the usual course, and it was alleged in the information that he had seized under it (as appeared by the inquisition taken thereon) goods and chattels &c.

of a much larger value than the debt due to the King: and that although he might and ought to have levied the said debt thereout, he did not &c.: nevertheless the Defendant being such sheriff as aforesaid, well knowing the premises, but not regarding, &c. did not &c.: but &c. at the return of the said writ, falsely and deceitfully returned to the Court, that the said goods and chattels were at the time of issuing the said writs in his custody, under three several writs of fieri facias, for sums amounting in the whole to 3727*l.*, besides poundage, and other incidental expences: [294] and that the said goods, &c. so subject to such prior executions, he had seized into the hands of his Majesty—whereas &c. to the damage of the King of 5000*l.*—whereupon the Attorney-General prayed the consideration of the Court. The sheriff pleaded the general issue, and the Jury returned (substantially) the following facts as a special verdict upon the record.

They found, that “before the issuing of the writ of extent against Foudrinier and Nicholls, thereafter next mentioned, viz. on the 21st August, 1816, a commission [to find debts due to the King] issued against Grover and Pollard, bankers, for money arising from the assessed taxes, paid into their hands for the use of the King, no part whereof had been paid over by them to his Majesty’s use—that on an inquisition taken thereon, they were found to be indebted to the King in 1480*l.* 6*s.* 9*d.* for &c. being the money of the King, arising from the assessed taxes and property tax, collected and received by them as bankers, appointed by the Receiver General of the said Taxes for the said county of Herts, to collect and receive the said taxes of and from the parochial collectors of the taxes aforesaid, as the money of the King, for safe custody—that a writ of the King of extent issued against them (Grover and Pollard,) directed to the sheriff of Middlesex, to find debts due to them—and that by inquisition taken thereon, on the same day, Foudrinier and Nicholls were found indebted to them in 1363*l.* 5*s.* 1*d.* for money lent, which debt the sheriff had seized into the King’s hands accordingly &c.”

[295] The Jury then found that, “on the same day, a writ of non omittas capias ad satisfaciendum and extent issued, directed to the sheriff of the county of Herts, against Foudrinier and Nicholls, for the said last mentioned debt, returnable the 6th November; and that the said writ was delivered to the Defendant, then sheriff of the county of Hertford—that on the 21st October it was found, by inquisition taken under that writ, that Foudrinier and Nicholls were possessed of the goods and chattels in the inventories thereto annexed specified, and enumerated; and that the same were in the custody of the said sheriff at the time of issuing the said last mentioned writ of extent, under and by virtue of three several writs of fieri facias, (for money due from Foudrinier alone, and from Foudrinier and Nicholls jointly, amounting together to 3727*l.*, besides sheriff’s poundage and incidental expences) and also of an extent tested 22d July then last, for 3066*l.* 1*s.* 9*d.*, and an extent in aid of R. Weedon, tested 27th July, for 650*l.*—all which said goods and chattels, subject to such prior executions and extents, as far as the same were available in law, in preference to the said extent, the defendant had taken and seized into the hands of his Majesty, as by the said last mentioned writ of extent he was commanded,”—referring to the inquisition.

They further found “that the said goods and chattels so taken were then of a larger value than the sum of money directed to be levied by the said writ of extent of 22d July, and by the [296] extent in aid of R. Weedon—and they found that the Defendant had returned to the Court at the return of the writ of extent of 21st August [the facts of the above finding in the same terms]—referring to the writ of extent.

They then found, that before the issuing of the said last mentioned writ of extent, and before the day on which the same was tested, a writ of fieri facias, tested the 3d July, 56 Geo. III. (1816), issued at the suit of Robert Gatty, returnable on Wednesday next after the Morrow of All Souls, and which (duly indorsed to levy 350*l.* besides &c.) was on the 8th day of July, 1816, delivered to the Defendant, then sheriff of Herts, to be executed &c. and that the Defendant on the same day and before &c. seized and took in execution divers goods &c. of the said Foudrinier, being part of the goods mentioned in the said inquisition taken under the last mentioned writ of extent.

They also found the issuing of another writ of fieri facias, at the suit of Luder Hoffman, endorsed to levy 376*l.* tested the 7th July, on all other respects as before, and delivered on the 8th, and a third fieri facias tested 3d July, at the suit of Frances Rougemont, endorsed to levy 5000*l.* besides &c. delivered to the Defendant

on the 21st of the same July, under which also the Defendant seized &c. (as before) of sufficient value to pay and satisfy the sums thereon endorsed.

[297] They also found, that before the issuing of the said extent of 21st August, a certain other writ of non omittas capias ad satisfaciendum and extent, tested 22d July, 1816, issued, directed to the sheriff of Herts, reciting that Foudrinier and Nicholls had been found indebted to the King in 3066l. 19s. for duties on paper made by them, commanding him to take their bodies, and to enquire &c. and seize &c.—and they also found the writ of extent in aid of Weedon, tested 30th July,—and that the Sheriff had seized &c. under each, subject to the said writs of fieri facias and the extent of the 27th July.

The Jurors then found, “that the Defendant after the making of the said return to the said writ of extent, bearing teste on the 21st August, that is to say, on the 31st day of March, 1817, sold the said goods and chattels, so specified &c. in the said inquisition taken thereon for a sum not sufficient to pay and satisfy the said writs of fieri facias and writ of extent of the 22d and 27th July, but more than sufficient to pay and satisfy the said writs of extent, and that he paid the proceeds arising from such sale in part satisfaction of the same several writs of fieri facias and the writ of extent bearing teste the 22d July, and that he did not pay any part in satisfaction of the said writ of extent tested 21st August, the whole having been paid and applied by him in part satisfaction of the monies due on the several writs of fieri [298] facias, and the writ of extent of the 22d July as aforesaid*.”

But whether &c.—leaving the question to the Court as to which of the said writs the said goods &c. were subject to and upon the whole matter aforesaid, and whether the return to the writ of extent of 21st August, was a false return—And if &c.

E. T. Wednesday, 10th May.—The case came on this day for argument on the direct question raised by the facts, whether the extent at the suit of the Crown, tested after the subject's judgment, and after the seizure by the Sheriff under the writs of fieri facias, was, under the circumstances stated in the special verdict, entitled to such a preference as to defeat all that had been done on the part of the judgment creditor, by himself and the Sheriff, for the recovery of the debt awarded by the judgment, under the writs of fieri facias upon which, the Sheriff had actually seized the Defendant's goods.

Tindal, for the Crown, supported the affirmative of that question, and his argument was founded, in substance, on the following grounds :

1st. That until sale the general property was not divested out of the debtor by the seizure, [299] nor transferred to the judgment creditor ; for that the debtor had a right to have the goods restored at any time by satisfying the execution ; and that until an absolute alteration of the property, which could only be by sale, the Crown process was not too late—and that until the sale, the goods seized were in the custody of the law, the Sheriff having a special property in them while the general property was still in the debtor. The case on which he mainly relied in support of this proposition,—which appears to have been considered a cardinal point in this case, and will be found accordingly to be much laboured by Mr. Baron Wood in delivering his judgment—is in 2 Equity Cases Abridged, 381, where the Lord Chancellor Hardwicke (speaking of the effect of the statute of frauds, which enacts, that the goods shall only be bound from the delivery of the fieri facias to the Sheriff, and not from the teste), says, “But neither before this statute nor since is the property of the goods altered, but continues in the Defendant till the execution executed” (2 Eq. Ca. Abr. 381).

2ndly. That even if the property were altered in cases between subject and subject, it was not as against the Crown, and might be taken by the Crown by virtue of the priority with which the prerogative process was endowed at the common Law, and which was not given by the 33 Hen. VIII. c. 39,—that whatever might be the law on the question of special property, as established by the decisions of the [300] Courts in cases between the judgment creditor and the Sheriff, or the Sheriff and a stranger or the owner intermeddling with his possession after seizure, it did not affect this question, which was wholly between the Crown and the debtor. And even as between the Crown and the Plaintiff in the action in which the fieri facias was sued out, he

* It does not appear on the special verdict to have been found as a fact, that the sheriff had returned a seizure ad valentiam, or that he had made any return to the writs of fieri facias.

submitted that it did not, on the authority of the dictum of Lord Mansfield in the case of *Cooper and Another, Assignees of Johns, a Bankrupt v. Chitty and Another, Sheriff of London* (1 Burr. 20), who there says, (in correction of a position wrongfully attributed to Lord Chief Justice Holt, by Comberbach, in *Letimner v. Thoroughgood*), "No inception of an execution can bar the Crown: this matter was lately very fully discussed in the Court of Exchequer, in the case of *The King v. Cotton*." And the same case was, for that expression of Lord Mansfield, much pressed also, as affording a recognition and confirmation of the doctrine in that respect deducible from that case in Lord Chief Baron Parker's Reports. On that point he cited also *The King v. Peck* (Bunb. 9) and the note of the reporter in the case of *The Attorney General v. Capell and Others* (2 Show. 480): and he contended, generally, that it was impossible to consider, after the several decisions on this point, wherein the question had been raised and decided so often, that the words of the proviso in the clause of the statute (33 Hen. VIII. c. 39, s. 74), were to be expounded ad litteram: more [301] particularly when the dates of those cases rendered applicable the maxim of construction, *contemporanea expositio est fortissima*.

Chitty, for the Defendant, contended that in this case the subject's execution had been so far proceeded in at the time when the extent was issued and tested, that the property in the goods had been divested out of the debtor, and were, when the extent came to the Sheriff's hands, transferred from him to the Sheriff, for the use of the Plaintiff; and therefore the extent was too late to entitle the Crown to the preference of execution acknowledged by the statute, and that this was a case on the part of the judgment creditor within the protection of the proviso.

Tindal replied—insisting, that the property in the goods, properly so called, was not at any period of the execution of a fieri facias, transferred to the Sheriff, and that it was not necessary that there should be any property in him to enable him to sell, as he acted necessarily throughout merely in the character of a trustee for all parties in any way interested in the disposal of the goods.

[The arguments on either side (particularly on the part of the Defendant) have been thus reduced to mere propositions, in consequence of the forcible manner in which they are illustrated in the course of the dissentient judgment as delivered here after, in which a comprehensive [302] view is taken of the material points in the case, and the arguments on both sides are arranged and opposed in systematic and lucid order.]

The Court took time to deliberate, with the usual intimation.

Adv. vult.

The Court now delivered judgment:—and as there existed a difference of opinion their Lordships stated their reasons seriatim.

GARROW, Baron. Since I have been a member of this Court, I have on several occasions intimated a conformity of opinion on my part, with the decision of this Court given on a former occasion after the most elaborate discussion, and I still entertain the same opinion. If I had now had the misfortune not to have any of the Court concurring in that opinion, it would have been my duty to have gone at length into the argument urged to the Court, and the authorities which have been submitted, and to have stated more fully the reasons on which my opinion is founded: but as I know that one of my learned Brothers has upon a former occasion delivered a most elaborate judgment, which by his kindness and favour, I have had an opportunity some time ago of seeing, and as I know that another member of the Court concurs in that opinion, and they will state their reasons at large, it would be a waste of the time of the Court for me to go at any length into the subject.

[303] This information was filed against the late very respectable Sheriff of the county of Hertford, complaining of his having made a false return to a writ of extent, tested the 21st of August, 1816, and the substance of his return, which is stated by the information to be false, is that the goods which by the writ of extent he was commanded to take in order to satisfy the King's debt were already in his hands under two former writs of extent, and certain writs of fieri facias; and the question raised upon the record is, whether they were, being so in the Sheriff's hands, subject to the Crown's extent in preference to the writs of fieri facias issued by a subject. [Here his Lordship adverted to the circumstances of the case.]

It is perfectly well known that the opinion of this Court is not in conformity with decisions in other places. It will be enough for me, having thus shortly stated the

case, to say that I am of opinion that the goods were in the hands of the Sheriff not liable to the subject's writs of fieri facias, in preference to the King's writ of extent; but that the Sheriff was bound to make satisfaction as far as those goods went of the King's writ of extent, notwithstanding he had previously seized the same goods into his hands under the writs of fieri facias at the suit of subject judgment creditors.

WOOD, Baron. The question for the decision of the Court upon this special verdict is, whether an extent issued by the Crown is to be considered as having priority over an execution under a fieri [304] facias on a judgment at the suit of a subject, under the circumstances found in this case, which are shortly these. The Sheriff having seized the debtor's effects under warrants on certain writs of fieri facias—whilst he is in possession; but before he has actually proceeded to a sale, the Crown's extent (tested and issued subsequently to the delivery of the writs of fieri facias to the Sheriff) comes into his hands.

The Crown claims in this case to be entitled to a priority in the execution of its process by virtue of its prerogative: the subject denies that there exists any such prerogative, asserting that, after a levy has been once commenced by an actual seizure made, the Crown is then too late, and has no longer any right to seize the same goods; but that the subject's execution is from that time entitled to the preference.

Although I use the terms, "the Crown" and "the prerogative," they must be understood to be used in their legal sense; for this is a question between the public at large, in respect of the revenue, and an individual creditor in respect of his private claim.

I am of opinion that the case of *Uppom v. Sumner* (a), which was decided in the year 1779, conclusively determined this precise question. The judgment of the Court of Common Pleas [305] in that case was delivered after solemn argument, and time taken by them to deliberate on the question which had been raised there: and they determined by their unanimous judgment—which was delivered by Gould, Justice, as founded on the opinions of De Grey, Chief Justice (who was present), and of himself, and Blackstone, and Nares, Justices—that, in that case, the extent did not take place of the execution. There the Sheriff was in possession of the goods which he had seized under the execution of the subject; but before the sale or appraisement the extent at the suit of the King (issued after the seizure) came in.

The very same question afterwards (in 1791) came on to be argued before the Court of King's Bench, in the case of *Rorke v. Dayrell* (4 T. R. p. 402), when that Court recognized and acted upon the determination of the Court of Common Pleas in *Uppom v. Sumner*: and they decided that, inasmuch as the goods in that case had been seized under a fieri facias at the suit of a subject, and before they were sold, the extent, although at the King's suit, and grounded on a bond debt, came in before the sale: yet as it was tested after the delivery of the fieri facias to the Sheriff, and a seizure made under it, they could not be taken under the extent to satisfy the Crown's debt.

We have, therefore, already two very solemn decisions of the Courts of King's Bench and [306] Common Pleas, on the precise point now before us. Notwithstanding those two decisions, however, it appears that the Court of Exchequer, in the case of *The King v. Wells and Allnutt* (16 East, in notis, p. 278), in the year 1807 afterwards determined the same question upon the same point, in the teeth of both of those authorities, and decided directly the contrary way; holding that the property, under such circumstances, was not bound as against the Crown, either by the delivery of the writ to the Sheriff, or by the actual taking possession of the goods in execution of the fieri facias.

Since that last decision of the Court of Exchequer, it has become a common practice where the subject has sued out a fieri facias on a judgment recovered by him, and the Sheriff has taken the effects of the debtor in execution under it, for the officers of the Crown, at the instance of the Crown debtor, to get his debt to the King found by inquisition on a commission pro forma in the first instance against himself, upon which an extent issues against him in due course; and under that extent debts due to him from the person whose goods have been seized under the fieri facias, are found by the inquisition taken thereon, upon the return of which another extent issues against such person, and the effects already taken are, if not actually sold, seized

again under the extent, and they are then sold to satisfy the [307] debt due to the King's debtor. That practice has always been, with reason, murmured at and objected to, on the part of the judgment creditor: and I am glad that the question has at length got into the shape of a special verdict, so that it may be carried to a higher Court by writ of Error.

In the case of *Thurstou v. Mills* (16 East's Rep. 257), in the year 1812, this question was once more brought before the Court of King's Bench and fully argued, when the case of *The King v. Wells and Allnutt* was cited, and brought under consideration. The Court were prepared, as I collect from what was said by Lord Ellenborough, to have given judgment on the question, but it went off on another point: because the Court thought that, under the circumstances of that case, an action, in the form in which that was brought, could not be maintained against the Sheriff, and therefore no opinion was given on this question. I am unable therefore to collect from the report of the judgment in that case, what the opinions of all the Judges upon that principal point were; but I infer from what fell from Lord Ellenborough, in the course of the argument, that he at least concurred with the decisions pronounced in *Uppon v. Sumner*, and *Rorke v. Dayrell*.

With these conflicting decisions before me, I confess I have had great difficulty in bringing [308] my mind to a satisfactory conclusion on the subject; but upon the fullest consideration, the best judgment I have been able to form upon this occasion is, that the determinations of the Courts of Common Pleas and King's Bench, in the cases of *Uppon v. Sumner* and *Rorke v. Dayrell*, were right, and consequently that the decision of the Court of Exchequer, in the case of *The King v. Wells and Allnutt*, was wrong. I consider myself the more fortified in that opinion when I find that the then Chief Justices of the Common Pleas and of the King's Bench, who both entertained the same opinion, as appears by the successive determinations of the several Courts in which they presided in the cases of *Uppon v. Sumner* and *Rorke v. Dayrell*, had each filled the office of the King's Attorney General, and must therefore have been well acquainted with the King's prerogative: and one of the other learned Judges, who concurred in the earliest of those judgments—Mr. Justice Blackstone, — was certainly as conversant with the principles of the Law of England as any man. I also find from the two reports, that in both those cases the Courts had all the authorities brought under their consideration which were cited in the Court of Exchequer in the case of *The King v. Wells and Allnutt*.

I will now proceed to give the reasons on which my opinion in this case is founded. That the King has prerogatives with respect to the recovery of his debts, as in obtaining first execution [309], and some other advantages beyond what the subject is allowed. I certainly do not mean to dispute. It is said in Coke, Littleton, 131 c. (a) "As to the third protection cum clausula volumus, the King by his prerogative regularly is to be preferred in payment of his duty or debt by his debtor before any subject, although the King's debt or duty be the latter; and the reason hereof is, for that *Thesaurus regis est fundamentum belli, et firmitas pacis*. And thereupon the law gave the King remedy by writ of protection to protect his debtor, that he should not be sued or attached until he paid the King's debt. But hereof grew some inconvenience, for to delay other men of their suits, the King's debts were the more slowly paid. And for remedy thereof it is enacted by the statute of 25 Edw. 3," [cap. 19] "that" [notwithstanding such protections] "the other creditors may have their actions against the King's debtor, and proceed to judgment, but not to execution, unless he will take upon him to pay the King's debt, and then he shall have execution against the King's debtor for both the two debts."

There was afterwards a further regulation made in restriction of the King's prerogative, in respect of any suit or process for the recovery of his debts, by the statute of the 33d of Henry VIII. cap. 39, sec. 74, passed in the year 1541. By that statute it is enacted, "that [310] if any suit be commenced or taken, or any process be taken, after awarded for the King for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons: and that our said sovereign lord, his heirs and successors, shall have first execution against any Defendant or Defendants of and for his said debts, before any other person or persons." Then follow these very important words, which certainly very considerably

abridge and confine the previous part of the enactment, and explain more particularly the object of the statute—"So always, that the King's said suit be taken and commenced, or process awarded for the said debt at the suit of our said sovereign lord the King, his heirs or successors, before judgment given for the said other person or persons." This clause evidently contemplates the case of two suits running on at the same time, —one that of the King, and the other that of a subject, —against the same person for debt, where both are striving to get first execution, and therefore it provides that the King shall have first execution, although the subject's suit be first commenced, and even if he have obtained a verdict, but upon this express condition, that the King's suit be commenced or process awarded for the King's debt before judgment given for the subject. A negative is here obviously implied, that if the King's suit or process be not commenced before the subject's judgment, he shall not have the preference; but, on the contrary, the subject's execution shall have [311] preference if the King's suit have not been commenced, or process awarded before judgment given,—or at all events, before the subject's execution has been executed.

The King had formerly, undoubtedly, in virtue of his prerogative already alluded to, a right of granting writs of protection: but I believe that no such writ had been issued for very many years, even in the time of Lord Coke, and they seem to have been then altogether disused, because Lord Coke says, in a subsequent part of the same section of his Commentary on Littleton (*a*), from which I have before quoted, and which proves that they had been then long in disuse—"Of these protections I cannot say any thing of my own experience: for albeit Queen Elizabeth maintained many wars, yet she granted few or no protections; and her reason was, that he was no fit subject to be employed in her service that was subject to other men's actions, lest she might be thought to delay justice." From this it seems that writs of protection have been disused probably almost ever since the time of Queen Elizabeth, and therefore they are of but little service in illustrating the question now before the Court.

Now let us see what that question is, and under what circumstances it comes before us:—The subject in this case had obtained a judgment [312] against two persons, who happened to be debtors to two other persons who were debtors to the King: upon that judgment he sued out execution by writ of fieri facias against his debtors, and the Sheriff seized the debtor's effects under that authority. Then, and not till then, this course of proceeding takes place. A commission issues out of the Exchequer, to find and get recorded a simple contract debt due from these persons, (who were therefore the King's debtors) to the King: On an inquisition taken thereon, the King's debt is found and recorded in this Court, whereupon a writ of extent issues against the Crown debtors, to find what debts are owing to them: and the Sheriff is commanded to seize those debts into the King's hands. A debt is then found to be due to the Crown debtors from the two persons against whom the fieri facias had issued, and whose goods had been already seized under it, and the debt so found is returned seized into the King's hands, and it then becomes a debt to the King. On that return another extent issues to seize the effects of the debtors to the King's debtors, and the effects already in the Sheriff's custody under the subject's fieri facias, are seized again under that extent, on the ground, that as the goods remained unsold, the extent must be preferred: and this course of proceeding takes place in the name of the King's prerogative, for no other reason than because the Sheriff has entered on the subject's execution, and has taken possession of the debtor's effects.

[313] Now it seems to me, that to support such a prerogative there ought in my opinion to be much stronger authorities than any that I have been able to find: one can hardly suppose that any thing so unjust could exist as a prerogative, the effect of which is, that a party shall have been permitted to proceed to the length of levying his execution, by seizing his debtor's goods, and that the proceeding shall then be instantaneously frustrated by another creditor, who has lain by till the last moment, getting a simple contract debt due from himself to the King then recorded under an inquisition (for till then it is no lien either upon body, lands, or goods), and immediately thereupon suing out an extent in the King's name, and seizing those very goods which had been previously seized under the fieri facias.

These are the two grounds on which I form my opinion, that this cannot be a

(a) Of Villenage, sec. 199.

practice authorised by law :—First, that the Crown by the common law never had a right to take either lands or chattels under an extent or execution, when the final execution of the subject had begun to be effected by a seizure of lands or goods before the issuing of the Crown process, and when the Crown could have had no lien antecedent to the subject's execution. Secondly, that if such a right ever existed, it has been controlled and limited by the 33 Henry VIII. c. 39, to cases where the King's suit or process has been commenced or issued before the subject's judgment was obtained.

[314] The Court of Exchequer, in the case of *The King v. Wells and Alhutt*, appear to have proceeded upon the principle that so long as the property seized by the Sheriff under the fieri facias, remains in the debtor unaltered, the Crown may take the same goods under an extent : and they also seem to have considered, that the property remains unaltered till the goods seized under the fieri facias are actually sold. Now if such be the principles on which the Court proceeded in determining that case, with great deference to the Court, I deny the truth of that proposition ; for I conceive that the property is altered by the Sheriff's seizure under the fieri facias, and before an actual sale may have taken place.

The Court of Exchequer, too, I perceive, in support of that proposition, mainly relied on the authorities of *Stringfellow's case* (a), in Dyer's Reports, and the case of *The King v. Colton*, in Parker (Park. 112). It therefore becomes necessary for me to consider those cases, and examine the grounds on which they were decided. As to the first, Stringfellow sued a writ of extendi facias out of Chancery, to have execution of a statute staple against Brownesoppe, directed to the Sheriff of Berks, who made extent of the lands of Brownesoppe, and took his goods accordingly, and seized them into the King's hands, according to the writ, but did not make livery ; that must [315] be noticed as being a most important fact in the case—and afterwards a writ of the King's prerogative issued out of the Exchequer, reciting the prerogative which the King ought to have to be first served and paid by his debtors, and commanded the Sheriff to levy the debt to the King, which the said Brownesoppe owed him, that is to say, 100l. of the goods of the debtor ; and if he had not sufficient, then to extend his lands ; and this writ was delivered to the Sheriff after the day of the return of the first writ—which was Stringfellow's writ—but the first writ was not returned at the day : and the Sheriff returned this special matter upon the writ of the Exchequer, and that he had returned the writ in the Chancery served as above : and averred in his return, that the debtor had no goods or lands to be extended besides the goods and chattels, lands, and tenements above extended, and therefore as to the further execution of that writ he had done nothing. And it was holden in the Exchequer for law, that the Sheriff should be amerced if he would not amend his return, namely, return the extent into the Exchequer, for the service of the King's debt : and Justices Hales and Bromeley were of the same opinion, because the property of the goods and land was not in Stringfellow before they were delivered to him by the writ of liberate.

A quere is added to that case by the reporter, who says it was against the opinion of many in the Temple. But even from that case it is [316] clear, that if the goods had been delivered by the writ of liberate, the prerogative writ would have come too late. There is then cited *The Earl of Lincoln's case*, in the margin of the same book, with other cases to the same effect.

For the better understanding these cases, it is necessary to explain what is the ordinary course of proceeding on a statute staple. The first step taken is this. There is a recognizance taken, acknowledging the debt ; that recognizance is made by the debtor before the Mayor of the staple. By a subsequent statute it was provided that it might be made before other authorities. By his recognizance the debtor bound himself, his lands and goods, to the payment of the debt at a certain time. If the comsee wants to have it executed, he gets it certified into the Court of Chancery. He thereupon sues out a writ of extent directed to the Sheriff, requiring him to seize the debtor's lands and goods into the King's hands (not into the hands of the comsee). If the Sheriff return that he has seized into the King's hands, and all this has been regularly done, there is then an award or judgment that the lands and goods be delivered to the comsee to hold till his debt be satisfied. Upon that a writ of habere issues. The liberate, therefore, is the execution and not the extent—the latter the

(a) *Stringfellow v. Brownesoppe*, 4 Dyer, 67.

extent) is only taking possession, not by the conusee, but by the King, and such possession is only preparatory to the award of the liberate, which is the execution; for till then no property vests in the conusee, [317] nor is any thing divested out of the conusor: but the moment after the liberate is executed, then I consider that any process coming on behalf of the Crown would be too late. Now the principal point of distinction is, that judgment, or award of judgment, passes according to the liberate. That is clearly shewn by *Playne's case*, which is in Cro. Eliz. (Cro. Eliz. 47).

That was a case where a lessee for years was obliged to pay his rent. In debt upon it, he pleaded, that the lessor was bound in a statute; and upon that an *extendi facias* was awarded to seize the lands and tenements of the lessor into the Queen's hands, which was executed accordingly, and upon that a liberate was awarded, and mean [while] between the *extendi facias* returned, and the liberate awarded, the rent was incurred, for which he is chargeable to the Queen, and demands judgment. The opinion of the whole Court was clear to the contrary; for before the liberate awarded *nihil operatur*, for he remains always tenant to the lessor, and chargeable to him for the rent: and the writ before is but of form when it speaks of the seizing into the Queen's hands; for it was never seen that lands were seized upon that writ. So that here upon an *extendi facias*, it is clearly held that nothing was divested out of the cognizor until the liberate. In *Stringefellow's case*, no liberate had been granted, and therefore the property remained in Stringefellow, and consequently would be liable to the Crown's [318] execution. The *extendi facias* does not alter the property, for that remains in the conusor until the time of the award of the liberate, or the execution; but after the liberate, for it is that alone which is equivalent to the *fieri facias*, the Crown's execution comes too late.

Curson's case too, may be cited here as applying to this part of the subject. That was a case in this Court also in 33¹ Eliz. (a)¹. Curson acknowledged a statute to one Starkey, and afterwards he acknowledged another statute to one Hampden, who assigned the same to Fitton, who assigned the same to the Queen.—That, by the prerogative, then became the legal debt of the Queen; for by an assignment even of a chose in action to the Crown, the legal right to the chose in action passes to the Crown, and it from that time becomes a debt to the Crown. Starkey sued forth execution upon his statute, and thereupon the land is extended of Curzon, and he hath a liberate of it. It was agreed by all the Barons, that if Starkey had execution upon his statute before the Queen, his execution should stand against the Queen, and the Queen should not put him out. This proves that the prerogative of preference is determined when the subject's final execution has begun, for the liberate is, in cases of statutes, the final execution, and not the extent.

Those cases which I have cited apply to land; [319] the principle is clear therefore, that, with respect to lands, after the subject's execution is once begun to be executed, the Crown's extent comes too late, as far, at least, as it would affect the lands.

Now I will cite a case more particularly in point, where the same has been held with respect to goods. In the case of *Letchmere and Others v. Thorowgood and Another, Sheriff of London* (a)², it was determined that, when goods have been seized under a *fieri facias*, the Crown's extent comes too late, and that is the true question now in judgment in the case before us. In that case an action of trespass [trover] was brought by the plaintiffs as assignees of Toplady, a bankrupt, against Thorowgood, and another, as Sheriff of London. On Not Guilty pleaded, there was a special verdict, and the facts appear to be these:—Alice Toplady had a judgment against John Toplady; she issued a *fieri facias* to the Sheriffs of London, tested the 27th of April, and the Sheriffs seized John Toplady's goods under it on the 29th of April. After the seizure, and before any sale or *venditioni exponas*, viz. on the 4th of May, an extent issued out of the Exchequer against Richard Holder, who, with two others, had given bond to the King, and upon inquisition Toplady was found indebted to Holder for wine sold and delivered. Then another extent issued for recovery of this [320] debt against Toplady, and the Sheriffs under this extent sold the goods which had been before seized under the *fieri facias*, and paid the money to Holder, the Crown's debtor. It was also found, that before the sale, a commission of bankrupt issued against Toplady on the 5th of

(a)¹ 3 Leon. 239, and 4 Leon. 10, S. C.

(a)² Comberb. 123. S. C. 1 Show. 12. 3 Mod. 236, and 2 Ventr. 156 & 169 (there called *Lechmere v. Toplady*).

May, the act of bankruptcy having been committed on the 28th of April, and under that commission the Plaintiffs were appointed assignees, so that the act of bankruptcy was after the teste of the fieri facias, and before the seizure under it, and the extent was subsequent to all. The question was, whether the Sheriffs were justified in selling under the extent; for if they were, the Plaintiffs could have no title, the sale being before the assignment: and the Court held, that the extent came too late. Another question was raised in that case, not affecting the point now before us. The Court, however, determined distinctly, that the Crown's extent came too late after the Sheriff had seized the goods under the fieri facias. That is a case, therefore, directly in point, and the authority was very fully considered, and recognized by the Court of Common Pleas in the case of *Uppom v. Sumner*.

There is also another case of which I have made an abstract, as applying here, although upon another point, to shew, that when an execution has begun to be executed, the property is divested out of the Defendants, or, at least, that it is divested so far as to place the goods in the custody of the law.

[321] The divesting of the property, which was one of the principal grounds on which the Court proceeded in *The King v. Wells and Alnutt*, and is a question, which it will also be very material to consider here, is very clearly disposed of in the case I am about to cite. The name of that case is *Clerk v. Withers* (6 Mod. 290). The Court there seem to have considered it an established principle, that where an execution is once lawfully begun, it shall be proceeded in, and I do not find any case which furnishes an exception to that rule. The same case is reported also, but much more shortly, in Lord Raymond's Reports (*b*). It was in substance this. An administrator had recovered a sum of money upon judgment by default against Clerk, in debt on a bond. He thereupon sued out a fieri facias, and the Sheriffs of London seized goods to the value. The administrator afterwards died. The Sheriff returned the seizure to the value, but that they remain in his hands for want of buyers. The Sheriff is removed, and new Sheriffs put in. Clerk sues seire facias against the then Sheriff who has the goods, for restitution. The Sheriff, it appears, pleaded, that he had seized the goods under the fieri facias, and was therefore compellable to sell them, to which plea there was a demurrer. Clerk therefore grounded his claim to restitution on this, that the judgment obtained by the administrator being by default, was then [322] at an end, because the administrator of the intestate being dead, there was no one who could by process, compel the Sheriff to sell: and it was also objected, that as the statute of 17 Car. II. cap. 8, only applies to judgments by verdict, it could not be taken advantage of in that case, where the judgment was by default; and therefore Clerk contended that the fieri facias fell to the ground, and consequently that he was entitled to restitution of his goods. It then became a question as to what was the legal effect of the levy under the fieri facias, —as whether it had divested the property out of Clerk, and whether an execution once begun must not be proceeded in. It was argued that the property still remained in Clerk, notwithstanding it had been taken under the execution, but not sold, which is the case here. The Court of Common Pleas, and afterwards the Court of King's Bench, on error, after several arguments, determined both points against the Plaintiff: for they held that Clerk was discharged of the debt, although no money was levied, because goods to the value of the debt had been seized, and that by the seizure the property was divested out of Clerk. Gould, Justice, says, in that case, (6 Mod. 298) "So here, the execution is executed in the life-time of the administrator, and the sale, viz. the formal part may be done by virtue of the same writ. The Sheriff, by the levying of goods by a fieri facias, as he seizes the goods, gets a property in them against all persons, and may have trespass against [323] the true owner, if he should retake them [and 3 Croke, 639, is cited], and so he may have trover, as appears in the case of *Willbraham v. Snow*, where Kelynge, C. J. held, that he gains a general property *, but all the rest say, it was

(b) Vol. ii. p. 1072, and also in 11 Mod. 35, and in Salk. 322, and Holt, 303, 616.

* The difference in the different reports of both these cases, particularly *Willbraham v. Snow*, may be worthy of notice here, as it bears upon the particular point before the Court. In the report of *Clerk v. Withers*, by Lord Raym. in this part, he makes Gould, J. say, "And in that book (1 Lev. 282) Kelynge holds, that the property is divested out of the owner, and vested in the party at whose suit the writ issued." In *Willbraham v. Snow*, (which is reported by no less than six different reporters,) it is given

only a special property, so as to sell &c." The report adds, "Powys, J. accord. Executions are favoured in law. This execution is so far completed, that it is a vesting of a property in the Sheriff. The selling is but a formal part of the execution, and by the seizure and writ he has authority to sell; and the venditioni exponas adds not to his authority, but is to spur him on to sell. The goods by the seizure are in custodia legis. Powell, J. accord. The Plaintiff in this scire facias shall not have the goods again, because [324] the execution was executed in the former administrator's life-time, and his death shall not abate the writ. How it would have been if it had not been executed in the party's life-time, I shall not say." They therefore all consider the execution executed by the seizure. "Execution (he adds) is an entire thing, and therefore where a Sheriff levies goods, and while they remain in his hands for sale, a new Sheriff is chose, he who begun the execution, shall go on with it and sell the goods, and not deliver them over to the new Sheriff, who is the officer of the Court." Now why is that? Because he had the property. "The reason is (says Mr. Justice Powell) that execution is one entire thing; and therefore where it begun it shall end; and that is the reason that a supersedeas, after execution begun, shall not supersede it upon a writ of error, because it is an execution from the first levying of the goods, and not like the case of an extendi facias [here he is obviously referring to the facts of this very case of *Stringfellow*], because the extent is only a seizure into the King's hands, and there must be another award of the Court, viz. a liberate to deliver them over to the Plaintiff." That distinction plainly accounts for the decision in *Stringfellow's case*, which was founded upon the difference between the nature of the proceeding in that case, and an execution by fieri facias.

Holt, Chief Justice, likewise accords with the other Judges, and he also takes the same distinc-[325]-tion between an extendi facias and a fieri facias, that the property is not divested by mere seizure under the former, which only gives a property on the award of the liberate: whereas the Sheriff having taken the goods under a fieri facias, is then to pay over the money to the Plaintiff or bring it into Court: and he adds, that after seizure, the Defendant is actually discharged, although the goods are not sold: and no writ of error or supersedeas between the seizure and the sale, shall prevent the Sheriff from selling, which he is bound to do, and may do either with or without a venditioni exponas*.

I will now proceed to enquire how the law stands in respect of the subject's execution for land: I mean with respect to the elegit. In that case also, if the debtor's land be extended under the writ of elegit, in other words, if the writ be executed before the taking of an inquisition upon an outlawry, it gives a good title against the Crown. A case to that effect is to be found in Shower's Parliamentary Cases (Show. Parl. Cas. 72^h), and it is stated fully by Lord Chief Baron Parker, in his report [326] of the case of *The King v. Cotton* (page 130): that is the case of *The King v. Baden*. Baden had a judgment against Clarke; Clarke was outlawed at the suit of another person, and on inquisition taken thereon, the land was seized into the King's hands; then Baden takes out an elegit, and has a moiety delivered to him, and pleaded as tenant to amove the King's hands: it was held certainly there, that the extent should be preferred; but it is also said, that if he had not been guilty

by Levinz, vol. i. p. 282, Kelynge is represented as uttering, after the judgment of the Court had been given, this gratis dictum, which is omitted in Saunders (vol. ii. p. 47) — "The property is altered from the owner, and given to the party at whose suit." The reporter, however, notes, "quere of this." Powell, Justice, says, in *Clerk v. Withers* (6 Mod. 293), "And surely the property by the execution is out of the Defendant whose goods they were: but if by any accident, the execution determine, he shall have them again: Who then has the general property in the interim? I cannot tell but it may be in abeyance." And he said, (adds the reporter) that the return [seizure ad valentiam] did not make him liable to the debt.

* To the above determinations may be added the authority of Chief Justice Holt, in *The Banker's case*, State Tr. vol. ii. p. 144, wherein his Lordship, in illustration of a proposition stated in argument, that the property is altered by the delivery of the writs in question in that case to the treasurer and chamberlain, so as to make those officers debtors to the party—says, "So soon as a fieri facias is delivered to the Sheriff, and upon it goods are levied [seized], the property of the goods is altered, and the Sheriff becomes a debtor to the Plaintiff."

of laches and neglect, but had sued out his *elegit*, and extended the lands before the taking of the inquisition on the outlawry, he would then have had a good title against the Crown.

I apprehend, therefore, that it is now considered to be clear law in every case, that, whether it be against goods or lands, after an execution is once executed at the suit of a subject, an extent coming to the Sheriff on the part of the Crown to be executed against the same property, comes too late. It then becomes necessary to enquire when and in what stage of the proceeding, an execution may be said to be executed. I am of opinion that in consideration of law, if a seizure have been once made under the subject's execution, inasmuch as in such case the execution has been begun to be executed, the sale cannot legally be stopped by or in consequence of any subsequent proceeding. Even a writ of error which in its nature necessarily operates *as a su* [327] *persedeas* before execution executed, cannot stay its completion when once it has been begun to be executed: and where the Sheriff has once seized the goods, if a writ of error be allowed before the sale, the Sheriff may go on notwithstanding, and proceed to sell the goods, and perfect the execution. There is a case to that effect in *Ventris*, 53 (*Wilbraham v. Snow*), and another in 12 *Modern* (*Anon.*, 12 *Mod.* 99). Now let us see in what cases the execution has been considered as executed, arising upon questions of construction and operation of the bankrupt laws. By the 21st James I. c. 19, s. 9, which provides for the division and distribution of the bankrupt's goods rateably amongst the creditors, it is enacted, that the creditors who have security for their several debts, whether by judgment, statute, recognizance, specialty, or other security, or who having no security, or having made attachments of the goods and chattels of the bankrupt, whereof there is no execution or extent served and executed, upon any of the lands, tenements, goods, chattels, and other estate of the bankrupt shall not be relieved thereupon for more than a rateable part of their just and due debts, with the bankrupt's other creditors, without respect to such judgment &c. or other security. Now, upon this statute it has been determined *, [328] that when a creditor has obtained judgment and sued out execution, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the Sheriff may proceed to sell the goods. Now the words of the act being, "whereof there is no execution or extent served and executed," it might be argued, on the principle which we are now discussing, that the execution under which the Sheriff has seized, but not sold, is not an execution executed, because there has been no sale; but those determinations upon the statute of James clearly must have proceeded on the ground, that as soon as goods have been seized under the *fieri facias*, that is considered in law as being an execution executed; and the sale is but a formal part of the execution of the process, and has therefore no further effect on the goods in respect of the alteration of the property in them.

I will now consider this case with reference to the statute of 33 Hen. VIII. c. 39, and see whether that statute has not controlled and limited the royal prerogative, by which it is said, the Crown's process was made to prevail against the subject's execution, after a seizure made under it. If, indeed, such a prerogative ever existed, there is [329] on that point, a case in which it was determined expressly that the statute does abridge the prerogative, and control the common law, and negatives the King's right. That is the case of *The Attorney General v. Andrew, on the Petition* (Haudres, 23), in the year 1655. The case was this: Harrison acknowledged two judgments in debt to Andrew, upon bond, and was bound to Fielder in a bond dated before the judgments; Fielder assigned his debt to the King: (that by the prerogative passed the legal right to the King, and gave him the same remedy from the time of the

* *Audley v. Halsen* †, Cro. Car. 118. Et vide *Philips v. Thompson*, 3 Lev. 191. *Cole v. Davies and Another Assignees of Maul*, 1 Lord Raym. 724.

† It is noticed in this case that upon the objection that the writ is not served nor executed until delivery of the goods upon the liberate, and therefore the commissioners had power of them—they [the Court] all conceived, that "the statute being with an exception, where execution or extent is served or executed," it was to be accounted the executing of an extent, when the goods be appraised and the writ returned.

assignment, as if the bond had been originally made to the King) Andrew takes out execution by elegit upon his judgments, and extends a moiety of the Defendant's lands by each, both being of the same date. Then process issues out of the Exchequer, for the debt assigned to the King, and the question was, whether or no the King should be preferred. It was argued for the Crown, that it was a rule of law, that where the King and the subject's title concur, the King's title shall be preferred, and many cases were cited to prove that general proposition which I do not deny. Amongst those this same *Stringefellow's case* was cited from Dyer, and was thus stated: "There a writ of prerogative was allowed after an *extendi facias* and goods thereupon seized into the King's hands." It was also argued that the statute of Henry VIII. was an affirmative law, and did not take away the prerogative at common [330] law. It was insisted, on the other hand, by the Defendant's Counsel (who agreed that when the King's title and that of a common person commenced both together, the King's shall be preferred) that if a common person's title be prior to the King's, it is otherwise. He also urged that in their case there was both judgment and execution before the King's title. The Court there held that the Defendant was entitled to their judgment. Mr. Baron Parker observes that "the statute of the 33d of Henry VIII. abridges the prerogative, and controls the common law. Affirmative statutes—he says—do not alter the common law, but negative statutes do, and here is a negative implied." Baron Nicholas according, says, "Before the statute the King was not bound, but the statute has made an alteration though it sound in the affirmative, for it enacts a new thing, and ita quod makes a condition precedent and a limitation." The Chief Baron Steel also accordant says, "The subject's title is prior to the King's, and is executed." Now I say, also, in the case before the Court, the subject's title is prior to the King's, and it was executed, that is at least in the legal sense of the term executed; because the Sheriff had actually seized the goods under the *feri facias*, and that even before the King's title accrued; for so far from the King's suit being commenced or process awarded before the judgment obtained by the subject, it was not commenced or issued before the goods were actually seized under the *feri* [331] *facias*, by which the subject's title was completed before the claim of the Crown was commenced. The King, therefore, had not only no lien, but no pretence for making claim upon the goods when the subject's execution had been first begun to be executed.

I will now make a few observations on the case of *The King v. Cotton*, in Parker (Parker, 112), because it was on that case, that the judgment in *The King v. Wells and Alhutt* principally proceeded. It was there certainly held, that an immediate extent against the King's debtor, tested after a distress for rent and appraisement, but before sale, should prevail against the distress. It might be sufficient to say, when that case is applied in support of the proposition that the extent would be entitled to the same preference, where a Sheriff had seized the goods under a *feri facias*, that it is a case altogether different; for it is to executions upon judgments that the statute of Henry VIII. applies; and that that statute does not extend to seizures on distress for rent. That case, however, proceeds on this principle, as Lord Chief Baron Parker states it, that "the distrainor neither gains a general nor a special property, nor even the possession in the cattle or things distrained" (Parker, 121). That is what he lays down. Whether he is right in that or not, is another thing; but that is the principle upon which he proceeds. He says also, "he [332] cannot maintain trover or trespass." Now these are the express and declared grounds on which Lord Chief Baron Parker went in giving judgment in that case. In the same case further on (p. 125) he says, "And though a Sheriff may maintain trover or trespass for goods taken in execution by him against a wrong doer, because he is answerable over for the value (as was held in *Wilbraham v. Snow*, 21 & 22 Charles II. reported in 1 Modern, 30, 2 Saunders, 47, and several other books), (yet," he is then pleased to add, and I do not desire to conceal any thing that is to be found in books of authority on this question, whether it makes for or against my argument) "goods so taken in execution and remaining unsold, are liable to seizure upon an extent." If that were intended to be an inference of the Chief Baron drawn from the case which he had just before cited, it is one which is not warranted by it. There is nothing in the case of *Wilbraham v. Snow* either so determined, or which in my judgment warrants such a conclusion, but quite the contrary in my conception of it. In that case it was expressly determined, that the Plaintiff being Sheriff, has such a property in the goods by seizing them, as that he

may maintain an action of trespass or trover at his election. Now whether the Sheriff, by the seizure acquires a general or special property in the goods, it makes no difference as to the present case; for if they are once vested in him either generally or specially, a subsequent extent for the Crown can-[333] not divest him of them; and the King can only take subject to the prior right of the Plaintiff, who sued out the fieri facias, to have the execution perfected for his benefit. A special property can no more be superseded by the King's extent than a general property, because the former is pro tanto an alteration of the property, and pro tanto entitled to the same protection, and on the same principles as the latter. The Chief Baron himself subsequently in the same case of *The King v. Cotton* (page 128), lays down this as a principle, that if there is an alteration of property in goods seized, they are not liable to seizure on an extent. If then we try this case by that test, there seems to me to be at once an end of the question; because it is clear that, according to the authorities which I have before cited, the property is divested out of the King's debtor by the seizure under the fieri facias. The Lord Chief Baron admits also, that if goods are pledged by the King's debtor for payment of debts, the pledgee has a special property in them, which cannot be superseded by the King's extent.

We, ourselves, have very lately held, in the case of a factor setting up his lien against the claim of the Crown, that where a factor has a lien it cannot be superseded by the King's extent (*b*). In the ordinary cases of bankruptcy, the principle of property determines the right as between the Crown and the subject. That is, [334] because the statutes of bankruptcy do not bind the Crown, and therefore the right of the Crown is not affected by any relation to the act of bankruptcy, and the extent takes precedence, if it is tested before the assignment, or even on the day of the date of the assignment; because as they both happen on the same day, the Crown, by its general prerogative, shall have the preference, as was decided in the case of *The King v. Crump and Hanbury* (*a*). The same preference is due to the Crown in the case of a fieri facias, and an extent at the suit of the Crown, if they are both tested on the same day, and there undoubtedly the extent shall be preferred, because the titles both concur on the same day, on the general principle that where the Crown's right, and the subject's right concur, the Crown's right shall be preferred; but after the execution has taken place, all preference ceases, unless the extent is tested or issued before judgment in the subject's action, according to the condition incorporated in the 74th section of the 33d of Henry VIII. c. 39.

With respect to the case of *The King v. Wells and Althutt* (16 East, 279, in notis), I will take the liberty, with great deference, to say a word or two on the principles and grounds of that decision. I observe by the report of the Lord Chief Baron's judgment, in 16 East, that he relies much on *Stringfellow's case*, cited [335] amongst others in *The Attorney-General v. Andrew*. He says that *Stringfellow's case* was the case of an execution, but I consider that to be clearly a mistake, for in all the cases where it is mentioned, it is contradistinguished from the case of an execution: it is only a previous and preparatory proceeding towards obtaining a judgment or award of liberate (which is the judgment) as the liberate itself is the execution. It is much more like a proceeding by seire facias upon a judgment, in which case the subsequent judgment is but an award of execution. In my opinion the case of *Stringfellow* was, for that reason, clearly a case in which the King's extent, coming in as it did in that stage of the proceedings, before the award or judgment, was entitled to a preference under the statute of 33 Hen. VIII.; because it came, in that case, directly within the terms of that statute, for the King's prerogative process was sued out before the judgment. Judgment had not in fact been given in *Stringfellow's case*, for there never was an award of liberate, which is the only judgment that can be given in such cases. The King's process, therefore, was in that case literally sued out before the judgment was given by the award of the liberate.

In the case of *The King v. Wells and Althutt*, also, I find that the Lord Chief Baron says, that an execution executed by the subject, alters the property, and there is then nothing left upon which the Crown's execution can attach. I have already, I think, clearly shewn, by authorities, [336] that the execution is executed, and is always so considered after a seizure has been made. It is so considered also, and has been so

(b) *The King v. Lee and Others*, ante, vol. vi. p. 369.

(a) Easter Term, 20 Car. II. Roll. 80, cited in *The King v. Cotton*, Parker, 126.

determined where there has been a liberate on an extent on a statute staple. It is the same thing where a Plaintiff has been put in possession under an *elegit*. So also, where a bankruptcy occurs after a Sheriff has seized under an execution on a *fieri facias*: and there is not, I believe, any one single case or authority to be found prior to the case of *The King v. Wells and Allnutt*, where that which is now claimed as the prerogative of the Crown, has been determined or recognized to be well founded; and yet the case must have been one of constant recurrence from the earliest period. I do not, however, mean to omit to notice the note of the reporter to the case of *The Attorney-General v. Capell*, in Shower's Reports (2 Show. 481). It is there certainly said, that "extents have been held good that have been made upon goods actually levied by virtue of a *fieri facias*, and in the Sheriff's custody, the extent coming before a bill of sale made so as the property was not altered" (*b*)¹. I can only observe upon that, that I do not find any thing in the case of *The Attorney-General v. Capell* warranting that, or any thing in any way calling for the observation: and that it is therefore a mere *gratis dictum* of the reporter of that case. The case, itself, was upon a bankruptcy, in which the Court held, that if the extent comes [337] before the assignment, it shall and must be preferred. There was no argument used, founded on the nature or effect of a *fieri facias*; nor was any thing said about the consequence or possible effect of goods having been seized under it: nor does it appear from the note so added to that case, under what circumstances the extents it speaks of were issued, or at what time they were tested, and he cites no authorities. They may have been extents which were properly held good, for they may have been issued before judgment had been recovered by the subject, or execution sued out, and therefore within the protection of the statute of Hen. VIII.: or they may, at least, have been tested prior to the seizure under the *fieri facias*. Lord Chief Baron Comyns, in his Digest, (vol. ii. p. 538 (tit. Dett. [G. 8], pl. 7, 8)), speaking of this statute, says, "By the stat. 33 Hen. VIII. c. 39, suit or process for the King's debt shall be preferred before other persons, so always that the King's suit be commenced, or process awarded before judgment for the said other persons. And therefore if execution be upon a judgment against the King's debtor, and before a *venditioni exponas*,"—which must be after seizure,—“an extent comes at the King's suit, those goods cannot be taken upon the extent.” He then refers to the cases of *Letchmere v. Thorowgood* (*b*)², and *The Attorney-General v. Andrew*, in Hardres. *The King v. Dickenson*, in Lord Chief Baron Parker's [338] Reports (page 262), is also cited by Mr. Justice Gould, as supporting the same opinion. There it was held that a precedent judgment obtained by a bond creditor shall be preferred to the King by the statute 33 Hen. VIII. c. 39, but a subsequent judgment shall not. The case was this. A debtor to the King had caused a simple contract debt due to him to be seized into the King's hands. A *scire facias* issued thereupon against the executor, who pleaded a prior judgment recovered against his testator, and two judgments obtained by bond creditors before the return of the *scire facias*, and after the death of the testator. Upon demurrer by the Attorney-General it was held, that the first judgment should have preference, but not the subsequent judgments. Surely this note of Shower's, standing alone, and opposed as it is by these cases, cannot be deemed a sufficient authority to establish a practice so oppressive and unjust to the subject in its operation, as that after the subject's *fieri facias* have been carried into execution by the Sheriff having taken actual possession of the debtor's goods under it, a debtor to the Crown shall then be allowed to transfer a debt (due to himself from a third person, the debtor of the plaintiff in the *fieri facias*) to the Crown by means of an inquisition and extent, and thereby to give the Crown, or I should rather say himself as the Crown's debtor, a preference which shall supersede the subject's prior execution already begun to be executed against that third person, and leave him without any remedy [339] whatever, after he has been at the expence of suing out a *fieri facias* on his judgment, and of executing it. After the most diligent research, I am not able to find, that there ever existed, by the common law, any such prerogative as that after the subject's execution had begun to be executed, that is, where the Defendant's goods had been seized under a *fieri facias* by the Sheriff, those very goods could be taken under the King's extent tested after the seizure, where the Crown had no prior lien on the goods, which it certainly had not in this case when the Crown

(*b*)¹ Vide note to *Swalcomb v. Cross and Buckingham*, 1 Lord Raym. 252.

(*b*)² 3 Mod. 236. S. C. 2 Ventr. 169. 1 Sh. 12, and Comb. 123.

officers thought it expedient to obtain this prerogative process for the Crown debtor. The Crown's execution only binds goods from the time when it is awarded, and this extent could only bind the goods from the teste. There is therefore no pretence for saying that the Crown had any prior right to a lien in this case, for every thing that has been done on the part of the Crown towards the recovery of the Crown's debtor's debt, was all subsequent to the time when the Sheriff had seized, and was in actual possession of these goods under the fieri facias. In the case of *The King v. Wells and Allnutt*, the Crown (though the Court of Exchequer did not determine the case on that point) had a prior lien, because the goods were stock and utensils in trade of a maltster, which by statute are made liable to the King's debts, into whosoever hands they shall come. I only mention this to shew that there was another ground which might have been put, but I admit that the Court did not [340] proceed on that ground. Upon the whole, under all the circumstances of this case, I am of opinion, that, independently of the statute of the 33d of Hen. VIII. this extent came too late, when the subject's execution had been begun to be executed by the Sheriff's seizure. But upon that statute (and I take this case to be clearly within it, as the Crown's extent was not issued or tested before the subject's judgment,) I am of opinion with the Court of Common Pleas in *Uppon v. Sumner*, and the Court of King's Bench, in *Boyle v. Driscoll*, that the execution should be preferred to the extent, and that the Court of Exchequer, in deciding contrary to those authorities in *The King v. Wells and Allnutt*, were wrong. Consequently, I think, that in this case, our judgment should be given for the Defendant.

GRAHAM, Baron. Although the case of *Uppon v. Sumner* was decided so long ago as 1779, and this same question has, on very many occasions since, been brought before this Court upon the authority of that decision, the discussion has always been attended with the same result—an uniform determination the other way; yet, notwithstanding, the Court has, upon all such occasions, afforded every means in their power of facilitating further enquiry, and even recommended a review of their opinions, no step has ever yet been taken for the purpose of carrying the question higher, that their judgment may be corrected, and the point finally settled. [341] But although, in recent instances, particularly in the case of *The Attorney General v. Fort*, the law as laid down in *The King v. Wells and Allnutt* has been considered as settled law, I shall, after the very learned argument embodied in the judgment which we have heard on the present occasion, only advert to the dates when those cases took place. I cannot, however, but feel, that the case which is now under consideration involves a question in the highest degree deserving of the most serious attention, and it becomes me, in offering the reasons that occur to me, in support of the judgment which I originally formed upon this question, not to advance them with too great confidence, but on the contrary with considerable diffidence; for I have a most earnest and sincere desire, whatever may be my own opinion on the subject, that it should undergo the strictest revision on a discussion elsewhere. If, upon that occasion, the opinion that I have formed, and for which I shall now proceed to state my reasons, shall appear to a higher authority not to be well founded, I shall most readily accede to any alteration which it may become necessary to make in it. That that opinion, however, has, during the long period to which I have alluded, been received as settled law in this Court, I shall now attempt to shew, although in a very imperfect manner. I fear, for I have not had the fullest time on the present occasion to devote to the due consideration of this important case. I would not wish to be [342] understood, in stating the reasons which I am now about to give for rather the authorities of the cases upon which those reasons are founded, as speaking without the greatest deference to what has fallen from my learned Brother. In that case of *The Attorney General v. Fort* to which I have alluded, this same point was unquestionably fully considered, on a review of the whole question now again brought before the Court, and with an attentive consideration of all the cases which the books furnish in any way bearing on the merits. The decision to which, in that case, the Court came, I have reason to believe, will be considered as pronounced by very high authorities. To say nothing of myself, the Court was then composed of Lord Chief Baron Macdonald, and a Judge of much revered authority who is now deceased, Mr. Baron Thomson, and, I believe, the present Chancellor of Ireland. But as it is a case

measure necessary, in support of the view which my Brother Garrow has taken of the present question, and in defence of the authority of the Court, against the grave and weighty objections which my Brother Wood has supported with his countenance, I therefore hope to be excused, if I state with a greater degree of particularity than the other duties of my Lord Chief Baron may perhaps permit him to do, the grounds of my opinion; and I have to request the indulgence of the Court in doing so; but it is a very difficult matter, in a case of this kind, to avoid occupying more time than one would wish.

[343] I must first observe, there are some points in the case on which we all agree. As to *Stringefellow's case*, that was undoubtedly not an execution of a judgment: it was but an inchoate execution of an extent by a private creditor on a statute staple. He certainly had not perfected his execution; he had merely sued out that process to which he was entitled in the first instance—the process of extent which directs the Sheriff to seize the lands and goods to satisfy the plaintiff's debt. The Sheriff had taken possession, and had seized both the lands and goods, but had not made livery; and he had returned that extent, as was his duty, into the Court of Chancery: therefore the execution was not complete, inasmuch as the further process which gives possession, or rather transfers the property from the Sheriff to the party,—I mean, the final process of liberate,—was not sued out. But it was the decided opinion of the Court in that case, that the Sheriff ought to return the extent into the Exchequer for the service of the King's debt. I do not consider it necessary, though I have prepared myself with a great many authorities for that purpose, to shew the constant recognition of that case as law, notwithstanding the doubts which were said to have been entertained by some gentlemen in the Temple at that time. Those doubts have, however, long since been completely removed; for in the case of *The King v. Cotton*, Lord Chief Baron Parker not only says, that *Stringefellow's case* is undoubtedly law; but he also [344] proceeds to shew that he is confirmed in that opinion by the greatest Judges which this country ever produced. My Lord Hobart has a passage in his work (Hob. Rep. 339), which I shall not trouble the Court with reading; but which certainly recognizes the law as laid down in *Stringefellow's case*: and my Lord Hardwicke (b) also considered it clear law, as did Lord Chief Baron Gilbert (Tr. on Excheq. 91, 92). I had prepared myself to go into these authorities; but I shall not do so for the reasons I have already given. My Lord Chief Baron Comyns, in his Digest (title Dett. [G. 8], pl. 4), mentions the case, and it is also abstracted with great accuracy in 2 Rolles' Abr. under title "Prerogative le Roy," (G.), pl. 2. In all those authorities it is recognized, without the slightest degree of impeachment, as clear law, that, inasmuch as the subject's execution was not completed till the liberate was executed, till that time the Crown's process did not come too late, because till then the property was not altered. My Lord Chief Baron Parker, who was perfectly well read in, and acquainted with the law on this subject, treats it as a proposition past all doubt. There were many gentlemen in the Temple undoubtedly at that time of day, who were very much in the habit of mootng points in which there was thought to be any difficulty; and Mr. Callis, in his book on Sewers, certainly affects to doubt the law of that case of *Stringefellow v. Brownesoppe*, intimating, [345] that it was the better opinion, that where the goods had been seized by the hands of the Sheriff, the Crown process comes too late. But my Lord Chief Baron Parker, however, says, that notwithstanding the authority of the gentlemen of the Temple, and Mr. Callis, the case of *Stringefellow* has been acknowledged as clear law on every occasion of its being cited, since it was determined by the highest legal authorities. In *Uppom v. Sumner*, Mr. Justice Gould himself recognizes the case of *Stringefellow* as clear law. Then we have arrived so far in our conclusions, that it is extremely clear that in the case of statute staple, until the execution is completely executed, the process of the Crown would not come too late. In the case of *The King v. Wells and Allnutt*, Lord Chief Baron Macdonald is stated to have said, that *Stringefellow's case* was "the case of an execution;" but that certainly must have been an inaccuracy in the note taken of what he said on that occasion; for I take it to be clear that the execution in that case was not an execution perfected, and therefore that Lord Chief Baron Macdonald could not have considered that it was

(b) So said by Parker, C. B. in *The King v. Cotton*, (Parker, 125)—but that is not noticed in the Report of the case alluded to, which is *Brassey v. Dawson*, Stra. 978.

what the law calls a complete execution (which is an extent not executed, but not it was an inchoate execution, and therefore not to be preferred to the process of extent, because, not having been finished, it had not effected an actual change of property. Upon that ground it was that the Court, in their judgment, delivered by the Lord Chief Baron, held, that, inasmuch as the property was not altered, the Crown's process did not come too late.

[346] Now I perfectly concur with my Brother Wood, that in the case of an extent on statute staple, there is no property, and can be none in the creditor till by the award of liberate it is executed^{*1}. The extent is merely to require the Sheriff to seize the property into the King's hands, and he is to return the extent, and the value of the lands and goods, and then the liberate is issued out of the Court of Chancery for the delivery of possession, if the comsee who has an option to take them at the appraised value or not, choose to do so.

The main question in the present case is, whether it is the clear law, that an execution under a common fieri facias, begun but not finished, is to take precedence of a writ of extent, issuing in the mean time; and also whether the same precedence is to be allowed in the case of an extent of prior teste, also begun by seizure, but not executed, by converting the goods into money. That constitutes the chief question on the present occasion.

[347] Now, to shew how far the Courts have gone in adopting the rule that is laid down, and which seems to have guided the Court in *Strangefellow's case* (Dyer, 67), that the Crown's process never comes too late^{*2} until there has been a sale, I shall refer to the cases. The first is *The Attorney-General v. Andrew*, in Hardres (Hardr. 27). It is certainly reported in a confused manner, and calculated to distress the reader much; for it is extremely difficult to guess on what ground the argument proceeds, and, I had almost said, what the particular point was on that occasion. In that case Mr. Baron Nicholas accords with Mr. Baron Parker, who had observed, that the statute of 33 Hen. VIII. c. 39, abridged the prerogative and made an alteration in the common law, which affirmative statutes, and such as imply a negative, do; and, (he adds) that statute enacted a new thing. The Chief Baron Steel then gives the true reason on which the judgment in that case proceeded: that "the subject's title was prior to the King's, and was executed." In that particular case, a creditor had obtained two judgments in the same [348] Term, and on both the judgments he sued out execution, namely, two elegits: on one judgment he extended one moiety of the land, and on the other elegit he extended the other moiety. Then the argument was, that he could not extend the whole of the land in that case; for upon each separate elegit he could only recover one half of the whole land on one judgment, and one half of the moiety on the other. It is quite clear, however, that the Court thought the elegits were executed. The case does not go further, and as far as it goes, I think it does not come near the case of a fieri facias the execution of which has not been completed. In the case of an elegit the Sheriff completes the execution by delivery of the lands without further process. The elegit requires no liberate; for when the party who obtains judgment has sued out the elegit, which is a direction to the Sheriff by a judicial writ to value a moiety of the land, as soon as that is done, he is to deliver that moiety to the party, and the

*1 The liberate has the effect, not only of a seizure under a fieri facias, but of a sale: for it transfers the property without more done by the Sheriff. In *Lapage v. Bulhurst* (Hutton, 53), the Court held that no fee was due to the Sheriff, because the execution (which was an extent upon a statute staple) was not executed. "And in this case, the opinion of the Court was (says the Reporter) that no fee is due to the Sheriff by the statute of 29 Eliz. c. 4, because the fee is not due until execution; copulative extent and delivered in execution, if it were a statute merchant, in which is a liberate included, then the fee is due."

*2 Vide Gilbert's Treatise on the Court of Exchequer (ed. 1751), chap. 1, from page 88 to 91, the whole of which is transcribed in *Vin. Abr. tit. Process* (H. p. 247). Speaking of the statute 29 Ch. II. he says, "But this act seems not to extend to the King; for an extent of a later teste supersedes an execution of the goods by a fieri facias writ; because by the King's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was not dissolved till the extent was executed; because" &c.

judgment is then perfectly complete : and in that case, the execution being complete, the Crown's process clearly came too late. Still, I say, that as well with reference to executions on statute staple, as in respect of executions at common law by fieri facias or elegit, if the execution is not completely executed by the delivery of the land, or the money raised by the sale of goods, to the creditor, the Crown's process, intervening before the final act, would not come too late.

[349] I will endeavour to abridge as much as possible what I have written down on the subject, that I may not take up the time of the Court in stating the authorities with which they are all so familiar, more particularly as I think, in what I have already observed, I have got so far that I may take my stand on this ground, that whether the extent of the Crown affects lands or goods, the prerogative writ never comes too late till the property is altered, which it is not until the execution is completely executed by sale or delivery. That, therefore, is the main question now before the Court, whether the execution, in this case, was completely executed or not? The counsel for the Crown, very properly, in the argument of this case, relied mainly on the ground (which I think perfectly sound, as applicable to the subject of goods), that the property of the debtor was not altered by the teste of the fieri facias, nor by the delivery of the writ to the Sheriff, nor even by the entry and seizure, nor any thing short of an actual transfer of the property by sale. And I cannot help thinking, with reference to the authorities, that that argument is perfectly correct. The whole ground of my opinion on the present case is founded on this, that until there is an actual sale of the goods, the property is not altered or divested from out of the original owner, the debtor.

I will now consider the authorities applying to that question, which strikes me to be the main point of the present case. In the case which [350] I have already stated, *The King v. Wells and Alnutt*, and which has since been followed by many others, (though they have all had undoubtedly to encounter the authority of the two cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*), it has been so decided. I cannot help saying, that I think those two cases were determined upon a mis-construction and mis-apprehension of the clause of the 33d of Hen. VIII. It is very remarkable, that when this point was first mooted in the case of *Uppom v. Sumner*, the counsel for the Plaintiff declared that they could not support the case on the part of the Plaintiff, and a verdict without argument was actually entered in favour of the Defendant. However, on the last day of the Term, Mr. Serjeant Walker, having entertained a doubt on the subject, applied to the Court to have it argued in the succeeding Term, and leave was given. Now the argument for the Plaintiff, as reported, does not strike me as being well founded. It is this—By the 33 of Hen. VIII. c. 39, the King's debts, it is there said, shall only have the force and validity of a statute staple, and that by the rule of law as laid down in 4 Rep. 59, and 6 Rep. (45 *Higgen's case*, Co. Rep. Parker, 260, 262), a statute staple shall not be preferred to a judgment : and that it has always been understood that an extent is to be postponed to a judgment. Then there are some other authorities (*Hardr.* 27. *Roll. Abr.* 159) referred to, which do not seem to me to support any such proposition. On the first authority cited, Lord Coke says, [351] "Nota reader, if A. is bound in a recognizance, or statute merchant or staple ; and afterwards a recovery is had against A. in an action of debt, and A. makes his executors, and dies, his executors are bound by the law to pay the debt due upon the recovery, although it be puisne, before the debt due by recognizance or statute : because, although both are records, yet the judgment in the King's Court upon judicial and ordinary proceeding is more notorious and conspicuous, and of more high and eminent degree, than a statute or recognizance taken in private, and by consent of the parties ; and therefore preferred in judgment of law." Now that and the cases referred to will, if investigated, be found not to apply to any such question as this. It is very probable, those decisions might have been right if applied to questions of administration of assets ; but they do not seem to me to apply to the case at present under our consideration. I take it that the clear and received effect of the 33 Hen. VIII. c. 39, is to put the King's bond debts on a footing with his debts of record, so as to give them the effect of binding the land, and I never have heard in this Court of a distinction being made between bond debts and any other debts of record. Whatever rule may have been understood by Lord Coke on the administration of assets by executors, as between subject and subject, I think I may venture to state it as a clear and established proposition, that the King's bond debts, which by the statute of the 33 Hen. VIII. are made equivalent

to debts by statute staple, bind the lands from the date of [352] the bonds, as all other debts of record do; and I never heard it yet stated as law, that a subsequent judgment obtained by the subject, should have priority before the King's bond debts of prior date. I really think that such a proposition cannot be sustained: for if a mere judgment, either prior or subsequent to the King's bond debts, were to be preferred, it would be possible that debts of that nature might never be satisfied, because every man might then by collusion give a preference to a favoured creditor, for he might give a judgment, which would totally defeat the effect of the King's bond: and that is what I have never heard stated yet. It is quite impossible that the subject's execution should have the effect of binding the Crown from the teste with regard to goods, because, although there be an actual delivery of the writ to the Sheriff, nothing is more clear than till the actual delivery of the land, or sale of the goods, the Crown is not bound. As to its bond debts, they are binding from the date. As between subject and subject, if a creditor by statute staple has once extended the lands and goods, it is quite impossible to say that any judgment creditor can afterwards supersede the execution of the *extendi facias*.

The judgment of the Court in *Uppom v. Sumner*, turns upon the construction of the 74th section of the 33d of Hen. VIII. Mr. Justice Gould observes there, that the King's prerogative might well be allowed, in *Stringfellow's case*, [353] (which he also says, was merely an extent on a statute staple,) because the property remained in the Defendant, or at least, in *custodiâ legis*, till liberate to the Plaintiff. So, I say, here the property remained in the Defendant till after execution of the *fieri facias* by sale. In the case of *Rorke v. Daprell*, Lord Kenyon says, (thus putting one of the grounds taken by Mr. Justice Gould in the shape of a *quære*) "the point to be considered in these cases is, in whom is the property?" Now, Mr. Justice Gould does not couple with the proposition stated by him any thing in the way of opinion that the property of the goods was in the creditor. Lord Kenyon, however, supplies this answer to that *quære*. After saying, that whilst the property in the goods is in the King's debtor, if there is an execution at the suit of the King, and another at the instance of a subject are sued out, the former will be preferred. On that principle, he observes, the case of *The King v. Cotton* proceeded. He adds, however, "But as, by the common law, abridged as it is by the statute of frauds, the property of the debtor's goods is bound by the delivery of the writ to the Sheriff; there then remains no property in the debtor on which the prerogative of the Crown can attach." Now, my Lord Kenyon's proposition on that point is one which I humbly take upon myself to dispute. I cannot assent to the proposition, that there remains no longer any property in the debtor after seizure of his goods on which the prerogative writ can attach. The whole question, however, [354] is contracted by him to that single point: and it appears to me that my Lord Kenyon felt the necessity of following up Mr. Justice Gould's proposition, by saying that the property must be altered in order to save the subject's execution. But in stating what he did, I think Lord Kenyon stated that which the authorities did not bear him out in. If the property were not in the debtor after seizure, I would ask, where the property would be till sale? The judgment creditor could not bring trespass or trover, most certainly: the Sheriff alone can do this, and in case of a felony, the Sheriff only can state that the property is in him, which shews, that the general property is not altered by the seizure of the Sheriff. The debtor may, after seizure, pay the debt in satisfaction of the execution, and thereby bar the sale; and where he pays the debt in that stage of the proceeding, he requires no bill of sale from the Sheriff to re-transfer the property, which can only be attributable to this reason, that, in fact, the property never had been completely taken out of him. In the notes in the margin of Dyer, to *Stringfellow's case*, there is this, "Execution was awarded upon a debt. The Sheriff by a *fieri facias* took the goods of the Defendant, and, before sale, the Defendant brought error, and delivered a supersedeas to the Sheriff. Per Curiam, the Defendant shall have his goods; for before the sale the property continues in him." Now, I think I may very fairly state this to be very high authority; because it is extremely well known, that the marginal notes in Dyer are [355] ascribed to one very great lawyer at least, if not more; and I believe it is universally allowed, that these notes carry with them an authority equal to that of the text itself. My Lord Hardwicke, in the 2d Equity Cases Abridged (a), thus expresses himself, "But neither before this

(a) *Lowthall v. Tonkins*, 2 Eq. Ca. Abr. 381.

statute (he was speaking of the statute of frauds) nor since, is the property of the goods altered, but continues in the Defendant till the execution executed. The meaning of these words, 'that the goods shall be bound from the delivery of the writ to the Sheriff,' is, that after the writ is so delivered, if the Defendant makes an assignment of his goods, unless in market overt, the Sheriff may take them in execution." It is unnecessary to state that, perhaps, few greater lawyers have ever existed in this country than my Lord Hardwicke, or were more conversant with questions of this kind: and he had been at that time Chief Justice of the Common Pleas. It is clear from this, that Lord Hardwicke thought the party might make an assignment, which would be good as against the Sheriff, if in market overt, when otherwise it would not be valid; for the Sheriff could take them in execution wherever he might find them, if they had been otherwise assigned.

There is another very strong authority in the case of *Smallcomb v. Cross and Buckingham* in [356] Lord Raymond's Reports (a), and which is also reported in Salkeld. There Lord Holt says,—and it is very material to attend to this, because very different language is supposed to have been used by my Lord Holt on another occasion,—“If a writ of execution be delivered to the Sheriff against A., and A. becomes bankrupt before it be executed, the execution is superseded: and, consequently, the property in the goods is not absolutely bound by the delivery of the writ to the Sheriff¹. But the teste of the writ binds against all sales and acts of the party himself.” If that be so in the case of the assignees of a bankrupt, in whom the property is vested by [357] statute, a fortiori would an extent, in the case of the King, supersede the execution which is not executed. And here it is clear that Lord Holt is not speaking of an execution under a statute staple, but of an execution at common law.

Mr. Justice Gould, in the case of *Uppom v. Sumner*, rests on the authority of a passage in Comyns's Digest, 538. Now, in explaining myself on this particular point, I would wish to dwell with some degree of particularity; because I am very desirous that it may be well weighed on the present occasion. Mr. Justice Gould rests on the authority of that passage in Comyns's Digest, 538; but the authorities which Comyns refers to, when they come to be looked at, do not support his proposition. He first refers to *Lechmere v. Thurgood*^{*2}, reported in Comberbach, and adopted by Comyns in his Digest. Now, when that case comes to be looked into, I think I may venture to say, it decides no such point: it was a point that could not be decided between the parties in that case. That was an action of trespass, brought by the assignees of a bankrupt against the Sheriffs of London for taking the bankrupt's goods. It is extremely difficult to collect what was the subject of the argument in that case, or what the real situation of the parties was. It appears there had been a race run between the Crown debtor and a subject creditor, before the commission of bankruptcy intervened; [358] but, in this action, the Crown debtor and the subject creditor, by accident, were on the same side of the question,—they were both resisting the claim of the assignees of the bankrupt: and it was quite impossible, with any degree of propriety, that the question could have been raised under the circumstances, between the two Defendants: one had sued under a writ of fieri facias, and the extent had

(a) 1 Lord Raym. 251. 1 Salk. 320, S. C. and 5 Mod. 376, S. C. called *Smallcombe v. Buckingham*; and 12 Mod. 146, S. C.; Comyns, 35, S. C.; and Carth. 419, S. C.; Comb. 428, S. C. called *Smallcorn v. The Sheriff of London*; and Holt, 302, S. C.

¹ In the report of the same case in 5 Mod. 376, Shower is represented as saying, “If the King's writ of extent come out after execution, yet the execution is superseded, and the King's extent shall take up the goods; but if the Sheriff had sold the goods by bill of sale &c. the property is altered, and shall not be divested by the King's writ.”

In a note to the same case in Lord Raymond, it is remarked that “Mr. Northey said, arguendo, that it is the common practice at this day, that if a fieri facias be delivered, and the goods appraised and sold, and the writ is not returned, and an extent for the King comes out of the Exchequer, it will over-reach the former sale. But per Curiam, it is a very dangerous practice.” In the case of *The King v. Mann* (2 Stra. 759), the Chief Baron (Pengelly), speaking of Sir Edward Northey having given up a point, observes, “he was known to be enough tenacious of the rights of the Crown.”

^{*2} Comb. 123, Show. 12; and vide S. C. 3 Mod. 236, and 2 Ventr. 169.

issued at the suit of the Crown: the assignees of the bankrupt disputed both, and, in order to assert their right, they brought an action against the Sheriff; and a great deal is said about the different rights and arrangements of this, and language, quite extra-judicial, is put in the mouth of my Lord Holt, which does not appear to have any relation to the question before the Court. Lord Chief Baron Comyns, though in general a most accurate compiler, seems unwarily to have adopted what is there attributed to my Lord Holt, and which, if he so expressed himself, must have been perfectly obiter dictum, because it was not necessary nor even relative to the cases. The question there was as to the right of the assignees of the bankrupt as against the private creditor, and the action was brought against the Sheriff, who was in possession of the goods by virtue of the fieri facias. It is in a case so circumstanced that such a proposition as this is represented as coming from my Lord Chief Justice Holt:—"The property of the goods is vested by the delivery of the fieri facias, and the extent afterwards for the King comes too late: and that on the statute of [359] frauds and perjuries." This Lord Chief Baron Comyns also states: but it has reference evidently to the case from which he takes it. Now I venture to say, that my Lord Holt never did deliver any such opinion. It is an opinion not only perfectly extra-judicial and beside the question; but it is moreover directly opposed by what he says in the case which I have cited of *Smallecomb v. Cross* (1 Lord Raym. 252), where he expresses an opinion directly the contrary. He there says, "If a writ of execution be delivered to the Sheriff against A. and A. becomes bankrupt before it be executed, the execution is superseded: and, consequently, the property of the goods is not absolutely bound by the delivery of the writ to the Sheriff." Besides this, we find that in the case of *Cooper v. Chilly*, in Burrow's Reports (1 Burr. 36), when that came on to be argued before Lord Mansfield, he observed, "Lord C. J. Holt could never say that 'the property in the goods vested by the delivery of the fieri facias, and the extent for the King afterwards comes too late.'" Then Lord Mansfield himself says, "No inception of an execution can bar the Crown." Now I cannot help giving more credit to Lord Mansfield for possessing greater knowledge on this subject at that time. This was one of the first cases which he decided on coming into the Court of King's Bench: and he was extremely conversant with the law on such subjects, and he had the opinion of his great predecessor, Lord Hardwicke, before him, [360] who had so recently declared his opinion on the same point, much to the same effect.

The other cases cited by Comyns I have already observed upon, in commenting on *The King v. Andrew*. I think it is extremely clear, therefore, that my Lord Chief Baron Comyns was not accurate when he cited that case as an authority for the position that the mere delivery of the writ of fieri facias was binding on the property: because in that case which he refers to, (*The King v. Andrew*;) I think it is perfectly clear, that the execution was completely executed by the suing out of the elegit, which requires no subsequent award of a liberate of the property. I will not therefore make any further remarks on that case. As to the judgment of Mr. Justice Gould, I cannot help thinking that he was also mistaken when he refers to *The King v. De la Cour* (Parker, 262); and I will now also refer to that case to shew that it by no means authorizes the proposition. There was no occasion there for a prior writ to be served, to give the Crown a preference to an execution against the debtor: the Crown could only sue in respect of assets: and the question was, how the executors should administer? The case was this: A., the testator, was indebted by judgment to B., and also by bonds to C. and D., and by simple contract to E., E. being a debtor to the King, caused the debt due to him to be seized into the King's hands, and then a scire facias issued against the executor of A. This was therefore in [361] its circumstances a very different case from one in which the Crown could have sued out a *clausit extremum*. The Crown proceeded in the common manner on the assignment of a simple contract debt, subject to other debts of the testator, and the Crown could only sue by scire facias: and until the Crown's execution was sued out on the scire facias, there could be no question arising upon the case at all like the question which is now before us. In that case, before the return of the process, the bond creditors had obtained judgment on their bonds, and the three judgments were pleaded in one plea. It is quite enough to say, that the Court of Exchequer only determined in that case that that plea was bad. However, the Court in that case which Mr. Justice Gould quotes as one on which Comyns founds his proposition, only held generally, that, inasmuch as the one judgment was unquestionably prior to the inception of the Crown's demand,

that is to say, the judgment that had been obtained before the assignment of the debt to the Crown, and after the death, that judgment, by virtue of the statute of 33 of Hen. VIII., was good against the Crown: and the Court were of opinion, that the Defendant's plea was bad, though he might have pleaded the first if he had not included the two other judgments: but as he chose to put all the debts together in his plea, the Court were clearly of opinion, they were not available against the Crown's demand on the debt assigned. It was the general opinion of the Court, that the De-[362]-fendant might have pleaded the first judgment, but having also pleaded in an entire plea those two latter judgments, the Court thought that the plea, being entire, was bad, and the Crown had judgment. Undoubtedly in that case a question arose upon the construction of that clause in the statutes on which my Brother Wood has founded some part of his argument, but the Court decided nothing then applicable to this question.

I shall now bring to a close whatever I had to say on the present occasion, with making an observation or two on what I consider to be the proper construction of the 74th section of the 33 Hen. VIII. c. 39. [Having read the section.] The only doubts which I have ever entertained are, first, whether the mere circumstance of the priority of the subject's judgment, if it does postpone in any case the Crown's execution till such judgment be satisfied, extends to both goods and lands, or lands only: and, secondly, whether it extends to the King's debts for penalties incurred. Now, to reason on the clause itself, I should be inclined to say that its meaning was, that where the Crown's suit is once commenced, or process awarded,—as, for instance, an extent sued out, there shall be no race between the Crown and a private person, to get first hold of the property: and that the Crown shall not be imposed upon through fraud or collusion. It means that the Crown's debtor should have preference to any other creditor: but that where a party has ob-[363]-tained a previous judgment, this special preference of the Crown's suit shall not have place, if it be followed up by immediate execution being executed. The clause does not say that the subject shall have prior execution. It leaves him, therefore, only the full benefit of his judgment, and the Crown must proceed without any benefit from this statute, as by common law it had a right to proceed: and, in like manner, the party may avail himself of his judgment. To say that the act binds goods as well as lands, if the Crown do not commence its suit before the subject has got judgment, would be to give the creditor by this statute an advantage against the Crown which he could not have against any other individual. The true meaning of the clause I take to be plainly this: the mere commencement of the Crown's suit shall bind the property: but where there is a previous judgment, the party shall have all the benefit of that judgment which he could derive from a due prosecution of it to execution, which I take to mean the perfecting of that execution. I take this to be the meaning of the Act of Parliament the rather that it would be quite monstrous to suppose that any person who may be a creditor of the debtor to the Crown, may by merely getting a judgment under any circumstances whatever, (which judgment would stand recorded at all times, not only against the present and future debts of the Crown, but against all antecedent debts by simple contract) and by that alone bar the Crown's suit from ever having effect—and that not only on the land, but even on [364] the goods of the Crown-debtor. It seems to me to be quite impossible to put such a construction on the statute. It strikes me that the plain sense and meaning of the clause is this,—that there shall be no race run between the Crown and the subject; and to prevent that, it has provided that in concurrent suits, the Crown shall have prior execution, and even that it shall, in such case, supersede the inchoate execution of the bonâ fide creditor,—but if he proceed with diligence to complete his execution, and take the fruits of his judgment before the Crown's suit has commenced, he shall have the full advantage of it, notwithstanding the Crown's demand. I was at one time very much inclined to think, that that clause would give the Crown a right, even after execution executed, till in *The Attorney-General v. Fort*, the Court held the contrary; but they so held in that case because there the property was actually changed by the completion and perfection of the execution*. The best construction [365] I can put upon the clause is, that the

* *The Attorney-General v. Fort, Esq.* Trin. Term, 1804.—Where a Sheriff has seized the goods of a debtor, under a fieri facias delivered to him by a judgment creditor, and has executed a bill of sale of them to the creditor, and given him possession, a

judgment shall only be effective if it be proceeded with and completed prior to the commencement of the Crown's suit: if it is subsequent, the law postpones it in favour of the Crown, as soon as the [366] Crown's suit is commenced. Even if it be prior, the act does not mean to say, that the subject shall have not only a judgment, but an execution

levari facias, issued by the Crown, on a judgment entered up for penalties incurred by the debtor for frauds on the Revenue, under a verdict obtained on an information, filed before the subject-creditor's judgment, comes too late: for the property in the goods becomes, by the bill of sale, completely altered. — In such a case the Sheriff may well return nulla bona. — If, however, any of the goods included in the bill of sale have been made chargeable with the duties of Excise in arrear, on a breach of the Revenue Laws, on which the information was founded, the Crown will be entitled to a verdict for the value of those notwithstanding the sale: and the return of nulla bona will not be a good return, as to them.

[Referred to, *Attorney-General v. Trueman*, 1843, 11 M. & W. 721.]

In this case an information had been filed (Hilary Term, 40 Geo. 3.) by the Attorney General against the Defendant, as Sheriff of the County of Wilts, in the nature of an action for a false return made by him to a writ of levari facias, issued against David Powell, for levying £14,600 recovered by the Crown, on an information against him for frauds on the Revenue, in his business of a paper manufacturer. — On the trial (30th May, 1800) a verdict was found, subject to the opinion of the Court on certain points arising out of the evidence, and it was made a special case. The case stated that judgment had been entered up against Powell in Trinity Term, 40 Geo. 3. On the 21st June, 1800, the writ of levari facias was issued, and delivered to the Sheriff on the 23d, commanding him to enter, and levy that sum on the goods and chattels, lands and tenements of the Defendant Powell: and, if they should be insufficient, to take his body.

On the 2d July, 1800, the Sheriff's officers entered on the Defendant's premises, where he found divers goods and chattels, amongst which were materials and utensils for making paper, to the value of £10; all of which goods and chattels were included in the bill of sale thereafter mentioned to have been made thereof by the Sheriff to Charles Ward.

It also stated that, on the 24th April, 1793, Powell had executed a bond to Ward, in £490, conditioned to pay £245, and interest. On the 23d of May, 1800, Powell executed a warrant of attorney to Ward, to enter up judgment by confession for £663 7s. 11d.; and, on the same day, judgment was entered up thereon, and a fieri facias issued, endorsed to levy £331 13s. 11½d. besides &c. On the 25th, that writ was delivered to the Sheriff: and, on the 27th, he entered, and levied under it. On the 31st the Sheriff took a bond of indemnity from Ward, and executed a bill of sale to him of all the goods and chattels taken under the fieri facias, and stated to be then in the possession of Powell, in consideration of the sum of £176 19s. 7d., the value thereof as appraised, according to a schedule.

The case stated that possession of the said goods and chattels was thereupon delivered to Ward, and that they all remained in the Sheriff's bailiwick at the time of the delivery of the Crown's execution, and the return made thereon, which was, "that Powell had not any goods or chattels, lands or tenements, in his bailiwick, whereon &c. nor was he to be found &c." The value of the materials and utensils for making paper was stated to be £10, and the residue of the goods &c. £166 19s. 7d.

If the Court should be of opinion with the Crown on the whole, the verdict was to be entered for the Crown generally: if on the question of the utensils only, the verdict to be entered for £10: if they should determine in favour of the defendant. On both points the verdict was to be entered for him, and the process delivered to him.

The case was argued in Michaelmas Term, (22d Nov.) 1803, by Wood, for the Crown, and by Burrough, for the Defendant.

On the part of the Crown it was urged, on the first point, that this case was quite distinguishable from those of *Upton v. Sumner*, and *Esche v. Peck*; because this was not the case of an extent, but of a suit by the Crown for the recovery of a debt, and therefore rather came within the principle of the decision in the case of *Burns*.

also, in preference to the Crown, whether he follow up his judgment in earnest and with [367] due diligence or not. It only intends, that the subject's judgment shall proceed unimpeached by the Crown, if it can be perfected and rendered available before the Crown comes in, just as it is in the case of any other creditor; because [368] we know it is every day's practice, that if A. has judgment of one year, and B. has another of a following year, by using due diligence the subsequent judgment may be rendered available [369] to B. in preference to the prior judgment of A. if he neglect to execute it. It is impossible to understand the statute to mean that the Crown was to be put in a worse situation than any other creditor.

Butler (1 East, 338), and *The Attorney-General v. Aldersey* (1 East, 342), from the Exchequer (cited in support of the argument on the part of the Crown, in the case of *Butler v. Butler*, and there reported), where it had been held, that the Crown's execution on judgment, in a suit for penalties, commenced prior to the subject's suit, is entitled to priority even under the 74th section of the 33d Hen. VIII. c. 39.

[The Court enquired during the argument, whether it was meant to be contended, that a suit commenced by the Crown before judgment obtained by the subject, would have the effect of staying the subject's execution, if the sheriff should have notice of the suit pending, and whether the sheriff might return that fact:—and the Counsel for the Crown stated that it was.]

On the second point it was contended that, as by the statutes on which the information against Powell was founded (28 Geo. III. c. 37, sec. 21, and 34 Geo. III. c. 20, sec. 27), the materials and utensils are made liable to, and chargeable with, the duties of excise in arrear, the Crown had a lien on them, into whose hands soever they might at any time and by any means come: and therefore the Crown would be entitled to a verdict for the value of the utensils at the least.

For the Defendant it was contended that a bill of sale having been executed by the Sheriff to the judgment creditor, and the possession of the goods &c. delivered to him thereupon before the extent came into the Sheriff's hands, the subject's execution was then executed, and the property was thereby completely altered: and, consequently, the Crown's execution came too late: for the Defendant, when the *levari facias* came to the Sheriff's hands, had then no goods and chattels in his bailiwick on which he could levy: therefore the return of *nulla bona* was a good return.

On the second point it was contended that the special case had not stated enough to enable the Crown to claim the value of the materials and utensils, said to be chargeable with the duties in arrear: for they did not appear to have been in the custody of the Defendant when the *levari facias* was sued out, and it could not be said that those things were liable from the moment of filing the information.

Wood replied.

Cur. adv. vult.

In Trinity Term, 1804, the Court delivered their judgment in this case. They held, that the execution of the subject had been finally and completely executed by the execution of the bill of sale to Ward, the judgment creditor, and the delivery of possession to him under it: and that it had therefore divested the property in all the goods and chattels which had been seized under the *fieri facias* out of the debtor, except in the materials and utensils for making paper: with respect to which, they held, that the statutes gave the Crown an indefeasible lien on them, and that, consequently, they could not be taken or disposed of under the subject's execution, whilst any part of the excise duties were in arrear.

On the first point, therefore, they determined that the Crown's execution could not be considered as overriding the subject's, after it had been thus executed, and that, for that reason, the verdict should be entered for the Defendant as to all the goods and chattels seized, except the materials and utensils for making paper, and as to those the verdict to be entered for the Crown.

When the Court were about to deliver their opinion, Mr. Baron Graham is understood to have been disposed to differ from the rest of the Court on the first point: but his Lordship, in deference to their greater experience on such questions, did not press his arguments, but yielded to the weight of authority opposed to them in the judgment of the majority of the Court.

As to the £10, therefore, the Court ordered Judgment to be entered for the Crown.

I have cited the authorities on which I rest my judgment. The general argument that I rely on undoubtedly is, that at the date of *Sheriff v. Hailes*, it was held, and has ever since been invariably recognized as law, that until the subject who has begun his suit has perfected his judgment by a complete and absolute execution, the Crown's process does not come too late. I may carry it further and say, that the law is the same with respect to elegits. That I take to have been the clear sense of the Court in *The King v. Andrew* (Hardres, 23). There is also a case reported by my Lord Holt (*Tyson v. Paske*, Holt, 318), which plainly shews that they make no distinction between the common law execution by elegit, and the common law execution by fieri facias. The great question, however, and the sole question, as it appears to me, is, whether from the mere circumstance of a seizure having been made under the fieri facias it can be said, that the property is divested out of the debtor. Now, I admit that my Brother Wood has cited some cases on that point which require consideration, but I really do not recollect that any one of them goes directly to determine the point. I must, however, claim the same attention for those cases which I have cited, notwithstanding the great authority [370] of my Lord Kenyon, to shew that the mere seizure of the goods by the Sheriff does not divest the property from the debtor of the Crown, but that the property in the goods still remains in him till actual sale. I will not take up the time of the Court by referring to those cases again; but I consider that the case of *Clerk v. Wathers* (6 Mod. 290), the principal authority which was cited by my Brother Wood, does not go the whole length of the proposition. It only establishes, that where the debtor had suffered judgment by default, notwithstanding the change of hands by the appointment of a new Sheriff, he should not be suffered to defeat the claim of the administrator by a demand of restitution by seise facias; but, in that case, they need not have contended that the property was out of him: that, I think, was inaccurate, and I prove it to be so by the contrary authorities which I have cited. The main point of the decision in that case, however, I think was perfectly right, that a creditor shall not himself stop the progress of an inchoate judgment against him by such means as were resorted to by the Defendant under the circumstances of that case.

Upon the whole, it does seem to me that I am possessed of very strong authorities to shew that it is not the effect of a seizure by the Sheriff to cause a transfer of the property. If it does not divest the property, the execution is not thereby [371] complete, as it is not executed, and if it be not, I am of opinion that the Crown's process is not too late.

I can perceive but very little difference between this case and that of *The King v. Cotton*. It is true, that that was a case of distress, and distress in its effective form is certainly given by Act of Parliament. In truth, after all the time and trouble spent in the examination of these cases, and the various topics of this tedious enquiry, it comes to this question: Does the seizure by the Sheriff under the fieri facias operate so as to effect a change of the property of the party? in other words, is the execution complete till the sale, so as to transfer the property? For if it be then complete, and if the property be thereby divested, the Crown process is certainly too late. If it is not divested, the execution not being completed till the sale, then, according to the authorities, in my opinion, the Crown process is not too late: for the proceedings are concurrent, and the Crown's execution must be preferred.

RICHARDS, Lord Chief Baron. This is a question of very great importance to the public; and it certainly is attended with very considerable difficulties. I understand that it is not intended to be left in this Court; and it is necessary, in order to afford facility to the further investigation of it, that I should give an opinion pro forma against my Brother Wood's otherwise the question must remain here. Without entering into a revision of all the arguments, I feel it impossible for my own part to decide against the determination in *The King v. Holt and Moore*. That was a solemn decision of this Court. It was very deliberately argued and well considered, and it was a very elaborate judgment of the whole Court, who were present in it. They took into consideration all the cases that had been decided before, some of which support a contrary doctrine undoubtedly; and they overruled those cases so far as they contradicted the decision in *The King v. Holt and Moore*. Since that time, a great many cases of the same description have come before the Court, some of them - indeed, many of them - since I have had the honour of sitting on the Bench. In all those the Court have either (as it were) tacitly noted in *The King v. Holt and Moore*.

Allnutt, or sometimes they have suffered a discussion, rather reluctantly I believe, with respect to the weight which was due to that case. I happen to have in my note-book the case of *The King v. Sloper and Allen**, in Michaelmas Term, 1818, when this question was argued, although on motion, with all the solemnity with which the present has been argued; and although I have heard an able argument to-day against the decision that was then pronounced, I must presume to say, that I hardly ever heard at the bar a more able argument than that of Sir William Owen, and yet the Court said that they would abide by *The King v. Wells and Allnutt*. Now, [373] that being the course which this Court has taken, I do not feel myself at liberty on this occasion, nor am I called on, to decide against that case. We have been told that there has since been an opinion entertained contrary to the decision in that case. Whether that was so or not I do not know; but I cannot take as an authority merely the supposed inclination of a Judge, or more Judges than one: but there has certainly been no subsequent decision, beyond all question, against *The King v. Wells and Allnutt*. That being so, I abide by that decision, as I think myself bound to do on the present occasion. I do not mean to say, that I do not feel that there is a great deal of difficulty in that case. At present I think the decision is right; but I have heard so much to-day, and heretofore when it was so well put in the able manner in which it was argued by Sir William Owen, that I feel considerable diffidence on the subject; and therefore I do not at all bind myself to abide by the decision in *The King v. Wells and Allnutt*, when it may come on to be heard elsewhere, so that the opinion of the other Judges may be had; but at present, under these circumstances, I consider myself bound to adopt the conclusion, and to abide by the case of *The King v. Wells and Allnutt*, whatever difficulty I may feel in so doing. I therefore agree with my Brother Graham and my Brother Garrow, that there must be
Judgment for the Crown.

[374] OBSERVATIONS ON THE FOREGOING CASE.

The question of whether the property in the goods of the debtor, seized under a fieri facias by the Sheriff, be, by the act of seizure, divested out of him, has been treated necessarily throughout the argument in this case, as being the first question to be disposed of, if indeed, it be not absolutely a preliminary question; because if that were so, the second and principal question in the case would not arise. In all the former discussions of the points now brought before the Court, the enquiry on the first appears to have been limited to whether the property was altered by the delivery of the writ of fieri facias to the Sheriff, as a consequence of its being one of the effects of such delivery to bind the goods by virtue of the Statute of Frauds. In this case, that enquiry has been extended in a very material respect, so far as to make it now necessary to determine whether actual seizure by the Sheriff, effects such an alteration of the property as to divest it altogether out of the debtor, and leave nothing on which subsequent process of any sort can attach.

Upon that point, it is apprehended that, in the case of the Crown, where, by the prerogative, even the remnant of a right or an equity is sufficient to let in the Crown's claim and render the goods liable to be taken, it is not enough that there should be, as a necessary result of the seizure, [375] a mere alteration of the property, to whatever extent it may be effected short of an absolute divesting of the whole, so as to oust the Crown; and it may even be doubted whether the whole property should not be completely transferred to some other person than the debtor ere the right of the Crown can be entirely defeated; because, it is conceived, the Crown may, by the prerogative, seize in transitu, so as to intercept the transfer of the property, even while in the act of passing from its debtor to his creditor. Whatever may be the consequence of the delivery of the fieri facias to the Sheriff, in this respect, there can, it is conceived, be no doubt that a seizure by the Sheriff under it, has the effect of making, in a certain degree, an alteration in the property in the goods: it at least diminishes the debtor's property in them, so far as that his former complete and absolute ownership, by virtue of which he might have used or have disposed of them as he pleased, without lawful control, is thereby abridged to a certain degree, inasmuch as the entire dominion over them is no longer in the Defendant after seizure, and his

* Vide ante, vol. vi. p. 114.

right is thereby also still further diminished by the absolute transfer of a special property in them to the Sheriff, who has thereby not only the possession, but the right of possession *pro tempore*, as being in the first instance *custos rerum in custodia legis*. In the mean time, however, the general property, subject to abridgment by the intervention of such special right, must be either in the Defendant or the Plaintiff, or, as Mr. Justice [376] Powell (6 Mod. 293) says, it must be in abeyance. But as the Defendant has still, it is presumed, at least a right of property, and may at any moment of time acquire a right of possession also, (which no other person could do) even up to the very last instant of the Sheriff's custody, and may then, by making a tender, hinder and stop the sale (*The King v. Bird*, 2 Show. 87), it should seem that the property is not actually divested out of him by the mere rightful amotion of actual possession, and the consequently necessary suspension, or rather restriction, by the effect of the process of the law, of that entire dominion over them which he previously had as absolute owner; still less as it transferred to the Plaintiff. The Defendant, it is apprehended, could sell the goods to a purchaser, subject to the Plaintiff's and Sheriff's demands against him, and the sale would give to the purchaser a right to have a transfer. If it were a real chattel which had been seized, or a term in land, perhaps the Defendant, on a bill for a specific performance of a contract for sale of the term, executed while it was in the Sheriff's custody, would be decreed to convey the premises; and that he would not be compellable to do if he had not some right remaining in himself at the time of the contract entered into. He has still the *jus in re*, and may at any time acquire the *jus ad rem*. So, if there should be more goods taken by the Sheriff than would suffice to satisfy the demands to which they were subject in his hands, [377] the Defendant, after satisfaction of the execution out of the produce of the sale of the goods, would be entitled to the surplus, without bill of sale, or any act to be done on either side, but delivery, or rather restitution; for that is more necessary to release the Sheriff than to entitle the party. The Sheriff has often been said to be trustee during his possession: if so, he is trustee for the Defendant; and although, perhaps, to the amount of the Plaintiff's demand he may be trustee for the Plaintiff also; yet it would be limited to that amount only, whilst he is a trustee for the Defendant in respect of the whole; for he has an interest in the whole at all times, as well in any surplus as in what should be necessary to satisfy the Plaintiff; because, as that goes in discharge of his debt, he has still an interest in having it so applied, and, consequently, in the goods themselves so far, as much as in the rest, if there should be any surplus remaining, over and above what would satisfy the debt. And, although the Sheriff may clearly maintain trover during the continuance of his right of possession, the Defendant, it is apprehended, might also support such an action for a conversion, even during the possession by the Sheriff, after satisfying the execution; and if he should release the Sheriff, he might avail himself of his evidence in such an action.

If, then, the debtor has the property, or the right of property, with a qualified conditional right of possession, it is apprehended that there is a sufficient interest remaining in him on which [378] the prerogative right of the Crown (which reaches all the property of the debtor, and his right thereto, whether that be merely the *jus in re* or *jus ad rem*) may attach. It has been even considered by some, that the money arising from the sale of a Crown debtor's effects, taken in execution, is liable, in the hands of the Sheriff, to this process of the Crown till actually paid over to the Plaintiff (a). In strictness, undoubtedly, the money levied by the sale should be brought into Court (b); although, by permission of the Court, the Sheriff may be allowed to return that he has paid the money to the Plaintiff (c), and on that ground it is, perhaps, that it has been considered, that even money produced by the sale of goods seized under a *fieri facias* is not out of the reach of the paramount claims of the Crown, whilst in the custody of the law, which it is till paid over to the judgment creditor.

The principal question in the case, however, is, whether the particular mode of proceeding by immediate process of extent in aid, resorted to in the present instance, under the circumstances of this case (it being assumed to have been previously

(a) Note to *Smallcombe v. Cross*, 1 Lord Raym. Rep. 251.

(b) 2 Bac. Ab. tit. Execution, (C.) 4, vol. ii., p. 352.

(c) *The King v. Bird*, 2 Show. 87. *Chambers v. Southwell and others*, 3 Lev. 291.

authorized by law, as founded on the acknowledged prerogative of the Crown) has not been so restricted by the 79th section of the statute of the 33d Hen. VIII. c. 39, as to be pre-[379]-cluded wherever the subject has obtained judgment [or, at least, where the Sheriff has seized the debtor's goods under a fieri facias on such judgment] before the Crown has commenced proceedings*.

On that question the following suggestions, relating to topics not adverted to in the course of the arguments or the judgments in this case, are here offered to assist the fullest investigation of this most important question. They are in substance transposed from a treatise on a subject (of which such proceedings necessarily form a conspicuous part) now preparing for publication; and are submitted to the consideration of those who may be desirous of pursuing the enquiry further, in order to refer them to authorities which have been collected at some pains, and to enable them the more readily at least to direct their search to much that is to be found in the books on this question, placed, as it is attempted to be, in a new light, and upon other grounds than those on which it was argued.

Their tendency is to shew, that the Crown's prerogative right to proceed by extent † in the first [380] instance against the goods and chattels of its debtors, and their debtors, in cases where the debts are in danger of being lost, was not only not given by the statute of Hen. VIII., but that it is not in any respect abridged or touched by the 74th section of that statute, and that this extraordinary mode of proceeding is not in fact within the purview of that statute: nor adverted to by it, either in terms or by construction, except, perhaps, only as far as a general discretion is thereby given to the Court of Exchequer to admit the just claims of the subject in answer to the Crown's demands, and to regulate and controul the issuing of the prerogative process on the part of the Crown.

That act appears to have been passed with a view to the construction of a new Court of Record—the Court of General Surveyors—and to give to that, and to the Court of Augmentations, jurisdiction, powers, and authority, in all respects equal to those of the Court of Ex-[381]-chequer, restraining either Court to the subject-matters of jurisdiction arising in each severally. That statute recites, “And forasmuch as all and singular the premises be appertaining to the King's most royal Majesty, as in the right of his Imperial Crown of this realm, which crown so being Imperial, it is very necessary and expedient that all possessions, lands, tenements, and other hereditaments, being any part, parcel, or member thereof, should be of such nature, quality, and condition as one whole and perfect body, undismembered, so that the officers thereof, appointed by the King's Highness, should have no necessity to have aid or assistance of the authority and power of any other Court or jurisdiction, of or for the ordering, surveying, setting, letting of any of the premises, or for levying of all and singular the farms, rents, issues, profits, and commodities of the premises, or for the determination and judgment of any manner, cause or causes that might happen to grow, insurge, or rise, in, of or about the same, or any part thereof wherein the King's Majesty is party. Therefore as well for the good ordering, and for more speedy and due administration of justice, to be had of and concerning all and singular such the King's honours &c. and to the intent the King's said excellent Majesty, his heirs and successors, may the more truly and speedily be answered, contented, and paid of the rents, issues, farms, revenues, and profits, rising, coming, and growing, or which hereafter shall rise, come, or grow of, in, and upon [the said honours &c.]. It then consti-[382]-tutes the Court of General Surveyors, and enacts, “that they shall have

* The mere circumstance of judgment being obtained before the Crown has commenced proceedings, although that is the express language of the statute, does not appear to have been insisted on in this or any other case.

† That extents eo nomine have been always used as a prerogative proceeding on the part of the Crown, is manifest from the Records. In the 50 Ed. III. (Cott. Abr. Rec. 138), the Commons petitioned, “That such as by sinister means procure extents against the King (vide post, p. 390, the extract from Madox) at a value, where it is thrice, or far better, may be punished.”—Answer: The King will make such enquiry thereof as him pleaseth.

In the same year (Cott. Abr. Rec. 178), they petitioned, That all patents of farms, as well of denizens as aliens, may be confirmed and not repealed. Answer: The King granteth but where there are extents duly returned, or for other reasonable causes

full power and authority from thenceforth to compel the said accountants to account before them; and also to examine, hear, and determine their accounts, and all circumstances thereof, and to do and execute all and every thing and things in and upon every of the said accounts, as well for the sure payment and satisfaction of such rents, farms, issues, profits, revenues, debts and duties as belong or shall grow unto the King's Highness by reason of the same, &c. &c. And generally, shall have full power and authority to levy, or cause to be levied to the King's use, by all ways and means, by their discretion, all and singular the rents, farms, issues, revenues, profits, arrears, debts, and duties that shall grow and be due to the King." Then the modes of proceeding in those Courts are prescribed and enumerated in several of the subsequent clauses.

Throughout the whole act it appears, that the intention of the framers was directed solely to proceedings by the Crown for the recovery of its debts by suits against its debtors, in ordinary cases instituted in personam in the common course in those several Courts; in other words, to proceedings in suits where the Crown debtors were solvent, and the Crown debts not in immediate or visible danger of being lost to the Crown if it should proceed in the usual manner, and to those only. All the various provisions and enactments, and the whole tenor and object of the statute, abun[383]dantly prove, that the attention of the legislature was directed to such proceedings only, and that no other were contemplated. There is nothing to be found throughout that very long act in any way relating to the extraordinary and collateral mode of proceeding then in use, founded on the King's common law prerogative, to secure the debtor's goods to answer the Crown's demand by immediate or present process of extent.

* As much confusion may be avoided by observing, in all questions on this subject, the true distinction (hitherto not always sufficiently insisted on and attended to) between immediate extents (or extents in chief) and extents in aid, and again between the "immediate process of extent" and "process of immediate extent," it will be of use to notice here in what that distinction really consists. The immediate process of extent is distinguishable from the extent which issues and is founded upon some previous intermediate proceeding taken against the party: the process of immediate extent is distinguishable from the extent in aid. All extents issued against persons who are immediate debtors to the Crown, are properly called immediate extents (or, as they are sometimes termed, Extents in Chief) because the party is the immediate debtor to the Crown, or the Crown's debtor in capite or in chief; and all extents against persons indebted to the Crown debtor, from the first to the third degree, (that is, for three degrees removed from the Crown's immediate debtor exclusively) are extents in aid. These are sometimes directly in aid of the Crown (a); but they are, for the most part, in aid of the original Crown debtor in the first instance, and they are always, in effect, ultimately in aid of both. The extent in aid was, from its origin, always intended solely for the advantage of the Crown, through the medium of debts due to its debtors, and is equally, with the extent in chief, founded on the Royal prerogative. The origin of extents in aid is said to be this. The King being presumed to be incapable of promoting maintenance, could at all times take an assignment of debts due to his debtors. "This (says Gilbert (Tr. on Excheq. 1677), begot the notion, that debts might be extended [seized] in aid of the King's debtor, as part of his personal estate." For that reason, and in consideration that it is for the advantage of the Crown to use its prerogative for expediting the recovery of its debts by such means, the Court, in practice and on principle, makes no act of distinction between them, or gives an advantage to one which it denies to the other. In the single instance where the debtor to the Crown debtor is also at the same time liable to an immediate extent, as an immediate debtor of the Crown, the practice is to prefer, in executing the process, the immediate extent; but the preference given in that case to the immediate extent is not founded on any supposed clashing of interests between the Crown and the subject on such a coincidence. That is a case when the Court, looking only to the Crown's advantage, does not contemplate. In fact, it does not always exist—as where both the parties so proceeded against in aid, and also where the proceeding is effectively on the part of the Crown. That point is

(a) In *Yale v. Kirwood* (Lil. Ent. 307) the extent is called "an extent in aid of the King."

whether immediate, or [384] in chief, or in aid, directed in rem, the proceeding resorted to only in those desperate cases where [385] the Crown's debts were considered in immediate danger of being lost, unless some such measure [386] of security were adopted quasi quia timet, previous to the commencement of the proceedings for the recovery of the debt, lest the debtor's effects should be lost to the Crown in the mean time. It is, in truth, a creature of the Court, formed out of the power given to the Exchequer by the statute of Hen. VIII. to use the prerogative of the Crown in enforcing payment of the Crown's debts, and in securing in the mean time, the Crown-debtor's property and effects, and the debts due to him, that they may be forthcoming to answer those Crown debts when recovered, and also to temper their proceedings by that equitable consideration of the subject's claims, on the other hand, which, by the statute, the Court are authorized to admit judicially: and, therefore it is, that both on the original issuing of the process and in all its subsequent stages, it is under the summary [387] control of the Barons, and they may mould it any way which, according to their discretions, they may think most expedient, and best calculated to meet the

preference has, in reality, no other foundation, and it is in effect nothing more than the Crown's obvious right to prefer any or either of its several concurring prerogative writs in the execution; and, of course, it would take care, in serving the several writs, that that demand should be first satisfied for which the Crown might have the most slender security. This power to prefer either of such proceedings, further shews, that both are equally considered to be proceedings wholly on behalf of the Crown in effect, and that the extent in aid is, in all its degrees, a pure prerogative right (*b*). It is, however, one which from its very nature, as long as it exists, must be liable to be abused for private ends: and as unquestionably it sometimes is attempted to be so abused where the Crown-debtor is of sufficient ability to pay the debt without resorting to this proceeding, it is therefore often said to be a proceeding for the mere personal advantage of the Crown-debtor. Although that indeed may be, and frequently is, ultimately beneficial to the Crown, it is, however, quite clear, that so remote an advantage forms no part of the consideration on which the prerogative right was founded, and rests. It is a necessary evil consequence inherent in the right itself, and cannot be eradicated without destroying the right, and that can only be done by the interference of the legislature. The Court most anxiously watches the practice to prevent such abuses, and as the attempt is consequently most commonly abortive, and always dangerous, the process is largely protected from such possible abuses.

A novel and ingenious distinction has been taken in a recent work of great merit and value on the subject of Extents, between such as are prosecuted really for the Crown's debts against the debtors of the immediate Crown-debtor, at the instance and for the advantage of the Crown, and such as are sued out by, or rather at the instance and on the part of, the Crown-debtor himself. The former are there, for the purpose of that distinction, called Extents in Chief in the second degree, as distinguished from the latter, which are there called Extents in Aid, as being prosecuted wholly for the advantage of the Crown-debtor. Now that, with respect to the latter, would be, if well founded, an invidious distinction, destructive of the title to the equal protection of the Court, which it has ever received in practice, on the principle of being equally employed for the benefit of the public; but, for the reasons before given, and there being no such distinction recognized in practice, or warranted by any thing to be found in the books, it is submitted, with deference, that there is no foundation for such a distinction in law, however it may be in some instances apparently supported by the facts of certain particular cases. An extent against the debtor of the Crown's

(*b*) It may be worthy of remark here, that the jurisdiction of this Court to take cognizance of debts due to Crown-debtors, was very early attributed to the speed with which the Crown's debts were thereby recovered. Lord Somers (rendering the language of Britton (fo. 2 b.)) thus cites his authority, in *The Banker's case* (St. Tri. 147), "Our Treasurers and our Barons from henceforth shall have jurisdiction, &c. &c." and to take cognizance of debts which are owing to our debtors, that we may come at our debts the sooner: and certainly, when the only mode which the Crown had of rendering its debtor's land available was by levary, it expedited the recovery of its debts by seizing its debtor's debts at once, than by waiting the operation of a levary facias

justice of each particular case on either side. Thus, whilst they enforce the rights of the Crown by the judicial application of the royal prerogative, they may preserve the claims of the subject, who may have any legal or equitable defence to the demand of the Crown.

That this extraordinary mode of proceeding by immediate extent, which is, in effect, a proceeding directed as much against the creditors, (or any persons having claims on the debtor's property in any character) as against the debtor himself, is not within the statute, appears as well from what it is not as from what it is, from the nature and object of the proceeding—and from the course, progress, and final result of it. It is submitted, that this species of extent is not an *extendi facias*, and that it is a misapprehension so to consider it; and further, that the *extendi facias* has not been given by the statute to the Crown for the recovery of all and every of its debts, as the 55th section has been supposed to have done; at least, that it has not given every mode of proceeding there enumerated for the recovery of each and every of the King's debts. It has given every mode of proceeding to each of the enumerated Courts; but, with respect to the debts, the clause must be construed *reddendo singula singulis*, the *extendi facias* being confined to the debts on bonds in pais, as a consequence of their being put [388] on a footing with statutes staple, and therefore requiring no longer an inquisition to record them. An *extendi facias*, properly so called, for a simple contract debt put on record by inquisition has never been heard of in practice.

Under what circumstances, and at what precise period, the proceeding itself first originated, it is at this time difficult to discover; but it is quite clear, from its nature, as it exists in use as at present, that it is a very ameliorated modification of the King's ancient and inherent prerogative to stay all proceedings against his debtor, and of the subsequent qualification of that prerogative by the 25th of Edw. III., to stay execution only upon judgments obtained by the subject till the Crown's debt were satisfied by the judgment creditor, exercised, as it now is, wholly on behalf of the public, in protecting and recovering the revenue. It is very probable that this species of proceeding by immediate process of mesne extent*, as contradistinguishable always from final process [389] of extent (whether immediate or in aid) was, in its origin, modelled like the Revenue Prosecutions in rem, commenced by writ of appraisement after seizures of goods for non-payment of customs, before condemnation, or even information filed for the purpose of obtaining condemnation, on the practice introduced upon the passing of the act of parliament in the first year of the reign of Hen. VIII. (c. 10), for allowing parties thenceforth to come in and traverse offices found in respect

debtor is said to be in the first degree, and that, and indeed the extent in every other degree, is an extent merely and strictly in aid, and every extent in aid is, in contemplation of law, always an extent in the first or some more remote degree. The learned author of the Treatise alluded to appears to have overlooked or omitted one (the first) degree, unless it is meant that the Crown's immediate debtor is to be considered as the debtor in chief in the first degree; but, as "degree" is a relative term, that first degree must, *ex termino* be a removal one step from the immediate debtor, or debtor in chief. If one be indebted to another in any degree, he cannot be an immediate debtor, and vice versa: the first gradation in the scale of removal of a personal privity of obligation or debt, is the first from the debtor himself. To explain this succinctly:—All debts owing to the Crown in capite, or in chief, make the immediate debtor the debtor to the Crown in the first instance, and debts owing to such Crown debtor becoming also due to the Crown when an extent is sued out against the creditor, the debt due to the Crown debtor, makes the party debtor to the Crown in the first degree.

* To obviate another apparent difficulty which the proposition that an immediate extent is not within the statute may seem to have to contend with, it will be necessary to make one observation on a received opinion, that an immediate extent is a more speedy means of recovering the King's debts. In point of fact it is not so, and the final recovery of the Crown's demand, where an extent is sued out, is frequently found in practice to be quite as dilatory where the demand is contested, as where recourse is had to the ordinary modes of proceeding in use for the Crown. All Crown processes recite, that the King is willing to be more speedily satisfied the debt to which it relates: the common *scire facias* is so worded.

of lands seized into the King's hands. Gilbert (Treatise on the Exchequer, p. 113, 181, 182) expressly deduces it from that source. "This, (he says, p. 112) begot the usual process on seizures of goods." And, further on, (p. 113) he observes, "Thus, the practice touching personal things in conformed to the ancient practice touching real estates." The analogy in the subsequent proceedings on the writ of appraisement and this writ of extent, considerably strengthens this conjecture. First, the proceeding itself is a prosecution in rem, and the party seeking to avail himself of this prerogative is termed the prosecutor of the extent. After the seizure and the appraisement of the goods, and the seizure and extent of lands, a rule^{*1} to appear and claim is indorsed on the writ of extent. Thus, the property seized in either case appears to have been treated as derelict and waived, on the presumption that the owner had absconded and abandoned it; and we have [390] the same high authority that that presumption of desertion of property, is the reason why the goods &c. of persons whose desperate circumstances countenance the presumption, are seizable in the first instance, as becoming thereby the property of the Crown; for Lord Chief Baron Gilbert observes, in his Treatise on the Court of Exchequer, p. 181, 182, "When they constructed penal laws by way of forfeiture, the forfeiture was appointed in rem, and likewise a penalty was laid upon the person transgressing the law; and hence it was that, upon seizures, such goods were often derelict, because the owners would not come in to claim them, lest they should be subject to a personal information; and therefore the two proclamations were entered, and upon the first proclamation a writ of appraisement went out, that the officer, or person that seized, might be answerable for the King's part, and the claim was always entered upon the second proclamation."

Madox (Hist. of the Excheq. vol. ii. ch. 33, sec. 13) certainly attributes the object and origin of appraisement to a different cause, and assigns a different reason for it. He says, "When Sheriffs had levied or distrained for the King's debt, it was their duty to sell or dispose of such distress at a just and reasonable price, so that the owner was not aggrieved thereby. But in regard some Sheriffs had misbehaved themselves in that behalf, it was provided by ancient statute, that when the Sheriff had seized any cattle for the [391] King's debt, certain persons should be assigned to appraise the same, according to which appraisement, they were to be sold by the Sheriff, lest the Sheriff should sell them at under-rates, to the wrong of the owners." "Peter de Meuling (he adds) claimed to be hereditary appraiser in this case for the county of Norfolk or Suffolk; and, in a note, he supplies the form of the writ as his authority for the text."

At whatever period the practice of issuing extents in aid against the debtor of the Crown's debtor originated, there is to be found a very remarkable passage in Leonard's Reports—part of a speech attributed to Lord Chief Baron Manwood—which shews at once the nature of this prerogative and the authority of the Court in modelling, applying, and enforcing it, according to the particular circumstances of the parties and the case. It also shews the reason why it is not now considered necessary to require that any foundation should be laid for the proceeding in the necessity of it to the debtor. It appears from that dictum, that the present practice of permitting the Crown-debtor to use this prerogative writ against his debtors, without requiring that he should shew his own insufficiency^{*2}, or that the debt due to the Crown [392] from him was doubtful, or that the debt due from his own debtor to himself was in danger of being lost, was first allowed in the early part of the reign of Elizabeth, and that, probably, on the ground that when commerce had so advanced as to have increased credit, and created a fictitious capital, whereby consequently it endangered or concealed the circumstances of parties. In *Clark's case* (2 Leon. 89, and the same case is

^{*1} This rule appears to have been heretofore sometimes called a Proclamation, 2 Ventr. 163.

^{*2} In *The King v. Blachford*, an affidavit was filed, stating that the Accountant of the Crown was completely solvent, as a reason for setting aside the extent; and the Court refused it, on the ground, principally, of its not being conformable with ancient practice, that the Crown-debtor should state his own insufficiency. The case above adverted to was not cited then; although it recognizes the practice, and furnishes the true reason for relaxing from the former course. It is observable too, that, in that case, no objection was made on the point of the impracticability of making such an affidavit positively in any case.

to be found in pages 30 & 31, almost verbatim) Manwood, C. B. observes, obiter "where the debtor of the King is sufficient, a debt due to him ought not to be assigned † to the King, but only where the debt of the King is doubtful, and that was the ancient course; but now, at this day, multi videntur et habentur divites qui tamen non sunt; and therefore omnis ratio tentanda est for the recovery of the King's debts."

A further reason may be found for such being the consequence of seizure under an extent, in the case of a Crown-debtor, in the consideration that the Crown being entitled to distrain for its debts in the first instance, proceeding in the nature of a distress at common law, when the property was taken as a pledge in [393] the first instance, it might have sold it as a waif in the next, if not claimed within the appointed time; for the Crown was always not only entitled to distrain for its debts—as inferior lords might under the feudal system—but to sell, which inferior lords could not. Gilb. 123.

But, whatever may be the value of these surmises, it will be sufficient for the present purpose, if it can be shewn by what the extent in question is not, that it is not a proceeding to which the statute applies; and, particularly, that it is not within the 74th section, on which it is universally admitted that this important question depends.

First, it is not (to follow the language and order of the 74th section of the statute) a "suit commenced or taken," nor "process awarded for the recovery of any of the King's debts," nor "process *1 awarded for the said [394] debt at the suit of the King"; nor is it an *extendi facias*, properly so called, however analogous with that writ it may be in its effect, for it may be contested by traverse, (which an *extendi facias* cannot) before the expiration of the rule to appear and claim, which rule forms no part of the proceeding on an *extendi facias*. It is a proceeding directed collaterally, as it were, against the Crown-debtor's property, in all cases of danger, from the state of his circumstances, to secure by premature seizure under a proceeding *ex parte*, and without notice from all other claims till the King's debts shall be first paid. It is certainly the usual course to introduce a *capias* clause into the writ of extent; but that, it is conceived, is rather, in this proceeding by extent, directed to the object of securing the debtor's property, as an effect of securing his person, than to the common and usual object of the writ of *capias*. The immediate process of extent is not a judicial writ, not being founded on a judgment or judicial process; and it is said to be the common practice, where the Crown debtor becomes insolvent, pending proceedings commenced against him in the ordinary course, thereupon to abandon the suit, and adopt the extraordinary proceeding by immediate extent *2. There, however, does not appear to be any satisfactory reason for abandoning the pending suit, unless it be to let in other claimants than the owner of the [395] property *3; but this very course of abandoning a suit commenced by process awarded, and perhaps proceeded in, of itself shews, that the seizure under an extent, is not, any more than is a seizure for non-payment of duties, a suit taken or commenced, and that it is not an execution on a suit or judgment.

Secondly, the extent, in cases of danger, is not an execution at the suit of the

† Debts due to the Crown debtor were formerly, on proceedings against him, assigned to the Crown; they are now found by inquisition. Gilb. 167.

*1 It appears from a passage in one of the Year Books, (Lib. Ass. pl. 35) that process is not necessary to bring a Crown debtor before the Court, to answer. That passage is as follows: "Nota, that Ludlow said in the Exchequer, that although no process be made to him who is debtor to the King, yet if it be found before us in the Exchequer, he shall answer to the King presently. FitzJohn said, that in case it were of record that he is debtor to the King, there is reason, but not upon surmise nor suggestion made; for there it is fit that he should be brought to answer by process, &c."

And in Compton (*Jurisdiction des Courts*, p. 112) it is also said, citing 30 L. A. 35) "Homme que est debtor de record en leschequer si soit view en Court, et n'est einsi sans proces et respondera, &c."

*2 Vide *The King v. Pearson*, ante, vol. iii. 296.

*3 This is in compliance with the rule of Court, that the Crown debtor shall make oath, that the debt due to him has not been put in suit in any other Court.

Crown, or in the nature of such an execution. This may be shewn by pointing out the many distinctions which are to be found in the object, form, and effect of that final process of extent, which is properly an execution at the suit of the Crown, instituted against a solvent debtor, and this proceeding by extent, in the first instance, to secure such debt as may be due to the Crown from a debtor who is insolvent, and incapable of satisfying the Crown and his other claimants, or whose debt to the Crown may be, for other reasons, in danger of being lost, unless the Crown be so secured. The immediate or present process of extent, whether the extent be immediate or in aid, is altogether wholly distinguishable from the final process of immediate extent upon a judgment, or a prerogative execution, not only in its language and terms, but in its whole course of proceeding, and in its ultimate object and result. The former is in terms a mere command (having [396] required the lands and tenements, and the goods and chattels of the debtor to be enquired of, and extended and appraised) to the Sheriff "to take and seize the same into our hands, there to remain until we shall be fully satisfied the said debt" *.

In this there are no words of execution; not only is there no command *ut debitum fieri aut levare facias*, but the Sheriff is expressly com[397]-manded not to sell even the goods and chattels seized until further command. The order to keep the property seized until the Crown be satisfied, does not express that the satisfaction (if that word were in any case used, or can be considered, as a term of execution) shall be made thereout, or inde; and this consists with the purpose here assigned to it as its sole object, that of withdrawing the property of an insolvent Crown-debtor from the reach of the subject's execution, till the Crown shall have been first satisfied, and even until the Crown shall have had an opportunity of substantiating its claim by the result of the consequent suit. The suit is then to be prosecuted by the party claiming against the Crown, and he, in establishing his right, takes on himself the onus of maintaining it affirmatively. Thus, the property seized becomes a pledge in the hands of the Crown, as goods distrained formerly were before the distrainer was empowered to sell; and in the future proceedings, as in replevin, the party claiming property becomes the Plaintiff, or quasi Plaintiff and actor in the suit. It is he who prosecutes the claim, and prays a positive judgment of *amoveas manus*; and it is observable that the section of the statute on which this question arises, speaks of the Crown-debtor as a Defendant in a suit, which is quite inapplicable to a party claiming under an extent, even if he should be, as he seldom happens to be, the owner of the goods seized. It is not, in fact, the immediate or present process of extent which is the execution; nor is the fiat [398] an award of execution. It is the *venditioni exponas* and *levare facias*, both founded on the ultimate order of the Court alone—the ultimate result of proceed-

* Then follows certainly these words "according to the statute made for the recovery of such (a) our debts." Upon those words, and the reference made at the end of the writ to the same statute, in these terms, "by the said Act of Parliament made in the 33d year of the reign of the late King Henry the VIIIth," the following observations may be submitted for the consideration of those who entertain the opinion that they prove clearly that the proceeding by extent was given by that statute for all the King's debts. The writ manifestly and in words adverts to debts of a particular nature, by the use of the relative term "such," which must have an application to some specific debts, in exclusion of others.—Now, that reference to the statute of the late King Henry VIII., seems to afford sufficient ground for conceiving that the debts in the particular instances were the very debts for the recovery of which the statute was meant to provide, by giving the *extendi facias*, without previous inquisition in the first instance, even against solvent debtors of the Crown, namely, debts on bond in pais, and no others. As soon, probably, as the Act of Parliament had placed such bonds on the footing of statutes staple, proceedings were instituted for their recovery, referring to the statute for their authority; and hence, in the modern forms, for whatever species of debt the extent issues, we still find the reference to the statute (however unnecessary) preserved; and so strictly is the then new form pursued, that to this day are frequently introduced the words "the late King Henry the VIIIth."

(a) In many instances it is "our debts of this nature." Hughes's report of *The King v. Bobb and Others*, p. 7.

ings taken upon present process of extent—that is the execution; and it is the order for those writs, or for an amoveas manus, which must be considered as the judgment of the Court. The order for a venditioni exponas is in nature of a judgment for a Defendant, or the party resisting the claim: because if there be no claim within a limited time, it resembles the judgment by default: and if the Crown obtain judgment on the merits, it is also a judgment, in effect, for the Defendant, denying to the party prosecuting his claim that which he seeks, namely, an amoveas manus. The venditioni exponas is so substantially an award of execution, that it is the Sheriff's sole authority for selling the goods, and for paying out of the proceeds the debt, into the Exchequer for the use of the Crown. The venditioni exponas which is issued on an extent is not,—as in the case of a common execution at the suit of a subject it always is,—a mere mandate to expedite the sale, and quicken the Sheriff therein, where he has made a dilatory return that the goods are in his hands for want of buyers; and is not in that case necessary to enable him to proceed to sale—but it is the Sheriff's authority to sell, and without it he cannot sell. It is like the liberate on the subject's extent on statute staple, which is (as was much pressed in argument to get rid of the authority of the case of *Strangefellow v. Brown* [399] *supra*) the judgment of the Court, with this important difference, that the liberate, when awarded, transfers, without any act by the Sheriff, the legal possession, the legal right being already in the Plaintiff by the mere appraisement of the Jury, and that is in itself a delivery in law. There never is in fact an actual delivery under the extendi facias; whereas, on a fieri facias, the execution is said to be executed only on a sale by the Sheriff, 2 Bac Abr. 349. On that distinguishing circumstance it is, that the well-known distinction between a fieri facias and an elegit executed upon goods only rests *on*. In the subject's extendi facias on a statute staple, there are words of execution not to be found in the immediate extent. It commands the Sheriff to extend and appraise the lands and chattels of the debtor, and cause them to be delivered to the comsee, until he shall be fully satisfied of the debt—which approaches more nearly the terms of a process of execution. The language of the elegit, too, is that the Sheriff cause the goods and chattels of the debtor, except &c. and also a moiety of all the lands, &c. to be delivered to the creditor by a reasonable price and extent, to hold to him &c. until the damages (or debt and damages) aforesaid, shall be thereof fully levied. But the most remarkable distinction observable between the mesne proceeding by extent, and the Crown's execution by extent, and which shew that the extent in the first instance is not an execution, are to be found in the following striking variations [400] ances. In the mesne extent the mandate is to seize, first, the body, secondly, the lands and tenements, and, thirdly and finally, the goods and chattels in action, and it requires the Sheriff to seize all the debtor's goods and chattels, debts, and general property, however small and inconsiderable the Crown's demand may be. On the contrary, we find from Lord Coke (2^d Inst. 19), that the proceeding by final process of extent was, in all these respects, a very different process. “After the statute says Lord Coke, —but Lord Chief Baron Gilbert (Treat. on Exch. 127) considers that the process was in use before, in cases of necessity,) of 33 Hen. VIII. was made for levying of the King's debts—the usual process to the Sheriff at this day is, *Quod diligenter &c. Inquiras que et cujusmodi bona et catalla, et cujus precii idem (debitor) habuit in dicta baliva tua &c. Et ea omnia capias in manus nostras ad valentiam debiti predicti, et inde fieri fac debitum predictum, &c. Et si forte bona et catalla predicta, debitoris, ad solutionem debiti predicti, non sufficiunt tunc non omittas propter aliquam libertatem quin eam ingrediaris et per sacramentum prefat. probare et per alium hominum diligenter inquiras quas terras et que tenementa et cujus annui valoris idem (debitor) habuit seu seisisus fuit in dicta baliva tua &c. Et ea omnia et singula in quorumcunque manibus jam existunt extendi fac, et in manus nostras capias, &c. Et capias predictum (debitorem), ita quod habeas cor [401] predicti (debitoris) ad satisfactionem totius debiti predicti*.*

(a) 1 Sid. 184. 1 Keb. 105, 261, 465, 692. 1 Lev. 92.

* As to that writ being made since the statute, Lord Chief Baron Gilbert, with much apparent reason, expresses great doubt, because (he says) it seems to be contrary, that an inquisition should be found whether the debtor had any goods and chattels, and if, upon the inquisition, there were none found, then to extend the land and take up the body of the debtor. So that it seems that this writ might have been used

We find therefore, that the writ for levying the King's debts contains words of execution—that it requires a seizure of the debtor's goods and chattels only to the value of the debt—that it orders recourse to be had to the lands only in cases where the goods &c. should happen to be insufficient†—and that the order for seizure of [402] goods &c. lands, and person, is reversed. And here it may be proper to notice a further very striking and material difference in the language of the writ of *capias utlagatum*, or writ of execution upon an outlawry, and the writ of extent, or seizure and appraisement, upon an outlawry. In the former, the command is, *et ill. [bona et catalla terras et tenementa] per eorum sacram. extendi et appreciari fac. juxta verum valorem eorundem, et ea quæ per inquis. ill. inveneris in manus nostras cap. & salvo custod. fac. ita quod de vero valore, et exitibus eorundem nobis respondeas*. In the note at the end of *Proctor's case*, in Dyer (p. 223 b.) the reporter states, that the outlawry being reversed, the Sheriff returned to the writ of restitution awarded thereupon [to restore the goods of the value of 100l.] “that he had sold the goods for 40l., and brought the price into Court,” and that that return was holden insufficient; for the *capias utlagatum cum extendi*, and *seire facias bona*, is, by the oath of good and lawful men, but no mention of the sale of them is in this writ; therefore, it is done without warrant, as it seems. “But (he adds) note these words in this writ, ‘and those things which you shall find by that inquest, you shall take into our hands and safely keep; so that of the true value and issue of the same you answer to us.’” So it seemed to Catlyn, Saunders, and Whyddon, that the Sheriff may sell them or answer the value to the King, and retain the goods himself &c. *Ideo quære inde*.” Now, if the order to extend the goods of the outlaw renders [403] the word *respondeas* of doubtful effect, as to giving the Sheriff authority to sell in this writ of execution upon an outlawry, it is quite certain, that by the terms of the command in the extent upon an outlawry, the Sheriff could not sell, because the terms of the command which follows the order to appraise and extend the goods and lands are “*Et interim omnia et catalla ill. aut de precio sive valore inde, et de exit. et profic. terr. et ten. præd. nobis respondere possis*.” This difference shews, that an extent, even on an outlawry, was not considered as an execution per se; and it goes far to support the main proposition here attempted to be established, that the Crown's extent against its debtors, in desperate circumstances, is a mere detainer of the property of its debtor as a pledge, and not a proceeding to recover its debt.

The insolvency of the Crown-debtor, and even a partial inability to satisfy the Crown's debt, appear to have had at all times the effect of at once, and ipso facto, investing the Crown with very large and almost absolute power over the debtor's effects, without regard to his own rights, or those of other persons as against him: and even in the more lenient exercise of it in more modern times, (since the reign of Henry the VIIIth) the right of the Crown to precede its doubtful suit by seizure, in the first instance, of the debtor's goods and chattels, and debts, has been strictly preserved, on the principle of the public good. The insufficiency of the Crown-[404]-debtor, as a feudist, either to render to the Crown the personal services due from him in former times, or in later days, the debts owing by him, appears to have reduced him almost to the situation of a subject outlawed in a civil suit, or to a state of pure villinage; and, as in cases of outlawry of the subject at the present day, as in his

before the statute of Hen. VIII. without any violation of *Magna Charta*; for if it were found, that the debtor had no goods, they might seize the land and take the body; and therefore it seems to be a writ that was used upon motion to the Court, in cases of necessity, before the statute; but since that statute, they may have a *capias levare*, or extent, without any such inquisition touching the goods. We have, therefore, clearly the express opinion of that very learned writer, that the statute had enlarged the prerogative, by enabling the Crown to seize the land of its debtor without a previous finding that the goods and chattels were insufficient to satisfy the debt. It may be added, that to this species of proceeding for securing the Crown, the provisions of *Magna Charta* cannot apply, as it is founded on the fact of the insolvency of the Crown-debtor, and that is now required to be verified by affidavit.

† It requires, however, that all his lands should be seized into the King's hands; but that may be because at the time when this writ was framed, the lands could not be sold, and the debt must necessarily have been raised out of the issues and profits by *levari*, which was a slow and dilatory mode.

condition of villeinage formerly, the property in his goods and chattels becomes thereupon subjected to seizure as vested in the Crown; and the Sheriff, empowered by the writ to seize, becomes thereby invested with the authority of an Escheator. Accordingly, it is apprehended, that if the Crown should proceed to seize the personal effects and debts of its insolvent debtor in the first instance (not his lands or chattels real), that it might do so without a previous inquisition to fine the goods &c. which is simply an office of instruction, not of entitling; and it would require only a mere writ of appraisement, instead of the extent, upon which the party might come in and defend himself, by entering his claim, as we have already seen.

In cases of outlawry, a distinction is taken between goods and chattels personal, and lands and chattels real. By bare outlawry, it is said, a party immediately forfeits his personal goods, and they are vested in the King; but he does not forfeit the profits of his lands and chattels real till inquisition taken. *Britton v. Cole*. 1 Salk. 395. Carth. 442. And the King may [405] have good action of detinue against any who have possession of the goods; for by the outlawry, the property is in the King. Br. Prerog. pl. 45. In Vin. Abr. vol. xvi. p. 80, title "Office," (D.), pl. 1, it is said, "In quare impedit the King made title to present, because the advowson was held of him in chief, and was aliened without license, by which he presented &c. and admitted for good title; and yet it is not alleged that the alienation was found by office: Quod nota. And, therefore, it seems the King may have chattel without office. Br. Prerog. pl. 33, cites 2 Edw. III. 71.

The following passages and authorities are to the same effect:

The escheator may seize the ward for the King without office; per Thorpe, quod non negatur; and therefore it seems that chattel may vest in the King without office, but he cannot grant the land before office, by the statute of 18 Hen. VI. Br. Prerog. pl. 30, cites 24 Edw. III. 54. Vin. Abr. title "Office," (D.), pl. 2, vol. xvi. p. 81.

If a villein of the King purchase goods, the King shall be adjudged in possession of them, without office found; but if he purchase land, the King ought to seize before that he shall be possessed; quare, if this ought not to be found by office? Br. Office devant &c. pl. 53, cites [406] 35 Edw. III., and Fitzh. Villeinage 22. Vin. Abr. title "Office," (D.), pl. 3, p. 81.

Br. Property, pl. 43, cites S. C. Brooke says, the reason seems to be, inasmuch as goods are moveable and transitory; and it is said elsewhere, that the King may grant the ward of the body without office. Br. Prerog. pl. 113, cites S. C. And Brooke says it seems to him, that the seizing of land shall be by office; for land abides, but oxen or cows may be eaten or wasted.

In the case of a transitory chattel, coming to the King, an office is not necessary; but where an interest comes to the King, an office ought to be found. Arg. Lane, 43, *The King v. Earl of Nottingham*. (Vin. Abr. title "Office," (E.), pl. 7, vol. xvi. p. 85.)

The subject of outlawry suggests here an enquiry as to what would be the effect of an extent upon an outlawry coming into the Sheriff's hands at the time when the present extent was delivered to him: in other words, if the extent in question had been an extent upon a judgment of outlawry in a civil suit! That would not have been a suit commenced or process awarded to recover the King's debt; yet if the goods and chattels vest in the King from the outlawry, the extent, it is presumed, must have relation to the judgment which binds the personal, or rather moveable, goods; yet, until judgment of outlawry, the [407] King has nothing to do with the outlaw, and the first proceeding on the part of the King is, therefore, the issuing of the extent.

An observation may be made here as to the effect of the seizure returned by the Sheriff, in giving a priority to the Crown process. It arises on the authority of a case which goes to establish that on an actual seizure into the King's hands, under prerogative process, the seizure gives priority, and creates a lien on land; which shall be preferred to a judgment obtained before the right of the Crown accrued; and which right, but for the seizure made, would not have created a lien upon the land, or have entitled the Crown to any preference before the seizure. That is the case of *Erby v. Erby* (1 Salk 80). The creditors of J. S. brought a bill for debts, which debts were mortgages, judgments, and bonds. Upon one of the bonds the Defendant was outlawed; and upon one of the judgments the recoverer had brought an action of debt; and the question being concerning priority of payment, it was objected, first, that the judgments were by confession, and it was not equitable that it should be in the power

of the party to prefer one creditor to another; but that seemed to be over-ruled: and as to the outlawry, the Court ruled, that being only upon mesne process before judgment, it did not alter the nature of the debt, nor create a lien upon [408] the land, in this case; but that where there is an outlawry, and a seizure thereupon, the debt attaches upon the land, and shall be preferred to a judgment, though prior to the outlawry, but that it is the seizure that gives the preference.

Here may be appositely extracted the following passages from the valuable author *1 by whose labours these pages are made worthy of attention, to shew how summarily the Crown was always, from the earliest period of which we have any accurate historical knowledge, entitled to proceed against the Crown-debtor on his becoming insolvent, and when and in what manner the proceeding began to be adopted for the seizure of the effects of those debtors whose debts were considered desperate, differing entirely from the mode in use for recovering such debts as were deemed to be separate:—

“About the time of Edw. I. there were several tenants and debtors that broke in the King's debt, and indebted also to others of the King's predecessors; and with these the annual roll was stuff: which made it necessary to write them out in charge in the prerogative writ †, which created an unnecessary trouble and expense. Hence- [409] forward the desperate debts were to be taken out of the annual roll, and it was not necessary for the Clerk to write them out to the Sheriff; but to put them into the ex-annual roll, which was not necessary to be transcribed: and as debts became desperate, they were all transmitted to the ex-annual roll, which was one roll of desperate debts, and never transcribed as the annual roll was. This ex-annual roll was read over to the Sheriff on his apposal, and chiefly at Easter, when the process was issued out.” In cases of amerciaments, &c., so large as that the party's estate was insufficient to discharge them without process for the sale, it was usual when such fines &c. were estreated, to issue writs to the Court of Exchequer, to atterminate such debts upon an inquisition to enquire “quant' inde Regi dare valeat, per ann. salva sustentatione sua, et uxoris et liberorum suorum.” Upon that practice Lord Chief Baron Gilbert makes the following remarkable observation *2. “When the debts were thus atterminated, if they were not paid at the time, the whole was levied; because, that when the debts were atterminated according to the contentment of the party, if he did not pay it according to the attermination, he plainly endeavoured to avoid the justice of the law; and therefore the whole was immediately to be levied, as upon an insolvent tenant.”

Upon the whole, therefore, it appears, that upon [410] the insolvency, or insufficiency of the subject, who owed money to the Crown, whether mediately or immediately, he was considered, on feudal principles, as one who had de facto forfeited the right of holding property which he possessed as feudatory, and was reduced to a state of villenage, as if in earlier days he had become incapable of performing the services due to his superior lord,—the condition on which he held them. Nor can it be considered as going too far back into antiquity to seek for the reason and foundation of a prerogative so apparently arbitrary, as the power of instant seizure of the subject's goods and chattels, on his becoming (if a Crown-debtor) insolvent, to derive it from the feudal condition, when we see that, in comparatively very modern times only, the oppressive burthens which were the consequence of the antient military tenure by knight service, with its train of real hardships, proceeding from the fictitious doctrine of feudal dependance, were abolished; and that was not till after the Restoration, when, having been discontinued during the short period of the Usurpation, they were entirely conceded and given up by the Crown (by the statute 12 Car. II. ch. 24), in consideration of the hereditary excise.

In the present case, the King's title accrued, and his right to proceed by immediate extent in aid originated, on the fieri facias being delivered to the Sheriff. The judgment recovered gave no right, for that alone was no indication of in-[411]-solveny — the submission to execution is so unequivocally: and then the debtor was subjected instantan to the prerogative proceedings on the part of the Crown-debtor, and it was

*1 Gilbert—Treat. on the Court of Exchequer, p. 78 and 79.

† This writ is the Long Writ against the goods, chattels, lands, and body of debtors, the item of whose debt the Sheriff has nichilled. Tr. 117.

*2 Treat. on the Court of Exchequer, p. 81.

the duty of the Crown-debtor, for the protection of the Crown, immediately to employ it, that his debt might be secured. Lord Chief Baron Gilbert, furnishing the reason why the King's right extends to debts due to his debtors, says *2, "For in relation to the King, not only the money that the debtor has in his actual possession, but that which he has out in other person's hands, shall belong to the King. For common persons, if their debtors made away with their effects, were supposed to be able to look after them, and to watch the goods in the actual possession of them; but the King being engaged in public affairs, could not watch an actual possession of his debtors; and therefore, since there was no danger of maintenance, he might proceed to get in their debts as far as he could discover them."

The consequence of the correctness of these several propositions would be, that the Crown becomes entitled to seize goods, chattels, and debts, on the first act or indication of insolvency, and may do so without inquisition or office † [412] wherever the property is not absolutely and entirely divested, subject, however, to the lawful claim of any one having demands on the same property and the effects seized. The mode of proceeding by claim would have been the proper course in this instance; but it was considered, that the present proceeding would give a speedy and easy opportunity of carrying this question to the highest authority. Since the statute of Hen. VIII., in the exercise of their discretion, the Court have thought fit to require an affidavit of [413] danger, where it is intended to be resorted to on an indication

*1 Treat. on the Court of Exchequer, p. 178.

† The finding of a debt is not to give title to the Crown. The inquisitions on commissions and extents are all offices of instruction; and, in later times, this finding of debts superseded the more early course of assigning debts due to the Crown-debtor from other persons. Their object is to ascertain, not so much the fact, as the amount of the debt, that it may be seen what proportion the goods &c. appraised bore to the debt due. The Jury, therefore, on an inquisition (which is a proceeding as well on behalf of the owner of the goods seized as of the Crown) are not a Jury, properly so called, or twelve men impanelled to try a fact between party and party, but a number of persons (usually twelve) called in ex parte to at once assist and control the Commissioners or Sheriff in making a return of the amount of the debt due, previous to the enquiry of the amount of the goods meant to be seized. If they were a jury, in the ordinary and legal sense of that word, they could not proceed to assess the amount of the Crown's demand on affidavits as they always do in practice. That may either have been suffered by reason of some analogy with the other proceedings on the Equity side of the Court in which depositions are always used in evidence, (and by order of the Court, even before a Jury): or the language of the commission and extent, requiring the Commissioners and Sheriff to enquire &c. as well by the oaths of good and lawful men as "by all other ways, means, and methods whatsoever," &c. may have been thought sufficient to authorize such a mode of proceeding.

We have an instance in *Madlox* ² of an order, calling on an individual to shew by what right he claimed the privilege of selling goods seized for debts of the Crown, and particularly at a low price. That order recites the reason why good and lawful men should be assigned to sell such goods for a just and reasonable price, which may, perhaps, include an appraisement. "*Datum est nobis intelligi; quod cum fuerit provisum et statutum antiquitus Progenitoribus nostris Regibus Angliæ quod in quibusdam Comitatibus assignarentur quidam legales homines, qui justo precio et rationabili venderent averia capta pro debitis eorum, ne Vicecomites vel ballivi eorum illa pro voluntate propria, et forsitan in odium aliquorum qui debita debebant, minori precio quam valerent illa venderent, et ita debitores gravarent: Petrus de Meuling qui jure hereditario, ut dicitur, in Comitatu tuo vendicat ad se hujusmodi vendiciones Animalium pertinere Bovem quanticumque sit precij vel valoris pro ij s, equum etiam pro eodem precio ovem pro iij d. vendit, quociens fuerint hujusmodi averia vendenda: propter quod valde gravantur debitores nostri in Comitatibus tuis. Et quoniam reputamus hujusmodi vendiciones valde iniquas et injurias, Tibi precipimus, quod venire facias coram Baronibus dictum P. a die S. Johannis in xv. dies, ad ostendendum quo jure vendicat sibi competere hujusmodi vendiciones facere, et precipue tali precio.* T. &c. Trin. Communia 27 Hen. III. Rot. 11 a.

of insolvency, before they suffer so peremptory a proceeding to be adopted, and ere the Baron issues his fiat. The proceeding is, however, in no other respect within any of the provisions of that statute than by having been subjected, for the ease of the debtor, in fit cases, to the general discretionary control of the Court of Exchequer; and therefore the statute cannot have abridged or controlled the prerogative right of the Crown.

It cannot fail to be observed, that no distinction has been made throughout these remarks, between the immediate extent and the extent in aid. That is because the Court makes none, and it has ever refused to recognize the existence of any such distinction.

Here, lastly, arises the argument, deducible from the course and usage of the Court, and the established precedents; and that is an argument which has always been so much respected as to be considered conclusive in the absence of express determinations. Upon this point, it will be sufficient to refer generally to the following authorities:—Br. Prerog. pl. 45, (citing 39 Hen VI. 26)—Vin. Ab. title Utlawry (M.) 1. *The King v. Baden* (Sh. Cases in Parl. 72). *Fleetwood and Aston's case* (Hob. 45). *The Attorney General v. Sir George Sands* (Hardr. 495). *Wilkinson v. Rocklas* (1 Mod. 91). *Britton v. Cole* (1 Ld. Raym. 307). *Windsor v. Seywell* (Sir T. Raym. 17).

These observations are, for the present, submitted to the consideration of the reader, rather for the purpose of directing his attention to this mode of considering the subject, by applying the principles of the prerogative right to use this process of extent to the question which has been raised by the case, than offered as a systematic and regular argument in favour of that right. The very little time which a periodical publication allows for arrangement of such secondary matter is insufficient for the purpose [415] of making it in that respect more satisfactory and complete; but as it is most material that it should be settled and known what the law upon such subject is, leaving to some other time and occasion the discussion of what, under a change of circumstances, it ought to be, the Editor has presumed to think, that some further reference to the decisions and dicta which are to be found in the books, would conduce to the assistance of those who might be desirous of giving their attention to the subject, whether for legal, judicial, or legislative purposes. His object is merely to assist in the elucidation of this very important and much agitated question, by an attempt to explain the real nature of this prerogative proceeding by present process of extent, the reason and origin of it, and the foundation on which it rests—and to furnish a brief history of the exercise of it in practice, tracing its various modifications and regulations from time to time, by statutes, rules of Court, and the practical control of the Court of Exchequer.

[416] GRAY'S INN HALL. CORAM, RICHARDS, LORD CHIEF BARON.

GORDON v. TRAIL. Saturday, 8th July 1820.—The Court will not allow an executor interest on costs paid by him, pending a suit regarding the estate.—Where interest is allowed it is only from the time of the balance having been struck on the general report.

Martin applied to the Court for directions as to the minutes of the decree in this case. The object of it was to have the report referred back to the Deputy Remembrancer, that he might calculate from certain specified periods, and allow the interest on certain sums, paid out of his own money by the Defendant, an executor, on account of the testator's estate, reported to be due to him. The sums were the costs of an action brought by the Defendant on behalf of the estate, and of actions defended by him. The Deputy Remembrancer had refused to give any interest thereon, although it was found that he had, at that time, no money in his hands.

The Chief Baron refused the application, observing that, notwithstanding the frequent hardships of such a case, it was contrary to the established course of practice to allow interest on costs, under such circumstances: and that where interest is allowed on sums carrying interest, it should be calculated from the time of a balance being struck on the general report; for, until that time, it cannot be ascertained that the executor has not money in his hands.

[417] GRAY'S INN HALL. CORAM RICHARDS, LORD CHIEF BARON.

DEARDEN AND OTHERS v. THE RIGHT HONOURABLE GEORGE GORDON, LORD BYRON, AND OTHERS. Saturday, 8th July 1820. Freehold estates of B., and of E. his intended wife, were settled by act of Parliament before their marriage to the use of B. for life, remainder to secure an annuity thereout to E., and subject thereto, to the use of trustees for a term of 500 years, for securing portions for younger children, remainder to the use of sons and daughters successively in tail, remainder to the right heirs of B. E. died in the life-time of her husband, having had issue, a son (Wm.) and a daughter, who both died in the life-time of B. the father, Wm. the son only leaving issue, one son (Wm. John), who also died in the life-time of B. his grandfather, without issue. After the death of Wm. John, the grandson, B. sold a part of the estates, so settled by the said act of Parliament, to D. the Plaintiff, for valuable consideration. That estate had been originally settled, long before, on the marriage of the parents of B. to the use of the father of B. for his life, remainder to trustees for a term of 700 years for raising portions for younger children of that marriage, remainder to the issue in tail male, with divers remainders over. On the death of B. the vendor, the Defendant, who was the heir at law of Wm. John the grandson, set up a claim to the estate so sold to D., and recovered a verdict in ejectment, asserting title under the following deed.—B. (the vendor,) and Wm. his son, as soon as he had attained the age of twenty one, and E. the wife of B., having joined in suffering recoveries of all the estates so settled, afterwards executed certain indentures of lease and release and appointment. The release recited, that B. and his son Wm. had both become very considerably involved in debt, and embarrassed in their circumstances, and that it had therefore become necessary for them to sell part of the said settled estates, having no other means of obtaining money to extricate themselves from their difficulties: and then it recited the following agreement between the parties,—that it was intended to settle an annuity on E. the wife, as a commutation for her jointure settled under the act of Parliament, and another on W. the son, in consideration of his having consented to join in suffering the recoveries, and subject thereto, that certain of the settled estates of E. in the county of Nottingham, should be settled and assured to trustees, to the use of such trusts; and that a term of years should be created out of all their other estates in the county of Nottingham, in trust to raise a sum for the portions secured for the younger children, and that the reversion and inheritance of all the said estates in N. and all the estates in the county of Lancaster, of which latter the premises in question were part, were to be limited to other trustees in trust to sell:—and out of the proceeds of the Nottingham estates all the debts were to be paid: that the proceeds of the Lancaster estates should be laid out in the purchase of other lands, to be conveyed and settled to the use of trustees for a term of years, upon various trusts, with an ultimate remainder to W. B. (the son) and his heirs; and in the mean time, and until the proceeds should be so laid out in land, that they should be invested in the public funds, and the dividends thereof to go to the persons to whom the rents of such lands so to be purchased would go if such purchase had been made. It was then witnessed, that, for the considerations aforesaid, B. E. (his wife), and W. B., their son, according to their several interests, granted &c. unto trustees and their heirs, their estates at R. in Lancashire, (of which the premises in question were part) upon trust that they should, with the consent and approbation as well of B. and W. B., or the survivors of them, as of C. G. (a third person) or his heirs, such consent and approbation to be testified by some deed or deeds, &c. to be sealed and delivered by them in the presence of two or more credible witnesses, sell the same, and the inheritance in fee simple. In that deed there was a proviso, that the rents and profits of the said premises, until such sale, should be received by the same persons as would have been entitled to receive them if the said deed had not been executed and the fines therein before mentioned had not been levied. It was thereby also declared, that the said trustees should stand possessed of the monies arising from such sale, upon trust to lay out and invest the same, with the like consent of the same persons, to be testified with the same formalities, in

the purchase of the inheritance in fee-simple of lands in England, to be conveyed, settled and assured to the use of the trustees of a certain term of 1200 years (before mentioned in the deed), or some other persons, to be named by W. B., his executors &c. for certain terms of years, upon certain mesne trusts, and ultimately to the use of W. B. his heirs and assigns for ever, or as near thereto as the death of parties and other circumstances would then permit. And, in the mean time it was declared that the trustees should invest the money arising by the sale until it should be laid out in such purchase of lands, in the public stocks, and the dividends &c. to be received by such persons as the rents and profits of the lands so to be purchased and settled would go to if such purchase and settlement were then actually made.—Under that deed the Defendant claimed, as heir at law of W. B., to be entitled on the death of B., to the inheritance of the land so directed to be purchased, insisting, that W. B. was entitled, as a purchaser, to the remainder in fee in the estate sold, and that the right of the heir of W. B. was not bound by the sale of B., who, being only tenant for life, had no power to dispose of the inheritance.—Held, that the sale by B. to D. was good, effectual, and valid; that B. had the fee-simple of the estate in him at the time of the sale—that, according to the true construction of the deed, the Lancaster estates were not necessarily to be sold by the trustees, in order to lay out the money in other real property, to be settled as therein provided; for that, whatever might be the effect of the recital of the agreement if it had stood alone, in giving the proper construction to be put on the deed, as shewing the intent and meaning of the parties, the declaration in the body of the deed had destroyed it, by the very particular manner in which the direction to sell was introduced; and the consents of the persons mentioned, which were required to be so formally authenticated, having been made necessary for that purpose, removed every ground for declaring, that such was the object of the parties to the deed, or that the trustees were bound to sell the estate at the request of W. B.; and that such particular conditions having been annexed to the trust thereof, they were indispensable, and, without them, a court of equity could not decree such a sale and settlement, when it had become impossible to obtain the performance of them. Therefore, the rights of the parties at the time of the sale, were held to be the same as before the making of the deed in question.—The Court accordingly decreed a perpetual injunction, to restrain the heir of W. B. and the persons having the legal estate, from proceeding further in the ejectment against the purchaser and his tenants. The case at law, however, having been considered to be one of much doubt, the Court refused to give the Plaintiff the costs of the suit.

This bill was filed in Easter Term, 47 Geo. III. by a purchaser, for valuable consideration, of certain premises in Lancashire, in his possession, and [418] his tenants, against the heir at law of the vendor, and other persons in whom the legal estate in the premises had become vested under certain trusts and old outstanding terms; and it prayed that the [419] trustees and the personal representatives of the termors might be declared to be trustees for the Plaintiff, the vendee, that they might be decreed to convey and assign their estate and interest respectively to the Plaintiff, or as he should appoint,—and that the Defendants might be restrained by injunction from proceeding further in the action of ejectment brought against the Plaintiffs on the several demises of the several Defendants, and from other proceedings at law, to recover the possession of the premises.

The questions in the cause arose upon the following summary of the facts stated from the record, and the construction of the legal instruments set out therein: the substance and material parts of which are noticed in the statement of facts, and the necessary abstracts of deeds are extracted from the pleadings.

The bill stated that, by an act of Parliament, passed in the 20th year of Geo. II. (1747) for settling the estates of William Lord Byron and Elizabeth Shaw, spinster, an infant, in contemplation of their marriage, certain freehold estates belonging to William Lord Byron, situate in the counties of Nottingham and Lancaster, and elsewhere in England; and particularly a certain manor of Rochdale, in the county of Lancaster, thereafter mentioned to have been purchased by and conveyed to the Plaintiff, James Dearden, were settled and limited to the use of the said William

Lord Byron for his life, [420] and after his death, to the use, intent, and purpose that the said Elizabeth Shaw (afterwards Lady Elizabeth Byron) should have and receive thereout an annual rent of 500*l.* for her life, and subject thereto, to the use of certain trustees, therein named, for a term of 500 years, in trust, for securing 5000*l.* for portions for the younger children of the said William Lord Byron, by the said Elizabeth, his then intended wife; and after the expiration of the said term, to the use of the first and other sons of the said William Lord Byron by his said then intended wife, successively in tail, with remainder to the daughters of the said William Lord Byron, by his said then intended wife, as tenants in common in tail, with remainder, in default of issue of the said William Lord Byron by his said then intended wife, to the use of the right heirs of the said William Lord Byron for ever; and that certain estates of inheritance of the said Elizabeth Shaw, in Nottingham and Cambridge, were also thereby settled to various uses,—such as augmenting the jointure of Lady Byron, and the portions of younger children, by a term of 600 years, and providing an annuity for her during her life, in case she should survive her husband, with remainder to the male issue of the marriage in tail male, remainder to the female issue in tail general, remainder to Lady Byron and her heirs: That the marriage between the said William Lord Byron and Elizabeth Shaw took effect soon after the passing of the said act; and that the said Lady Elizabeth Byron died in the life [421]-time of her said husband, having had issue by the said William Lord Byron, one son, named William Byron, and a daughter, named Caroline Byron, and no other issue; and that the said Caroline Byron departed this life in the life-time of her said father, unmarried; and that the said William Byron, the son, departed this life in the life-time of his said father, leaving issue, one son only, named William John Byron, and no other issue; and that the said William John Byron, the grandson, also departed this life in the life-time of the said William Lord Byron, his grandfather, unmarried and without issue; and that all of them, the said Lady Elizabeth Byron, William Byron, Caroline Byron, and William John Byron, died previous to the year 1795; that in the year 1796 the said William Lord Byron was in the possession and enjoyment of the hereditaments and premises hereinafter mentioned to have been purchased by and conveyed to the Plaintiff, James Dearden, and claimed to be seised of and well entitled to the same in fee simple, under and by virtue of the said act of Parliament, and in the events aforesaid, such hereditaments being part of the estates therein comprized, and which were thereby limited to the uses hereinbefore mentioned; and that sometime in the said year 1796, the said William Lord Byron contracted with the Plaintiff James Dearden, for the sale to him (Plaintiff James Dearden) of the hereditaments comprized in the indentures of the 9th and 10th days of February, 1796, thereinafter mentioned, at or for the [422] price or sum of 510*l.*, which said sum of 510*l.* the Plaintiff (Dearden) paid to the said William Lord Byron accordingly; and thereupon, and in consideration thereof, the said William Lord Byron duly executed indentures of lease and release, dated the 9th and 10th days of February, 1796, whereby he conveyed the said premises to the Plaintiff in fee.

And the bill stated another contract for the sale and conveyance of another part of the same property in the same way; and that the Plaintiff (Dearden) entered into possession and receipt of rents and profits.

The bill then charged disturbance by the Defendant's, Lord Byron's, claim, under a certain deed of 1773, relied on in the answer; but the Plaintiff insisted, that the trusts of that deed, which were created for the purpose of extricating the vendor and his son from pecuniary embarrassments by sale of some part of the settled estates, were satisfied when that object had been obtained: and the Plaintiff charged, that it was expressly stipulated by the said indenture, that the estates comprized therein should not be sold without the consent and approbation of the said William Lord Byron, and Lady Elizabeth his wife, and the said William Byron, or the survivors of them; and that therefore the consent and approbation of the said William Lord Byron, and Lady Elizabeth his wife, and of the said William Byron, or of the survivors of them, [423] were requisite to enable Brackley Kennett and John Heaton (the trustees) to proceed to a sale of the hereditaments and premises comprized in the said indenture; and that the said William Lord Byron, and Lady Elizabeth his wife, and the said William Byron did not, nor did any or either of them at any time, call upon or require the said Brackley Kennett and John Heaton, the trustees therein named, to sell or dispose of, or consent that they should sell or dispose of, such parts of the

hereditaments and premises as were so purchased by the Plaintiff James Dearden, as aforesaid.

And the Plaintiffs expressly charged that, in fact, all the debts which were due and owing from William Lord Byron, and William Byron respectively, at the time when the said deed or indenture of 13th November, 1773, was executed, and for the payment whereof such deed or indenture was intended to provide or raise a fund, were and had been fully satisfied, paid, and discharged by and out of the monies which arose from the sale of other parts of the hereditaments and premises comprized in the said deed or indenture than those which were so purchased by the Plaintiff James Dearden, as aforesaid, and before the said Plaintiff so purchased the same; and that therefore it became and was unnecessary to sell such last-mentioned parts of the said hereditaments and premises under the said deed or indenture of 13th November, 1773, or for any of the purposes therein expressed. And, as further [424] evidence of the said agreement or understanding, and of the intent of the said William Lord Byron and Lady Elizabeth his wife, and of the said William Byron, and that the said John Heaton considered himself as a trustee of the said estate so purchased by the Plaintiff James Dearden as aforesaid, the Plaintiffs charged, that the said William Lord Byron, long previous to the sale by auction, caused the hereditaments and premises so purchased by the Plaintiff, together with other estates, to be advertized in the public newspapers to be sold by public auction; and that Heaton (the then surviving trustee) did not interpose to prevent the said sale, or cause any notice whatever to be given at or previous to the time of sale that William Lord Byron could not make a good title in fee simple to the said hereditaments and premises, or that the same, or any part thereof, were or was vested in him (Heaton) upon the trusts of the said indenture: and it further charged, that the Plaintiff had no notice of the said indenture of 1773, until long after the execution of the indentures of lease and release to him.

The Plaintiffs therefore insisted that, at the respective times when the said William Lord Byron made the said conveyances to the Plaintiff James Dearden, he (William Lord Byron) was tenant for life of the said premises so sold, with remainder to himself in fee, and therefore was equitably entitled to such last-mentioned hereditaments and premises, and that the said [425] John Heaton and Brackley Kennett, in whom the legal estate was then vested in trust as aforesaid, were, in fact, then trustees for William Lord Byron in respect of such legal estate, and that Heaton was, after the said sale to Plaintiff Dearden, a trustee, in respect of the said hereditaments and premises so sold to him, for Plaintiff James Dearden, as claiming under the conveyances so made.

The Defendant Lord Byron, and the other Defendants, stated by their answers, that in 1720, William Lord Byron, the great grandfather of Defendant, being seized in fee-simple of the manor and estate of Rochdale, in the county of Lancaster, by a settlement made previous to his marriage, the 3d of December, 1720, settled (amongst other premises) his said manor and estate of Rochdale to the use of himself for life, remainder to the use of William Lord Berkley and Lucy Temple, spinster, (therein described) for a term of 700 years, in trust for raising 4000*l.* for the portions of the younger children of the marriage, if there should be three or more,—remainder to the use of the first and other son and sons of the said marriage successively in tail male, with divers remainders over; that the said William Lord Byron departed this life in 1736, leaving issue by his said wife, who survived him, William late Lord Byron, his eldest son and heir at law, and who succeeded him, by virtue of the said settlement, in the estates in question in this cause, and also three younger sons and [426] one daughter, viz. John Byron, (late an Admiral in his Majesty's fleet, and since deceased, the grandfather of Defendant,) Richard Byron, George Byron, and Isabella Byron, since deceased.

The answer also stated that the said William Lord Byron the son, being so seized of the first estate tail in said manor and premises comprized in the said settlement, soon after the death of his said father duly suffered recoveries thereof, and, by means of such recoveries, barred the estates tail and remainders limited or created in and by such settlement, and acquired the fee-simple and inheritance of and in the said manor and premises, subject to the said term of 700 years, and the jointure of 600*l.* [500*l.*] a year in favour of his said mother, charged on part of the said premises by the said settlement.

The answers then stated the said intended marriage, and the act of Parliament, and the deaths of parties, as in the bill so far.

They then alleged, that the said William Byron attained his age of twenty one years in or about the year of 1770, and that he and his father, the said William late Lord Byron (the vendor), having become greatly embarrassed in their affairs, and totally unable to pay their respective debts, he the said William late Lord Byron, soon after his said son attained his said age of twenty-one years, proposed to and prevailed on [427] the said William Byron his son, in whom the first estate tail in the premises (of which said manor of Rochdale was part) comprized in the said act was vested, to join with him the said William Lord Byron in suffering proper recoveries of such premises, to bar and defeat the estates tail and remainders over thereof, limited and created by said act of Parliament, and to make provision for the payment of both their said debts, and to re-settle the said manor of Rochdale, and the estates and premises mentioned and contained in said act of Parliament, in manner set forth in the indenture of the 13th of November, 1773, after mentioned. That the said William late Lord Byron, in consideration of his said son agreeing to join with him in suffering such recoveries as aforesaid, and in the sale of certain estates situate in the county of Nottingham, further agreed to grant his said son an annuity of 700*l.* during their joint lives, and that his said son should be paid 2000*l.* That the said William late Lord Byron accordingly, by a certain indenture bearing date on or about the 25th of September, in 1772, granted the said annuity to or in trust for the said William Byron his son. That the said William Byron, by a certain indenture of bargain and sale, duly inrolled, bearing date on or about the 1st of May, 1773, duly conveyed, with his father, the estates of the said William late Lord Byron to a person as tenant to the precipe for suffering a recovery thereof, which was afterwards duly suffered, to the uses in the said indenture mentioned or declared; and that by another indenture of bargain [428] and sale inrolled, dated on or about 12th of July, 1773, and made between the said William late Lord Byron of the first part, and the said William Byron his son, of the second part, and James Holland (therein named) of the third part, and William Dawes (therein also named) of the fourth part, they, the said William Lord Byron and William Byron conveyed the said manor of Rochdale, and all their estates and premises in the said county of Lancaster, to the said James Holland, to make him tenant of the freehold for suffering a recovery thereof, which recovery was thereby declared to be and enure to the use of such person or persons, and for such estates and interests, as the said William Lord Byron and his said son William Byron should by deed, with or without power of revocation, in manner therein mentioned, jointly appoint, and in default thereof, then as the said William Byron the son should by deed or will appoint, and in default of, and until some such appointment should be made, then to the uses limited by the said act of Parliament, or to such of them as were then subsisting or capable of taking effect. That, in pursuance of the said last-mentioned indenture, a common recovery was duly suffered on or about the 21st of August, 1773, of the said manor, estates, and premises, with their appurtenances, in which the said Dawes was demandant, Holland tenant, and William Byron vouchee. He also stated in his answer, that by certain indentures of lease and release, and appointment, dated respectively the 12th and 13th of November, 1773, the release [429] being of five parts and made between the said William Lord Byron and Elizabeth Lady Byron his wife, and the said William Byron, therein described as their only son and heir apparent, of the first part, Charles Gould, (who appears from the recitals to have been an incumbrancer) Charles Morgan, and George Stubbs (therein described) of the second part, the representatives of the termors under the said act of Parliament, of the third part, Brackley Kennett and John Heaton (trustees) in the said bill named, of the fourth part, and Joshua Manger and William Wolseley, in the said release described, of the fifth part. After reciting the said act of Parliament, and that the two terms of 500 years, and 500 years thereby created, were then vested in Frederick Montague, as in the said release mentioned; and after reciting the said two indentures of bargain and sale, and the recoveries suffered in pursuance thereof, and also reciting that the said William Lord Byron and William Byron his son, were indebted to divers persons in considerable sums of money, some of which were secured by judgments, and that the said William Byron alone, and also jointly with his said son, had granted annuities to a large amount, secured and charged as well upon the estates comprized in said act of Parliament, as by judgments, some of which had been obtained against the said William Lord Byron, and others both against him and his said son, the interest of which annuities and debts greatly exceeded

the annual income of the estates comprized in the said act of Parlia-^[430]ment, and that their creditors being very pressing for payment of their debts, and the annuitants being very willing to have their annuities redeemed upon reasonable terms: and that the said William Lord Byron and his said son, being unable to raise money to pay such debts, and to redeem such annuities, otherwise than by sale of part of the estates comprized in the said act of Parliament, he the said William Lord Byron and his said son applied to the said Elizabeth Lady Byron, and also to the said Charles Gould, Charles Morgan, and George Stubbs, and proposed, amongst other things, that the annual sum of 500*l.* by the said act of Parliament provided for the said Elizabeth Lady Byron out of the estates of the said William Lord Byron during her life, for her jointure, and also the annual sum of 500*l.* provided for her by said act of Parliament out of her own estates, and also the said annual sum of 700*l.* secured to the said William Byron, the son, during the joint lives of himself and his said father by the said deed of 25th of September, 1772, and likewise a power given by the said act to the said William Lord Byron to jointure a future wife, should be severally extinguished, and that all the estates comprized in the said act of Parliament should be freed and discharged therefrom, and that certain estates in Newstead, and the Forest of Sherwood Linby, and Blidworth, in the county of Nottingham, should be settled and assured to the use and intent that the said William Byron the son, might receive thereout, during the joint lives of ^[431]himself and his said father, an annual rent of 315*l.*, in part satisfaction of the said annual rent of 700*l.*, and subject thereto, to the use of the said William Lord Byron for life, and after his death, to the use and intent that the said Elizabeth Lady Byron might, if she survived him, receive out of the same premises an annual rent of 500*l.*, in lien and satisfaction of the said like annual rent by the said act of Parliament provided for her jointure, and subject thereto, to the use of trustees for a term of years, for better securing the same, with remainder to said William Byron the son, and his heirs, and that a term of years should be created out of all other the estates in the said county of Nottingham, in trust to raise the sum of 11,000*l.*, and the annual sum of 385*l.* for the interest thereof, at the rate of 3*l.* 10*s.* per cent. per annum, and apply the same in paying the portions by the said act secured for the younger children of the said William Lord Byron and Lady Elizabeth Byron his wife, in order that all the estates comprized in the said act might be thereby exonerated from the same, and that so much of the said 11,000*l.*, if any, as should remain after paying the said portions, and the whole of said 11,000*l.*, in case the said portions should not become payable, should be paid to other trustees; and that the said yearly sum of 385*l.* should, so long as the same should continue payable, be paid to the said William Byron the son during the joint lives of him and the said William Lord Byron, and together with the aforesaid annual ^[432]rent or yearly sum of 315*l.* in lieu and satisfaction of the aforesaid annual sum of 700*l.*, and after the decease of the said William Byron the son, to the said William Lord Byron during his life, if he survived the said William Byron: and after the decease of the said William Lord Byron, if his younger child or children by the said Elizabeth Lady Byron should, by virtue of the trusts aforesaid for the terms of 500 years and 600 years, become entitled to such sums of money as in the said act of Parliament were mentioned for his or their maintenance and education, then that said annual sum of 385*l.*, or so much thereof as should be sufficient to answer the sums of money by the said act secured and intended for the maintenance and education of the said younger children, should be paid to the trustees for the time being of the same terms of years, to be by them applied for the maintenance and education of such younger child or children, and that the reversion and inheritance of the estates in the said county of Nottingham to be comprized in the term of years so to be created as aforesaid; and also a parcel of land lying at or near Wymondham, in the county of Norfolk: and likewise all the premises in the said county of Lancaster, which were then of the yearly value of 130*l.* only, or thereabouts, should be limited and assured unto and vested in other trustees, in trust to sell the same, and that out of the money arising from the sale of the estates in the said county of Nottingham all the debts due or owing by or from the said William Lord Byron, and William ^[433]Byron, and secured by mortgages, judgments, statutes, or recognizances, should be discharged, and that the annuities which had by the said William Lord Byron and William Byron, either jointly or separately, been granted or secured, and which did or might affect all or any of the estates comprized in the said act, should be purchased in and redeemed, and the arrears thereof paid, and all the estates comprized in the

said act exonerated and discharged therefrom, and that the sum of 2000l. should be paid to the said William Byron the son, and the residue of the money to arise by sale of the estates in the said county of Nottingham, after deducting all costs and charges, should be paid to the said William Lord Byron and William Byron, in order to enable them to pay such other debts as were due from them respectively: and that the aforesaid sum of 11,000l., or so much thereof, if any, as should be paid to the trustees of the inheritance of the premises so to be sold as aforesaid, and the money arising by sale of the premises at or near Wymondham aforesaid, and in the said county of Lancaster, should be laid out in the purchase of other lands and hereditaments, to be conveyed and settled to the use of trustees for a term of years, upon trust, if the payment of the said yearly sum of 385l. to said William Byron the son, should, during the lives of him and the said William Lord Byron, cease and determine, then to raise the like annual sum of 385l., or so much thereof as the rents and annual profits of the lands and hereditaments to be purchased [434] as aforesaid should amount unto, and pay the same to the said William Byron, during the joint lives of him and the said William Lord Byron, and subject thereto, to the use of the said William Lord Byron for life, with remainder, after his death, to the use and intent that the said Elizabeth Lady Byron, if she survived her said husband, should have and receive thereout an annual rent or yearly sum of 500l., by the aforesaid act secured to her, in augmentation of her jointure, with the usual powers for obtaining payment thereof, and subject thereto, to the use of trustees for a term of years, upon trust for better securing the same, with remainder to the said William Byron the son, and his heirs, and that, in the mean time, until the money which should arise by the sale of the hereditaments and premises at or near Wymondham aforesaid, and in the said county of Lancaster, and the said sum of 11,000l., or so much thereof, if any, as should be paid to the trustees, should be so laid out in the purchase of lands and hereditaments, the same should be invested in the public funds or stocks, or on Government or real securities, at interest, and the dividends &c. thereof go to and be received by such persons as the rents of the lands and hereditaments so proposed to be purchased and settled, would go to if such purchase and settlement had been actually made. And, after taking further notice that the said Elizabeth Lady Byron, having consulted her friends, and considered said proposal, and notwithstanding the provisions so proposed to be made for her during her life, if she survived the said William Lord [435] Byron, might, in consequence thereof, become and be less than the annual rents or yearly sums of 500l., and 500l. secured to her by the said act for her jointure and additional jointure, she, at the request and desire of the said William Lord Byron and William Byron, in order to remove the difficulties which they were under by reason of such their debts and annuities, and likewise the said Charles Gould, Charles Morgan, and George Stubbs, at the special instance and request as well of the said Elizabeth Lady Byron as of the said William Lord Byron and William Byron severally, consented and agreed to the said proposal, and to all such acts as were necessary on their parts respectively for effectually carrying the same into execution, It was witnessed, that, for the considerations aforesaid, they the said William Lord Byron and William Byron, by virtue and in execution of the powers and authorities reserved to them by the therein before-mentioned indentures of the 1st of May and 12th of July, 1773, did direct, limit, and appoint, and the said representatives of the said termors, and the said William Lord Byron, Elizabeth Lady Byron, and William Byron, did, according to their several and respective estates and interests, grant, bargain, sell, assign, release, quit claim, and confirm unto the said Brackley Kennett and John Heaton and their heirs, (the premises in the said act of Parliament mentioned and settled) To hold unto and to the use of the said Brackley Kennett and John Heaton and their heirs, upon trust as to the Nottingham estates, to the uses recited in the deed, and [436] to the use of Manger and Wolsley for the term of 1200 years, upon the trusts recited, in discharge of the hereditaments comprised in the said act, with a proviso that no mortgage should be made of the premises comprised in the said term of 1200 years by the said trustees, before it was determined by the event whether the aforesaid portions for younger children would become payable or not, with a proviso, that when the trusts of the said term should have been executed, such term in such of the hereditaments and premises therein comprised as should not have been so mortgaged or sold, should thenceforth cease, and, as to the inheritance of the same hereditaments and premises comprised in the same term, and those in Wymond-

ham and in the county of Lancaster, it was thereby declared that the same were so limited, upon trust that they (Kennett and Heaton,) or the survivor of them, or the heirs or assigns of such survivor, should, as to the manor of Rochdale aforesaid, and all the hereditaments in Rochdale, or elsewhere in the county of Lancaster, with the consent and approbation as well of the said William Lord Byron and William Byron, or the survivor of them, as of the said Charles Gould or his heirs, such consent and approbation to be testified by some deed or deeds, instrument or instruments, in writing, to be sealed and delivered by them in the presence of, and to be attested by, two or more credible witnesses, sell, convey, and dispose of all the said hereditaments, and the inheritance in fee simple thereof, to such person or persons, and for such price or prices, as [437] they the said Brackley Kennett and John Heaton, or the survivor of them, or the heirs or assigns of such survivor, should, with such consent and approbation as aforesaid, to be testified as therein before mentioned, think fit, and to stand possessed of the money arising by sale thereof, for the purposes thereafter mentioned. And in the said indenture was contained a general proviso, that the rents, issues, and profits as well of the said hereditaments and premises comprised in the term of 1200 years therein before mentioned, as of the said hereditaments and premises at or near Wymondham aforesaid, and in the said county of Lancaster, should, in the mean time, and until the inheritance of the same hereditaments and premises should be sold as aforesaid, from time to time, go and be had and received by such person and persons and be applied to and for such ends, intents, and purposes, and in such course, order, and manner, as the rents and annual profits of the said hereditaments and premises thereby made saleable as aforesaid would have gone or been payable or applicable if the said deed had not been made and executed, and no such fines as before mentioned had been levied. And as well all the money arising by such sale of the said hereditaments and premises at or near Wymondham aforesaid, and in the said county of Lancaster, as the aforesaid sum of 11,000*l.*, or so much thereof, if any, as should be paid to them the said Brackley Kennett and John Hea [438]-ton, or the survivor of them, or the executors, administrators, and assigns of such survivor, pursuant to the directions therein before for that purpose contained, it was declared and agreed, that said Brackley Kennett and John Heaton, and the survivor of them, and the executors, administrators, and assigns of such survivor, should stand and be possessed thereof, upon trust, that when the money arising by such sale or sales of the hereditaments and premises at Wymondham aforesaid, and in the county of Lancaster, and said 11,000*l.* or any part thereof should come to, or be or remain in their or his hands or hand, or so soon after as conveniently might be, to lay out and invest the same, with the consent and approbation as well as the said William Lord Byron, Elizabeth Lady Byron his wife, and William Byron, or of the survivors of them, as of the said Charles Gould or his heirs, such consent to be testified in manner therein before mentioned, in the purchase of the inheritance in fee-simple of lands and hereditaments situate in that part of Great Britain called England, free from incumbrances (except fee-farm, chief or quit-rents): and it was thereby declared and agreed, that all such lands and hereditaments so to be purchased, should, when so purchased, be conveyed, settled, and assured to the use of the trustees or trustee for the time being of the aforesaid term of 1200 years, or some other proper person or persons to be for that purpose named by the said William Byron, his executors, administrators, and assigns, for the term of 60 years, if the said William Lord Byron and William [439] Byron should both so long live, upon trust, if the payment of the aforesaid annual sum of 385*l.* to the said William Byron should, during the life of the said William Lord Byron and William Byron, cease and determine, and ought not, according to the true intent and meaning of the then stating deed, to be paid to the said William Byron, or his assigns, then that they the said trustee or trustees should, during the joint lives of the said William Lord Byron and William Byron, by and out of the rents and annual profits of the lands and hereditaments so to be purchased and settled as aforesaid, levy and raise, so far as the said rents and annual profits would extend, the annual sum of 385*l.* of lawful money of Great Britain, by equal half-yearly payments in every year, tax free, and without any deduction or abatement whatsoever, and pay the same to the said William Byron during such joint lives as aforesaid, in full and satisfaction of and for the aforesaid like annual sum of 385*l.* secured or intended to be secured to him by and under the trusts of the said term of 1200 years, and from and immediately after the expiration, or other sooner determination of the said term

of 60 years, and in the mean time subject thereto and to the trusts thereof, to the use of the said William Lord Byron for life, with remainder to the use, intent, and purpose, that the said Elizabeth Lady Byron, if she should survive the said William Lord Byron her husband, should, out of the lands and hereditaments so to be purchased and settled as aforesaid, have, receive, and take yearly, during [440] her life, an annual rent or sum of 500l. at the times therein mentioned, in lieu and satisfaction of and for the said like annual rent or yearly sum of 500l. by the aforesaid act provided and intended for her in augmentation of her jointure, the first payment thereof to be made on such of the days or times therein mentioned as should happen next after the decease of the said William Lord Byron, if the said Elizabeth Lady Byron should be then living, with usual powers of distress, entry, and receipt of the rents and profits of the same hereditaments and premises, for securing and obtaining payment of the said annual rent or yearly sum of 500l. from and after the decease of William Lord Byron, and subject to and charged and chargeable with the said annual rent or yearly sum of 500l. : To the use of such person as should be for that purpose named by said Elizabeth Lady Byron, his executors, administrators, and assigns, for the term of 70 years, upon trust, for better securing, by the usual ways and means, the payment of the said annual rent or yearly sum of 500l., and from and after the expiration of the said term of 70 years, and in the mean time subject thereto, and to the trust thereof, to the use of the said William, his heirs and assigns, for ever, or as near thereto as the deaths of parties and other circumstances would then permit : and that in such settlement so to be made as aforesaid should be inserted and contained proper provisoes and clauses as well for determining the said term of 70 years, when the trusts thereof were performed or at an end, as [441] for the safety and indemnity of the trustees of the said term : and it was thereby also declared and agreed, that the said Brackley Kennett and John Heaton, or the survivor of them, or the executors, administrators, or assigns of such survivor, might and should in the mean time, until the money arising by such sale or sales of the hereditaments and premises at or near Wymondham aforesaid, and in the said county of Lancaster, and the said 11,000l. or so much thereof, if any, as should be paid to them or him as aforesaid, should be laid out in the purchase of lands and hereditaments thereinbefore mentioned, by and with the consent and approbation of the said William Lord Byron, Elizabeth Lady Byron, and William Byron, or the survivors of them, and of the said Charles Gould, if then living, in writing, signed with their hands, place, lay out, or invest the purchase money arising by such sale or sales as aforesaid ; and the said 11,000l., or so much thereof, if any, as should be received by them the said trustees or trustee for the time being in the public stocks or funds, or upon Government on real security or securities at interest, and might, from time to time, with such consent and approbation as aforesaid, sell, assign, dispose of, alter, and vary all or any of the said stocks, funds, or securities, and again from time to time place, lay out, and invest the money arising thereby in or upon any such like new or other stocks, funds, or securities, as they or he should think fit : and it was thereby also declared and agreed that the dividends, interest, [442] and annual produce of the said stocks, funds, and securities, should from time to time go to and be had and received by such person and persons, and should be applied to and for such ends, intents, and purposes, and in such course, order, and manner, as the rents and profits of the lands and hereditaments so to be purchased and settled as aforesaid would go or be payable or applicable if such purchase and settlement were then actually made.

The Defendant Lord Byron in his answer further stated that the said trustees, in 1774, with the consent of the persons required in and by the said deed last before in part stated, sold and conveyed divers parts of the said trust estates situate in the said county of Nottingham, to the Duke of Portland for 50,500l. ; and that a sufficient part of such sum was applied in payment of all or many of the debts of the said William Lord Byron and William Byron, secured on judgments and mortgages, and in redeeming the annuities granted by them respectively, and in payment of the said 2000l. to the said William Byron ; and the residue of the purchase-money was accounted for to the said William Lord Byron pursuant to the directions in the said last mentioned indenture of release : and the Defendant insisted, that, although it appeared that the manor of Rochdale, and the estates lying in the county of Lancaster, were not sold by the said trustees, yet that the same nevertheless continued bound by and subject to the uses and limitations contained in the said indenture of [443] release of the 13th

of November, 1773: and he submitted, that it was the obvious intention of the parties to such indenture, and in particular of the said William Lord Byron and William Byron his son, that whether the said last-mentioned manor and premises were or were not sold, the same, if not sold, or if sold, then the money arising therefrom, should be invested in lands, and be liable to the trusts, uses, and limitations of the indenture last-aforesaid, by virtue of which indenture, and upon the execution thereof the said William Lord Byron became entitled to an estate for life in the said manor and premises, with the ultimate remainder or limitation to the said William Byron the son in fee-simple.

He also by his answer admitted the facts of deaths of parties &c. and insisted, that on the death of William John Byron, without issue, the remainder or reversion in fee-simple in the manor of Rochdale, and all the lands &c. in the county of Lancaster comprised in the said act of Parliament, and in the indentures of lease and release of the 12th and 13th of November, 1773, devolved upon or descended to him (Defendant Lord Byron) as the heir at law of the said William John Byron, and that the said William Lord Byron, party to the said indentures, was, by virtue thereof, and not otherwise, in the years 1795 and 1796, in the possession and enjoyment of the hereditaments and premises conveyed to Dearden, and, admitting that they were part of the estates comprised in the said act of Parlia-[444]-ment, and limited thereby to the uses in the bill mentioned, insisted that they were afterwards included in and re-settled by the said indentures of the 12th and 13th of November, 1773. He submitted that, as the two terms—the one of 700 years, created by the settlement of 3d December, 1720, and the other of 300 years, created by the said act of Parliament—had long ago been satisfied and fulfilled, the Defendants (the termors) ought to be considered trustees thereof for the Defendant Lord Byron, as the person entitled to the inheritance of the hereditaments and premises alleged to be purchased by and conveyed to the Plaintiff Dearden.

He then submitted that, by the deed of November, 1773, the said William late Lord Byron, and William Byron his son, agreed to re-settle the manor, lands, hereditaments, and premises in the said act of Parliament contained, and which was accordingly done by the said indenture of the 12th and 13th of November, 1773: and that thereby the remainder in fee was limited to the said William Byron the son: and he insisted that the said William Byron, under the circumstances, became and ought to be considered as a purchaser, and that, although it was stipulated by the said indenture of the 13th November, 1773, that the estates comprised therein should not be sold without the consent and approbation of the said William Lord Byron, and Elizabeth Lady Byron his wife, and said William Byron, or the survivor of them, yet Defendant was advised, [445] and submitted, that according to the true construction of the last-mentioned indenture, such consent and approbation were not absolutely requisite to enable said Brackley Kennett and John Heaton to proceed to a sale of such estates, but that the Court, on being applied to for the purpose, would have directed a sale thereof, notwithstanding said William Lord Byron and Elizabeth Lady Byron his wife, and said William Byron, had refused to consent thereto.

The Defendant also submitted that, inasmuch as such recovery as aforesaid had been suffered of the premises comprised in the said act of Parliament by the said William Byron, and which might have been seen by referring to the records of the Court of Lancaster, from which recovery it was to be inferred, that some deed or deeds, leading to or declaring the uses thereof, had been executed: if said plaintiff did not search he was guilty of neglect, and ought not to be permitted to take any advantage of want of notice, which he might have obtained by using due caution and diligence.

He admitted the ejectment, and that a verdict had been obtained therein on the demise of Heaton, which the Court of King's Bench, on a rule to shew cause, had refused to set aside, after argument, holding that the Defendants (the Plaintiffs in this cause) were not relievable at law (a).

[446] Shadwell, Sugden, and Barber, for the Plaintiffs, contended (the material circumstances of the case having been lucidly stated by Shadwell) that Lord Byron, the ancestor of the Defendant, was entitled, at the time of the sale of the premises in question to the Plaintiff Dearden, equitably, if not legally, to the absolute fee-simple

(a) That case is reported in 8 East, p. 248.

therein, and therefore had full power to sell, as he had done : for that, as the ultimate remainder in fee was originally in him, as soon as the purposes and objects of the deed of the 13th November, 1773, were answered and satisfied, he stood seised, under his original title, of an estate of inheritance in fee in the lands which had been sold, the old reversionary limitations being revived on the destruction of the estate-tail.

They submitted, that, even under the deed of the 13th of November, 1773, on which alone the Defendant's claim rested, the estates which were settled under the act of Parliament stood limited to the same general uses, unaffected by the trusts of that deed, until there should have been a sale made under all the circumstances and formalities which were thereby contemplated and required, and which were to be considered as measures of precaution and guards surrounding the old uses, if a sale should be unnecessary for the purposes for which that deed was made—and that no positive or definitive use could arise in the trustees till a sale should have been made :—that the uses of that deed were, in the events which had happened, never executed in the trustees ; the main [447] object of it being to exonerate all the settled property by a sale of the Nottingham estates ; and it was only in case those should be insufficient that the Lancashire estates were to be sold, nor even then unless, indeed, the consents of the several parties so providently required thereto should be first obtained for that purpose ; and therefore, as soon as the object of the deed was satisfied, and the parties to whom the protection of the property had been committed were dead, the conditional power to sell which had been given to the trustees was extinguished, and could never afterwards be revived ; for that qualified power to sell expired with the lives of the parties empowered to consent, amongst whom Gotld was most prominent, who, as a stranger, could only have been named as one whose consent was required in order that he might see that the money was properly laid out :—that the direction to the trustees to sell under the special circumstances, was a mere authority, subject to control, and not an absolute, nor even a discretionary duty, independent of existing circumstances, and the persons to whose approbation it was to be referred ; that it was an imperfect power, requiring the sanction of further authority, not a complete trust, unfettered and imperative : and that therefore, on the death of the controlling parties, the object of the deed being effected, Lord Byron's estate of inheritance became absolute.

They observed that in none of the deeds was there any absolute property given to William [448] Byron the son, unless in the event of his surviving his father, in which case he might have acquired the fee ; as soon, therefore, as his contingent interest was determined by his death, the father was restored to his reversion in fee—that there was no reason for stipulating that the estates should be sold and other estates purchased to be limited to the new uses in all events—that, under these deeds and the circumstances of the case, the parties could not call on a Court of Equity so to decree ; whereas, on the contrary, there was good reason for suffering the family estates, as far as they could be preserved from the necessities of the parties, to remain unsold in the same family upon the old uses—that that was, in fact, distinctly provided for by this very deed, and was plainly evidenced by the proviso, that until a sale, the rents, issues, and profits were to be received by such persons as would be entitled to them if that deed had not been made : after sale too, the dividends arising from the money produced, were to be received by such persons as would have been entitled to the rents and profits of the real estate directed to be purchased with it :—and that unless the character of land were, by the covenant, so imperatively and definitively affixed to money in such a case as to exclude all uncertainty as to the manner in which the owner meant it to descend, and to leave no option, Courts of Equity will not convert the property. *Walker v. Denne* (2 Ves. jun. 170. 5 Ves. 388). *Whiddale v. Partridge* (2 Atk. 168).

[449] They also urged that, in respect of the objects of the deed of 1773, there was no further trust to be performed by the trustees : and therefore ought to and should be presumed to have re-conveyed the estate to the old uses created by the act of Parliament.

They submitted, therefore, that there was no foundation for this attempt to deprive a bonâ fide purchaser for valuable consideration of the estate for which he had paid his money to the ancestor of the claimant, from whose descendant he derived title.

Martin, Preston, and Skirrow, for the Defendants, contended that, at the time of

the sale in question, William Lord Byron, the vendor, had no greater interest in the premises sold than that of tenant for life under the deed of 1773, under which also his son William took an ultimate remainder in fee, as a purchaser for valuable consideration—that that was the manifest intention of all the parties to all the transactions and deeds—that the Court could not presume an intention contrary to the express objects of the parties, as signified by the very particular and careful recitals (which, as Lord Mansfield observed, in the case of *Moor v. Magrath* (1 Cowp. 12), are like the preamble to an act of Parliament, the key to what comes afterwards) and the whole tenor of the deed, which, in a matter of settlement and family arrangement, as this was, ought to be considered with the greatest attention,—and that this Court, as a Court [450] of Equity, could not put a different construction on the deed than a Court of Law would be bound to do, except where the strict technical sense of the instrument ought, in justice, to be more liberally construed.

[The Lord Chief Baron. The court of Law has put no construction on the deed. They proceeded on the lessors of the Plaintiffs in the ejectment having a right to the legal estate, and the Defendants at law come here upon the equitable right to sell the fee, which, they say, Lord Byron had.]

They also insisted, that it appeared clearly from the recitals of the reasons and objects of entering into and executing the deed of 1773, in which recitals the whole agreement between the parties was embodied, that the direction therein to the trustees to sell, was an imperative trust to sell in any event, and not a mere discretionary power, to be exercised or not, as there might or might not be thought to be occasion—that that trust was not controllable by the parties whose consents had been directed to be obtained in the common form of such deeds, observing that, in the lifetime of Lord and Lady Byron, their consents might be required with reason, for the protection of their minor interests. The same might be said of Gould, for he was an incumbrancer, and not named for any purpose of controlling the trust to sell, on the estates: and from that circumstance it was, that the requisition of his consent was in-[451]-troduced into the deed: but if Lord and Lady Byron should have been desirous to sell the estate, Gould could not have withheld his consent. If the direction was not imperative, all the trusts of the indenture might have been defeated and prevented from taking effect, or might have been only partially executed, at the caprice of one of the contracting parties: and the consequence would be, that the persons who were clearly intended to have been benefited by the deed would have been injured in interest by its execution.

It was much pressed, that Courts of Equity view with great jealousy such transactions as these, between a father, tenant for life, and his son, the tenant in tail in remainder: and Lord Hardwicke's words, in *Heron v. Heron* (2 Atk. 168), were relied on. His Lordship says, "Suppose the Plaintiff had been entitled to a tenancy in tail of real estate, and the father, a bare tenant for life, had taken such an advantage of his son's necessities to draw him in to join in any conveyance which would destroy his remainder: this Court, upon very slender evidence of such a practice in a father, has relieved the son."

That doctrine is adverted to as being correct, where there has been no laches, in the case of *Brown v. Carter* (5 Ves. 877).

On the point of the presumption of a recon-[452]-veyance by the trustees to the father Lord Byron, they insisted that no such presumption could be made, as that would clearly have been a breach of their trust which, they submitted, was to sell all the estates, for the purpose of exonerating them out of the produce, and purchasing with the surplus another estate, to be settled according to the family arrangement agreed on as the object of the deed, of which the limitation of the remainder of that estate in fee to William Byron was the ultimate use.

RICHARDS, Lord Chief Baron, now delivered judgment.

The question in this cause is reduced to a very narrow compass, notwithstanding the extraordinary length of the instruments set forth in the pleadings, which form the foundation of the arguments on either side. The single question is, whether the late Lord Byron had the fee-simple of the estate at the time when he sold this part of it to the Plaintiffs: and that will depend on the construction of the deed of 1773! All that we know of the circumstances of the family at the time when that deed was executed is necessarily derived from the history furnished by the recitals in that deed.

In the year 1770, William Byron the son attained the age of twenty-one, and

then, it appears, that with the required consents, he joined in the several deeds for the sale of these estates. His Lordship here stated principal facts—the act of [453] Parliament and the substance of the deeds and recoveries, previous to the deed of 1773, already set out: and (having observed that there were also other deeds and instruments, into which it was impossible to look without lamenting very much the situation in which this noble family had become involved) thus continued:—

I now come to the deed of 13th of November, 1773. All the recitals in that deed are material. They are a sort of key to the construction of it; and I cannot help firmly believing, from the perusal of those recitals, that the son William Byron incumbered his estate at the instance and for the benefit of his father. This deed recites all the former deeds, and that debts were due from Lord Byron, and his son William Byron, to a numerous body of judgment, mortgage, and annuity creditors, the interest of which greatly exceeded the annual profits of the rental of the whole of the estates which were comprised in the act of Parliament. Lord Byron being only tenant for life, could not, alone, raise money by the sale of any part of these estates to be applied in the payment of his debts; and he could derive no relief from his difficulties by such means, except by the consent and concurrence of Lady Byron, and his son William Byron. He was unable, it seems, to raise money to pay the debts and redeem the annuities by any other means than by the sale of part of those estates. By this deed, therefore, of 1773, Lord William Byron, Lady Elizabeth Byron his wife, and their son William [454] Byron, conveyed and limited all their estates, which were comprised in the act of Parliament, in Nottingham and Norfolk, and the county of Lancaster, (of the latter of which, the premises purchased by the Plaintiff James Dearden were part) to the use of John Heaton and Brackley Kennett, and their heirs, upon certain trusts expressed in the deed. One of those trusts was, that they, or the survivor of them, or the heirs or assigns of such survivor, should, as to the estate at Rochdale, with the consent and approbation of the said William Lord Byron and William Byron, or the survivor of them, and of Charles Gould, or his heirs,—such consent and approbation to be testified by some deed or deeds, or instrument or instruments, in writing, to be sealed and delivered by them in the presence of, and attested by, two or more credible witnesses—sell the said estate (part of the property in the county of Lancaster), and the fee-simple and inheritance thereof, and should stand possessed of the money arising from the sale of the whole, in trust to apply so much of the money arising from the sale of the estates in the county of Nottingham—excluding the Lancashire estates—as should be necessary for that purpose, in the payment of the debts due and owing from them William Lord Byron and William Byron respectively, and were secured by mortgages, judgments, statutes or recognizances, and in freeing and discharging the estates comprised in the act of Parliament from the annuities secured thereon, and granted by Lord Byron and William Byron, jointly or sepa-[455]-rately, and to apply the surplus of such money in the payment of other debts due from Lord Byron and William Byron, and 2000*l.* to William Byron. Then, the money to arise by the sale of the lands in Norfolk, and the estates in Lancashire, was to be laid out in the purchase of other freehold lands and hereditaments, to be settled and limited (subject to certain charges) to the use of William Lord Byron for his life, with remainder to William Byron the son, and his heirs. Accordingly, certain parts of these estates were sold for the purposes stated in this deed, subject to the paying and raising the sum of 11,000*l.*, which, by the act, was charged in part on each of their estates, to furnish portions for younger children: and it was agreed, that a term of years should be created on other estates, to raise the 11,000*l.* The interest on that sum at 3*l.* 10*s.* per cent. was made payable to William Byron until his death (which happened in 1776) and afterwards to Lord Byron for his life. Besides the sum of 385*l.*, William Byron had an annuity of 315*l.*, and he also got all his debts paid, and 2000*l.* besides, agreeably to the terms of the deed. After the payment of all the debts of William Lord Byron and his son, the surplus, as I have stated, was to be laid out in purchasing lands, which were to be conveyed to Lord William Byron for life, and then it was to go to his son William Byron and his heirs. It is quite clear, therefore, that it was the intention of all parties, that part of the produce of the sale of these [456] estates was to be given to William Byron in fee.

It is also recited, that Lady Byron, and Gould, at the request of Lord Byron and their son, agreed to the plan so proposed for extricating them out of their difficulties, and consented to carry it into execution.

In the witnessing part of the deed it is stated, that Lord Byron, Lady Byron, and William Byron the son, limited, appointed, granted, and released all the estates in the counties of Norfolk, Nottingham, and Lancaster, which were comprised in the act of Parliament; and of the estate in which last county the premises stated in the bill to have been purchased by the Plaintiff were part—To hold to the use of Brackley Kennett and John Heaton, and their heirs, upon trust that they, or the survivor of them, or the heirs or assigns of such survivor, should, as to the manor and estates at Rochdale, with the consent and approbation as well of the said William Lord Byron and William Byron, or the survivor of them, as of Charles Gould, or his heirs, to be testified by some deed or deeds, or instrument or instruments, in writing, to be sealed and delivered by them in the presence of, and to be attested by, two or more credible witnesses, sell the said estates: and they were to stand possessed of the money to arise by the sale of the hereditaments and premises at or near Wymondham in the county of [457] Norfolk, and in the county of Lancaster, in trust to lay out and invest the same—with the consent and approbation as well of Lord Byron, Elizabeth his wife, and William Byron the son, or of the survivors of them, as of Charles Gould or his heirs, such consent to be testified as before in the purchase of the inheritance and fee simple of lands and hereditaments situate in that part of Great Britain called England, free from incumbrances, except fee-farm, chief or quit rents. And it was thereby declared and agreed, that such lands and hereditaments, so to be purchased, should be conveyed, settled, and assured to the use of the trustees for the time being of the term of 1200 years therein mentioned: or to some other person or persons to be named by William Byron, his executors, administrators, and assigns, for 60 years, if they should both so long live, upon the various trusts therein mentioned, and subject thereto, to the use of the said William Lord Byron and his assigns for life, with remainder to the use, intent, and purpose that Elizabeth Lady Byron, if she should survive William Lord Byron, should take and receive the yearly sum of 500l., in lieu of 500l. provided for her by the said act of Parliament in augmentation of her jointure, with remainder to such person as should be named by the said Elizabeth Lady Byron, and his executors, administrators, or assigns, for the term of 70 years, upon trust, for the better securing, by the usual means, the said annual sum of 500l., with remainder to the use of the said William Byron, his heirs and assigns for ever; or as near thereto as the [458] deaths of persons and other circumstances would then permit.

The intention of the parties to this agreement, as recited, was certainly, that William Byron should ultimately take the fee-simple: and we must examine the deed with great care, for the purpose of seeing whether there be any thing in it destroying the effect of what was so plainly declared to have been the intention of the parties.

The Nottingham estates given to Kennett and Heaton, in fee, in trust to sell, to raise money thereby, in order to discharge William Lord Byron and his son William from their incumbrances, were sold for 50,500l.—and were so applied, and also in paying the 2000l. to William Byron. The 11,000l., which was intended as portions for younger children, if it should not be wanted, was to be paid to Kennett and Heaton, to be by them placed in the public funds on certain trusts, and the produce of the term of 1200 years which had been directed to be created for raising the 11,000l. was to be appropriated to other trusts, unless it should have become necessary for raising portions for younger children.

The main and leading object, certainly, of this deed of 1773 was, to enable William Lord Byron and his son to extricate themselves from their pecuniary embarrassments by a sale of part of their estates. A portion of these estates has been sold, and their debts were discharged.

[459] In one part of this deed there is a proviso that the rents, issues, and profits as well of the said hereditaments and premises comprized in the term of 1200 years therein before mentioned, as of the said hereditaments and premises at or near Wymondham aforesaid, and in the county of Lancaster, should, in the mean time and until the inheritance of the same hereditaments and premises should be sold as aforesaid, from time to time go to and be had and received by such person and persons, and be applied to and for such ends, intents, and purposes, and in such course, order, and manner as the rents and annual profits of the said hereditaments and premises thereby made saleable as aforesaid would have gone or been payable or applicable if the said deed had not been made and executed, and no such fines as before mentioned

were levied. Upon this a question arises as to the person entitled to the inheritance of the estate out of which the term of 1200 years was to be created. The 11,000l. need not have been raised, nor the term created, if it were not wanted for the portions; as, if there should have been no younger children, so that such portions would not have become necessary to be raised. And here we must observe, that the sale was only to take place with the consent and approbation of Lord Byron and William Byron, or the survivor of them, and Charles Gould, and that consent was to be testified with extraordinary and unusual formalities. Hitherto I think the parties have gone on pretty regularly in executing the agreement as recited, and have abided by the [460] terms of it. In determining that point, this question occurs,—and I consider it the most important question in this cause—whether the Rochdale or Lancashire estate was devoted to be sold at all events, and converted into another estate. The term of 1200 years was to be created out of those estates which were limited to the use of Lord William Byron for life, with remainder to his first and other sons and daughters in tail, with remainder to William Byron in fee: then Kennett and Heaton were to stand possessed of the money arising from the sale of the estates. They are directed to sell them, it is true, but, with all the formalities I have mentioned, and with the consent and approbation of William Lord Byron, of Lady Byron, and of William Byron their son, and the survivors of them, and of Charles Gould or his heirs. Out of the proceeds they are, first of all, as I have already stated, to pay off the debts of William Lord Byron, and of William his son; and then they are to provide for the other trusts of the deed, and, ultimately, to lay out the surplus in the purchase of other land in some part of England, to be settled to the original uses; and, in the mean time, they are to lay out the money in stock, and to pay the dividends and interest to such persons, and to apply them to such purposes, as the rents and profits of the lands would have been payable and applicable to, if such purchase had been made according to the deed of 1773. That deed has been said to be a voluntary deed; and from the recitals in the deed itself, I am of opinion that it was a voluntary [461] deed. One cannot read the recitals, confirmed as they are by the joint execution of the deed by all the parties, without seeing that this was a family arrangement, intended for the benefit of the family, by which each of them was to take something. The question, therefore, comes to be the shortest possible: whether, according to the true construction of a few words in this deed, the estate in Rochdale was necessarily, and at all events, to be converted into another real estate? I take that to be the real question in the cause. If the agreement which is here recited had stood alone, without any degree of qualification in the subsequent parts of the same deed, this Court, as a Court of Equity, would have corrected the deed in such a manner as to have made the agreement effectual, by making the deed conformable with it. And, if this Court would have done so, there can be no doubt at all that the parties contracting on that foundation would be entitled to do so, exactly as they would have been if that agreement had been carried into execution. But the difficulty here is, what the parties really intended; and it arises in consequence of what we find in the deed subsequently. The estates were not to be sold without extraordinary formality, and the consent of various persons was made necessary; for the estates were conveyed to Kennett and Heaton, upon trust that they, or the survivor of them, or the heirs or assigns of such survivor, should, as to the manor and estates of Rochdale aforesaid, with the consent and approbation as well of said William Lord Byron, Lady Byron, [462] and William Byron, or the survivors of them, as of the said Charles Gould, or his heirs, such consent and approbation to be testified by some deed or deeds, or instrument or instruments in writing, to be sealed and delivered by them in the presence of and to be attested by two or more credible witnesses, sell, convey, and dispose of all the same hereditaments, and the inheritance in fee simple thereof, to such person or persons, and for such price or prices, as they or the survivor of them, or the heirs or assigns of such survivor, should, with such consent and approbation as aforesaid, to be testified as therein before mentioned, think fit.

Now, there is no doubt that, according to the true construction of this deed, the agreement as to the sale which is recited, is very much narrowed by the subsequent words in the deed itself; and as they are introduced with so much particularity, they must be taken to imply some particular purpose and object: so that I cannot reject them as being of no force, or as if they were not in the instrument. The agreement, certainly, was to sell the estates, and to purchase another with the surplus, of

which the ultimate remainder was limited to William Byron in fee; but I do not observe that, in the recital of that agreement, the consents of these parties, so particularly required in the body of the deed, are made necessary; yet all these circles of protection are afterwards introduced into the operative part of the deed, and thrown round the sale. Even if the [463] agreement stood in the way, (as it might have done if there had been no qualification of it in the subsequent part of the deed) I cannot think the trustees would, in this case, be bound by the letter of that agreement, to sell the estate. I cannot help considering, that the object of so much caution was, that the trustees should not be allowed to proceed merely on the letter of that agreement, and that the trust that Kennett and Heaton were to sell, with the consent and approbation of Lord Byron, of Lady Byron, and of William Byron, or the survivors of them, and also of Charles Gould, to be testified by some deed or instrument in writing, to be sealed and delivered by them in the presence of and to be attested by two or more credible witnesses, was not to be executed except in some particular case, or on an express request, and for some good and solid reason; for I cannot imagine that Kennett and Heaton were to have sold these estates without any other reason than mere request. I cannot suppose it was the intention of the parties, that this trust should be considered merely directory, as in some of the cases which have been cited, trusts of this sort have, under other circumstances, been considered to be. It seems to me that there was something required to be done previously, of so much importance, as that it cannot be dispensed with in a Court of Equity. I really cannot suppose myself, that Kennett and Heaton would have been warranted in proceeding to sell, unless all the four persons who were parties to the deed and had an interest in the sale, or who [464] at least were given a controlling power over it, had given their consent and approbation. Then, can it be supposed that a Court of Equity would, in such case, say to the trustees, "You shall sell this estate at all events, and without such consent?"

There having been no sale in point of fact, and as there can now be no sale according to the terms of this deed, these premises are therefore precisely in the same condition in which they were before the deed of 1773 was executed—I mean as to the title of the parties.

It has been said, that the direction is, that until sale, the rents should go to the persons who would have been entitled to them by the act of Parliament. But there was no sale, nor attempt to sell; nor could there have been any unless authorized according to the express directions of this instrument, which indicate the intention of the parties most plainly, and are quite strong enough to control any vague or loose terms in the recital of the agreement; and that seems to me to be the true sense to be put on the deed in ascertaining what ought to be the construction of it.

Then it was very properly urged as a strong feature, that the purchase-money is to be placed in the public stocks, to follow the interest which would have been taken in the lands to be purchased; but the answer to that is, "You cannot reach that till the estate is sold according to the [465] terms of the deed; and if you cannot sell the estate, then there can be nothing to be invested.

It really seems to me, that this case does not come within the principle of any of the authorities that have been mentioned; for they were all cases where the intention of the parties to convert the real into personal estate was sufficiently clear.

Taking the whole of this case together, it is too much for me to say, that the state of the parties was different at the time of the sale in question from what it was at the time when the deed of 1773 was executed. I cannot take upon myself to declare that the parties meant at all events to sell this manor, and to convert it into another real estate. The whole case turns entirely on the true construction of these few important passages in the deed. If I am right in my opinion, it follows that Lord Byron, before the deed of 1773, having the fee, was entitled to sell the inheritance; and that therefore the Plaintiff is entitled to the prayer of his bill.

[Shadwell, after the judgment was pronounced, applied on the part of the Plaintiff for costs; but

The Lord Chief Baron said, that he should certainly not give costs in a case like this, where [466] there had been so much doubt whether the ejectment was not rightly brought.]

DECREE.

That the Defendants (the surviving trustee and the representatives of the termors) are trustees of the legal estate of inheritance and terms of years vested in them respectively of the hereditaments and premises in the pleadings mentioned, purchased by and conveyed to the Plaintiff Dearden, and were at his costs and charges to convey and assign &c.—with the usual reference to settle the conveyance :

The injunction already granted to be continued and made perpetual.

The decree to be without costs on either side, with liberty to the parties to apply.

[467] IN THE HOUSE OF LORDS.

[Error from the Court of Exchequer and Exchequer Chamber.]

BULTEEL AND ANOTHER v. JARROLD. Demurrer. Wednesday, 28th June 1820.—

Plea to an action on a recognizance of bail, that after &c. the plaintiff entered into an agreement with the principal in the bail bond without the privity of the bail, to take from the principal goods, to secure the payment of part of the money recovered, and that such goods were consigned to them accordingly :—Held bad, on special demurrer, because such agreement, by parol, with a person not a party to the cause cannot be pleaded in bar of such an action, arising on matter of record.

This was an action brought in the Court of Exchequer, on a recognizance of bail to the action entered into in the same Court by the Plaintiffs in error, as bail of Joshua Rowe, in an action against him at the suit of the Defendant in error. The declaration was in the usual form.

The Defendants below, (the now Plaintiffs in error) pleaded, first, that there was no such record of the recognizance : and

Secondly, that after the making the said recognizance, and after the recovery of the judgment in the Court of Exchequer by the Plaintiff below in the suit against Joshua Rowe, the Plaintiff below, without the privity of the Defendants below, entered into an agreement with the said Joshua Rowe for the payment and discharge of the sum of money recovered by the Plaintiff below against the said Joshua Rowe ; and that it was agreed between the Plaintiff below and the [468] said Joshua Rowe, without the privity of the Defendants below, that the Plaintiff below should take and receive fifty tons of clay, in part payment of the said sum of money recovered against the said Joshua Rowe, and that twelve months were to be given to the said Joshua Rowe for the payment of the residue of the said sum of money so recovered, and that one hundred other tons of clay were to be delivered to the Plaintiff below by the said Joshua Rowe, to secure the payment of 1000*l.* part and parcel of the residue of the said sum of money so recovered : and that, in pursuance of the said agreement, fifty tons of clay of the said Joshua Rowe were consigned or appointed to the Plaintiff below, and certain other transactions were had in furtherance and upon the said agreement entered into between the said Joshua Rowe and the Plaintiff below. And the Defendants below averred, that the agreement between the Plaintiff below and the said Joshua Rowe was entered into without their privity or knowledge, concluding in the usual form.

Upon the plea of nul tiel record the Plaintiff below joined issue, and the Court of Exchequer gave judgment thereon for the Plaintiff below.

To the special plea the Plaintiff below demurred specially, and assigned the following causes of demurrer :—

That it is wholly foreign and immaterial to the [469] question in dispute between the parties in this cause, whether any agreement was made by the said Plaintiff, with the said Joshua Rowe, or with any other person not a party to this cause. Also, inasmuch as the cause of action in this suit arises upon matter of record, the same cannot be discharged by any parol agreement whatsoever, and that it does not appear in and by the said plea, that the agreement in the said plea mentioned was or is by matter of record, or under seal. Also, that although it is set forth in the said plea of the said Defendants, by them lastly above pleaded, that it was agreed that the said time therein mentioned should be given to the said Joshua Rowe, as therein mentioned,

yet it is not in the said plea expressly stated, nor does it necessarily appear what time, or that any time was actually given to the said Joshua Rowe, or that the said Plaintiff was at any time precluded from, or did in part delay proceeding against the said Joshua Rowe, or against the said Defendants in this present action. And also, for that it does not appear what were the other transactions which are in the said last plea alleged to have been had in furtherance and upon the said agreement in the said last plea mentioned, and the said allegation is altogether vague, indeterminate, and uncertain, and no distinct or precise issue can be taken upon such an allegation. And also, that the said plea is in other respects uncertain, informal, immaterial and insufficient, &c.

The Defendants below joined in demurrer, [470] and the Court of Exchequer gave judgment for the Plaintiff below.

Upon that judgment of the Court of Exchequer, the Defendants below (the Plaintiffs in error) in Michaelmas Term last brought a writ of error in the Exchequer Chamber, and assigned the common errors, and the Plaintiff below pleaded in nullo est erratum, whereupon the judgment of the Court of Exchequer was affirmed.

On that judgment and affirmance the Plaintiffs in error brought a writ of error, returnable in Parliament, and assigned for error the common errors: the Defendant in error pleaded in nullo est erratum.

The question arose on the sufficiency of the second plea of the Defendants below (the Plaintiffs in error), which the Defendant in error contended was bad.

Wilde and Manning argued in support of the plea, and

Littledale and Tindal for the demurrer.

For the Plaintiff in error the following reasons were submitted:—

First, That Rowe cannot in any sense be regarded as a stranger to the record, the action [471] being founded upon an engagement entered into for his sole benefit, and upon the judgment rendered against himself. In the only case (*Grimes v. Blofield* (Cro. Eliz. 541),) in which satisfaction moving from a stranger was held to be no bar to the action, great stress was laid upon the circumstance of such third person being in no sort privy to the condition of the obligation, whereas the reverse is here obviously the case. It was also observed, that the only two authorities there cited, expressly determine, that a satisfaction by a stranger is a good plea, inasmuch as it is immaterial whence the satisfaction proceeds, provided the plaintiff has the benefit of it.

Secondly, That in assigning the second cause of demurrer, the Plaintiff below appears to have lost sight of the distinction so clearly laid down by Lord Coke, in *Blak's case* (6 Rep. 43), where it was resolved by the whole Court of Common Pleas, "that there is a difference when the duty accrues by the deed in certainty tempore confectionis scripti, as by covenant, bill, or bond to pay a sum of money. There this certain duty takes its essence and operation originally and solely by the writing, and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personality: but when no certain duty accrues by the deed, but a wrong, or default subsequent, together with the deed, gives an action to recover damages which are only in the [472] personality, for such wrong or default accord with satisfaction is a good plea."

Thirdly, That it is expressly alleged in the plea that the agreement was to give twelve months time to Rowe, which agreement, it was submitted, would discharge the Plaintiff in error, whether any time were in fact given or not: and inasmuch as, during the stipulated period, no proceedings could have been taken against Rowe, the Plaintiffs in error were discharged absolutely from their engagement, upon the principle, that the Defendant in error could not, during that period, have proceeded against the Plaintiffs in error, without indirectly violating the indulgence given by him to Rowe, by giving the Plaintiff in error an immediate right to resort to Rowe for an indemnification. As was said by Gibbs, C. J., in *Melville v. Glendinning and Another*, *Bail of Coombe* (7 Taunt. 126), "The doctrine was first introduced in Courts of Equity, that if the creditor gives time to the original debtor, the surety is discharged. It was founded on this principle, that every surety has a right to come into a Court of Equity, and require to be permitted to sue in the name of the original creditor. If the creditor gives time to the original debtor, he thereby prevents the surety from using his name with effect. The Courts of Law have held, with respect to bail, that the bail are entitled to surrender the principal at any time, whenever the Plaintiff himself would not be precluded from taking [473] or proceeding against him. If

the creditor gives time to the principal, the creditor cannot, during that time, take or proceed against him, neither, during the same period, can the bail, who are therefore discharged."

Lastly, As to the fourth cause of demurrer, it was submitted, that the allegation of the further transactions between the Defendant in error and Rowe was material, as shewing, that the agreement was recognized and acted upon, but that the Plaintiffs in error, not being privy to these transactions, were unable to set them forth with particularity.

For the Defendant in error the reasons urged against the sufficiency of the plea were,

First, Because it is wholly foreign and immaterial to the question in dispute between the parties in this cause, whether any agreement was made by the Defendant in error with the said Joshua Rowe, or with any other person not a party to this cause.

Secondly, Because, inasmuch as the cause of action in this suit arises upon matter of record, the same cannot be discharged by any parol agreement whatsoever, and it does not appear by the second plea that the agreement therein mentioned was by matter of record or under seal.

[474] Thirdly, Because, although it is set forth in the second plea, that it was agreed that the time therein mentioned should be given to the said Joshua Rowe, yet it is not in that plea expressly stated, nor does it necessarily appear what time, or that any time was actually given to the said Joshua Rowe, or that the Plaintiff below was at any time precluded from, or did in fact delay proceeding against the said Joshua Rowe, or against the Defendants below: and because it does not appear what were the transactions which are in the second plea alleged to have been had in furtherance and upon the agreement mentioned in the second plea, and the allegation in that respect is altogether too vague, indeterminate, and uncertain, and no distinct or precise issue could have been taken upon such an allegation.

The House this day affirmed the judgment of the Court of Exchequer, and affirmation of the Exchequer Chamber *.

[475] FRERE v. MOORE AND WIFE, HEREFORD AND ANOTHER (Representatives of Cooke), HUDSON, AND JANE FALLOWES (the Representative of Fallowes) AND BIRD. Saturday, 8th July 1820.—M. and his wife mortgaged to A. F. by indenture, wherein B. (M.'s trustee of the mortgaged premises, who had the legal estate) covenanted to stand possessed (subject to a prior mortgage) for securing to A. F. 2900*l.* and subject thereto, in trust for such persons as M. and his wife should appoint. M. and wife afterwards appointed, that B. should stand possessed, subject to the said first mortgage, and subject to the sum of pounds, due to the representatives of A. F., in trust for securing to H. 1200*l.* Afterwards, M. and wife appointed that B. should stand possessed, &c. subject to the first mortgage, in trust for securing to T. F. (the representative of A. F.) the sum of 2714*l.*, due on the mortgage to A. F. for 2900*l.*, and 2162*l.* due to T. F. before the mortgage made to H., which latter sum was composed of sums owing to him as executor of A. F. and of another person, on notes and bonds, and of sums due to himself on bonds and the balance of an account, all of which were recited in the deed:—Held, that as the mortgagees had all equal equities, and neither had got in the legal estate—the incumbrances were available according to the priority of their several dates only, and that they were entitled to no other preference inter se.—Held also, that T. F. could not tack the two securities, so as to exclude the mesue mortgage.—The covenant to stand possessed held not to be equivalent to an assignment, or tantamount to getting in the legal estate, which, however, either of the mortgagees, in this case, might have done, and thereby have obtained a priority.

The Plaintiff, Thomas Frere, filed this bill against the several Defendants, praying that the trusts of certain indentures, respectively of the 14th of August, 1813, and the 14th of February, 1817, might be performed and carried into execution:—that the prebend and premises whereof such trusts were declared, might be sold:—and that

* The Lord Chancellor stated that the Plaintiff must seek his remedy in Equity.

an account might be taken of what was due to the representatives of Cooke, and to Hudson, and the representative of Fallowes, upon the security of the said prebend and premises.

The bill also prayed that the respective priorities of the Plaintiff and the last named Defendant might be ascertained, and, particularly, that the Plaintiff might be declared to be entitled to tack together the two several securities of the [476] 14th May, 1813, and 14th February, 1817, and to be paid what was due to him upon both such securities, before and in preference to the Defendant Hudson, and the representative of Fallowes, in respect of the securities holden by them, with the usual directions.

The bill stated that by indenture of lease of the 19th of September, 1806, Robert Squire, Prebendary of Basham, otherwise Bartonsham, belonging to the Cathedral Church of Hereford, demised the same to Bird, (who was merely a trustee for the other parties, under an original demise of the 17th of October, 1786, creating the title of Cooke, the first mortgagee, and those from whom Moore and his wife derived title) his executors, &c. for twenty-one years. The Defendant Moore—having become entitled to the beneficial interest in one moiety of the said prebend and premises in right of his wife, being entitled also to the other moiety, charged with the sum of 1000*l.* remaining due to the representatives of Cooke, and secured thereon—by indenture of the 12th of October, 1816, Bird, and Moore and his wife, assigned the moiety of the prebend and premises, so subject to Cooke's mortgage, to Anthony Frere, for securing 1460*l.* and interest. In 1817, the lease for years was surrendered, and a new lease was granted to him for the lives of Robert, Thomas, and John Hudson.

By indenture of the 14th May, 1813, between Moore and wife of the first part, Anthony Frere [477] of the second part, and Bird of the third part; after reciting that a sum of 1400*l.*, which had been formerly advanced, and that 1500*l.* then to be advanced, to Moore by A. Frere, was to be secured upon the said moiety of the prebend and premises. Bird covenanted with Frere and Moore and his wife respectively, to stand possessed of the same, subject as to a moiety to Cooke's mortgage, first for securing to Frere the said sum of 2900*l.* and interest, and subject thereto, and after payment of all costs and charges attending the execution of the trusts, in trust for such persons &c. as Moore and his wife should appoint. Moore by that deed covenanted to pay to A. Frere the 2900*l.* on the 14th of November then next.

The bill then stated that A. Frere was since dead, and that the Plaintiff was his legal personal representative—that at the time of the execution of the next mentioned indenture of the 14th of February, 1817, there was due to the Plaintiff, as such representative, on the said security 2714*l.* 16*s.* 6*d.*; and that afterwards, by indenture of the 14th of February, 1817, between Moore and his wife of the one part, and T. Frere the Plaintiff of the other part, after reciting that such sum was due, and that there were also several other sums due to Plaintiff, as executor of A. Frere, and of his sister, on promissory notes and bonds, given to A. Frere and to her, and also on bonds to himself long before the year 1816, amounting altogether to 2162*l.* 15*s.* Moore and [478] his wife appointed that Bird should stand possessed of the said prebend and premises, subject, as to a moiety, to Cooke's mortgage, for securing to him 4877*l.* 11*s.* 6*d.*, and interest: and it was thereby covenanted, that if that money should be unpaid by the 14th of August then next, the Plaintiff might enter and sell the premises.

The answer of the Defendants Hudson and Jane Fallowes stated, that by indenture of the 30th of December, 1816, between Moore and his wife of the first part, Hudson and Fallowes of the second part, and Bird of the third part, Moore and his wife appointed, that from thenceforth Bird should stand possessed of the prebend and premises, subject, as to a moiety, to Cooke's mortgage for 1000*l.*, and subject, as to the entirety, to the sum of 1, with interest, due to the representatives of A. Frere, in trust for securing to Hudson 1200*l.*: and, by endorsement thereon, Hudson declared that 200*l.*, part thereof, was the proper money of Fallowes, for whom his name was used as a trustee: and they submitted, that they had a prior charge on the premises for that amount.

A. Frere was not proved to have had notice of this mortgage when the mortgage of 1817 was executed to him.

On the hearing of the cause, a reference was ordered to the Deputy Remembrancer,

the Lord Chief Baron observing, that the case raised a [479] very considerable question, and one of much novelty. The cause was now brought on for further directions.

Martin and Wilbraham, for the Plaintiff, contended that he was in the situation of a party entitled to call for an assignment, and to get in the legal estate; for he was the first incumbrancer—that the lease to Bird, who was a trustee, was an outstanding instrument, to be considered as held for the protection of all the estates, according to their priority; and that the legal estate being in him, it was the same thing as if it were in the first incumbrancer, for whom he must be taken to be a trustee. They also submitted, that the Plaintiff was entitled to tack the security of 1817 to that of 1813, as he had had no notice of the mesne incumbrance when he took that new mortgage: whereas, on the other hand, they submitted that the Defendants had notice of the mortgage, which was recited in the very mortgage-deed to Hudson and Fallowes, which cast upon them the duty of inquiring what was due to A. Frere before they advanced the mortgagor more money; and, more particularly, as there was no sum mentioned as the amount for which the mortgage was given, and a blank was left—that the Defendants had been therefore remiss, and great laches was imputable to them, the consequence of which they must now abide. On the question of the priority claimed by the Plaintiff as first incumbrancer, they cited the case [480] of *Ex parte Knott* (11 Ves. 618), where the Lord Chancellor thus expresses himself in giving judgment on a similar question: “I shall not go through all the doctrine, which I examined with great jealousy in *Maunderell v. Maunderell*, as that was the first case of the class that occurred while I have sat here, furnishing a great principle. I shall only observe now that, when such a point as this comes to be discussed, if the legal estate has not been got in, it must be considered with reference to the question, whether the first incumbrancer has a better right to call for an assignment of the legal estate; and from that circumstance a Court of Equity is bound to hold, not only that the first mortgage shall be protected, as it was the first equitable security; but that mortgagee, having a better right to call for the assignment, is in equity in the same state as if he had it.” In *Maunderell v. Maunderell* (7 Ves. 567, and 10 ib. 246) also, where all the cases are brought together, the rule is laid down, that a subsequent incumbrancer cannot protect himself but by getting in the legal estate, or by obtaining an actual assignment of a term; and not then if there are circumstances in the case giving the prior incumbrancer a better right to call for an assignment. In this case, the term being outstanding in the trustee, there was no necessity for the prior incumbrancer taking an assignment from him, after his solemn covenant to stand seised to the use of the mortgagee—*Willoughby* [481] v. *Willoughby* (1 Term Rep. 771):—and enough had been done to put the Plaintiff in a situation to maintain an ejectment.

Jervis, Rose, and Pemberton, for the Defendants, contended that the Plaintiff was not entitled to any priority over the Defendants Hudson and Fallowes, in respect of the mortgage of 1817, or at least for any greater sum than 2900*l.*, and that the Plaintiff was not entitled to tack the subsequent to the preceding mortgage, so as to postpone the mesne incumbrancer—that the incumbrancers were, in all respects, save the date of their mortgages, on an equality—and that Bird was not a trustee for any one in preference to the others, except so far as they had prior claims in point of time, but was, in point of fact, a trustee for all.

They also insisted that the subsequent mortgagees of the equity of redemption had an equal right to get in the legal estate; and, if they had done so, it would have given them a priority over the mesne mortgagees. That was so held in *Barnett v. Weston* (12 Ves. 130). The Master of the Rolls there says, “The law of this Court gives a person who has obtained a mortgage of the equity of redemption this chance: that he may get in the legal estate if he can; and if he does get it in, the legal estate being united to his equity of redemption, he would have a priority over all the mesne mortgagees.” In that case too, the legal [482] estate was in the mortgagee in his own right; and a mortgage of the equity of redemption coming to him in the character of executor to a subsequent mortgagee, it was held that the legal and equitable estate could not unite, so as to exclude mesne mortgagees.

On the objection of laches which had been imputed they submitted, that the laches were attributable to the mortgagee, who had not taken care to get the blank filled up.

The Lord Chief Baron observed, at the close of the argument, that this was a considerable question requiring deliberation; and that he had never before met

with a case precisely similar in its circumstances. He therefore postponed giving judgment

Adv. vult.

8th July.—The Lord Chief Baron now gave the following opinion on this case, for the purpose of disposing of the questions, subject to arrangement between the parties.

This case came before me nominally, as being a case for further directions. I shall, however, give no further directions.

The first instrument produced in evidence in this case was used by way of introduction, to shew where the legal estate was. By that deed, which is dated October 17th, 1786, a moiety of [483] the prebend is assigned to William Bird, to secure to Mr. Cooke, a sum of money, afterwards reduced to 1000*l*. There is no question at all between the parties as to that mortgage. That is clearly the first incumbrance on this estate. Thus, William Bird originally acquired the legal estate, which continued in him till his death, when his son Thomas Bird succeeded him. He took renewals of the lease from time to time.

The first deed which it is material to consider is dated October 12th, 1806. By that deed Thomas Bird, the son, (who had then acquired the legal estate in the whole prebend) and Moore and his wife, assigned a moiety of the premises demised by the lease, to Anthony Frere, the brother of the present Plaintiff, to secure 1460*l*. By that transaction A. Frere obtained the legal estate as to a moiety. Then I suppose we must presume that there was another intermediate assignment: for by the indenture of May 14th, 1813, which is the first instrument upon the effect of which this question is raised, it appears that the legal estate had, in the mean time, got back again into T. Bird, most probably on some renewal. In that indenture Bird covenants with A. Frere, and with Moore and his wife, to stand possessed of the whole, to secure 2900*l*. to A. Frere, subject, as to a moiety to Cooke's mortgage, and subject thereto according to the joint appointment of Moore and his wife. The effect of that covenant is merely this:—Moore and his wife being indebted to A. Frere in the sum of 2900*l*., and Bird having the legal estate of the whole pre-[484]bend, subject, as to a moiety, to Cooke's mortgage, they agree that Bird, who executed that instrument, shall stand possessed as a trustee for Frere, to secure the 2900*l* with such legal interest as should become due upon it. That is the only effect of that deed. He thereupon becomes a trustee for that purpose, and for that purpose only.

Afterwards, December 30th, 1816, another deed is executed by Moore and his wife, and Frere, to which Bird is not an executing party. I need not state the formal parts of the deed: but the object of it referring to their power in the former deed of May, 1813, was to secure on this estate 1200*l*. to Hudson and Fallows, who, in this case, insist by their counsel, that they stand next to Frere, after the payment to him of 2900*l*. This deed is expressly an execution of the power reserved to them in the former deed. There was a blank left as to the amount of the sum intended to be secured by Frere's mortgage in the deed of 1813: but the security was stated, though the extent of it was not: so that, beyond all question, Hudson and Fallows had, at that time, distinct and full notice of the existing security to Frere. The consequence of that would be, that if they had afterwards obtained possession of the legal estate, they never could have made any use of it against Mr. Frere to the extent of his security. It has therefore been argued, and I think with good reason, that by this deed the parties had sufficient notice of Frere's prior security. It is, however, [485] also urged that, having such notice, they were guilty of laches in not making enquiry as to the real amount of the mortgage: more especially as in their own deed of December 30th, 1816, there was a blank left, and that blank might be for any sum, to any amount. I do not think that argument so well founded as that of the parties having had due notice; for it must be remembered, that if they had inquired of Frere what was the amount of the security—supposing they were bound to enquire, and to have ascertained the amount secured to him by the deed of 1813—they would have had no further information, than that 2900*l*., with interest to a certain period, was then due to him. Much was said of the deed being in the custody of Frere: but that was surely the proper custody, and their having had due notice of a security existing, which they certainly had, was equivalent to notice of every thing else. It was also said, it was the duty of Hudson and Fallows to have given notice to Frere, that they were about to advance money on the security of this lease, which might

have put him upon his guard against advancing more money, which he afterwards did. At the date of this deed of the 30th of December, 1816, however, there was due to Frere only 2900*l.* and the interest. Beyond all question, Mr. Frere had become entitled to that sum, and the interest upon it, against any security that could afterwards be given to Hudson and Fallows, or to any other person whatsoever.

[486] Then, the deed of 1817 was executed in favour of Frere, and the further sum professed to be secured thereby it is which Frere's representative seeks to tack—a strange term, by the way—or to unite to the security by the deed of 1813, and in addition to the former mortgage of 2900*l.* and interest. That further sum is composed of several sums, making together 2162*l.* Some of those sums were due to Frere the Plaintiff, as the executor of his brother, and of his sister. 1696*l.* was due to the Plaintiff himself upon two bonds, and a small sum of 23*l.* was due to him on the balance of an account. At that time there was nothing that bears any thing like an appearance of a lien on the land. The highest security is a bond. Then the case stands thus. In the year 1813, Anthony Frere took a security for 2900*l.* In 1816, Hudson and Fallows took a security for 1200*l.*; and, in 1817, the Plaintiff took a further security for 2162*l.*, in addition to that which was due to him as executor to his brother, on the former security, in the manner I have just stated.

Now the question is, whether the Plaintiff is to tack together or unite his two securities, and by so doing postpone the middle security of 1816 to his own subsequent security of 1817. That is the main question in this cause.

Neither of these parties has got in the legal estate; and each of them, in my view of the case, has an equal equity. The Defendants were all [487] honest incumbrancers, having money due to them. The Plaintiff was also an honest mortgagee for 2162*l.*, in addition to the former security of 2900*l.*, and interest. Hudson and Fallows are also equally honest mortgagees, and no laches can be imputed to them, because, when they advanced their money, there was nothing more due to Anthony Frere than 2900*l.*, with interest. I have never yet heard, that when a person is about to advance money on any security, that he is to give notice of it to another who has previously advanced money on the same property, requiring him not to advance more money, because he is also about to advance money to the owner of the same estate, yet that is the only notice which could be given by Hudson and Fallows to Frere. Were Hudson and Fallows bound, when they were about to advance 1200*l.* to Moore, and his wife, to ask A. Frere, whether there was more money due to him? And, because they did not, is Frere, or are his representatives, to consider whatever is due to them on an after security as if it were due on a prior security? In my opinion, the subsequent mortgages were not bound to tell the prior incumbrancer, that they, knowing that 2900*l.* and interest was due to him, were about to advance the mortgagor more money; and that really seems to be the only notice these mortgagees could have given to Frere.

All the parties, therefore, seem to have equal equities in point of honesty in the several trans-[488]actions. Neither of them has the legal estate; and therefore they all stand on an equality in point of equity. The rule therefore must prevail *qui prior in tempore, potior est in jure*; for as neither of these parties is possessed of the *tabula in naufragio*, neither has priority of right; and therefore the priority in point of time must have the preference: consequently the security given in 1817 must be postponed to that of 1816.

It was, however, contended for the Plaintiff that the covenant of Bird, to stand possessed of the legal estate for the Plaintiff, is to be considered as tantamount to an assignment of the legal estate. That is certainly a point on which much stress was very fairly laid, and it is a question in the case which requires attention. By that covenant it is clear that Bird became a trustee for Frere; but Frere did not thereby acquire the legal estate. Then it was said that Hudson and Fallows had notice that Bird was trustee for Frere, and were bound by it. They had notice, certainly, a charge; but then it was only to the extent of 2900*l.*, and interest. The legal estate, meanwhile, continued in Bird, and was not assigned to Frere. Then the question is, whether this covenant to stand possessed gave the same advantage to Frere as if he had had an assignment of the legal estate. There is no doubt that A. Frere had originally the first right, as between him and Bird; but what is the effect of that? I take it to be clear, that if I agree to purchase an estate, and take a contract or cove [489] nant, that the owner will sell that estate, and he should sell or mortgage it to another person who

has no notice, I, the first purchaser, cannot avail myself of any right to call on him for the legal estate; and, if the second purchaser can get in the legal estate, he may thereby protect himself. The person, therefore, who might have first called for the legal estate, unless he does so, has no advantage against another who gets in the legal estate, though his title be posterior in tempore. If there had been no covenant on the part of Bird, and Frere had come here, and filed a bill against Bird, and Moore and his wife, to compel them to perfect his security by a good legal conveyance, Frere would have been entitled to a conveyance; but he did not do so. If one has a right to obtain a conveyance of the legal estate, but do not avail himself of it, another may get the legal estate if he can. It is a well-known rule in Courts of Equity, where equities are equal, and they proceed invariably on that maxim, *qui prior in tempore, potior in jure*.

There is a very material difference in circumstances between the cases cited, and this now under consideration. Here the second incumbrancer had notice, it is true, that the legal estate was held in trust for Frere; but he had notice that it only amounted to 2900l. If Frere had been the purchaser of the estate, it would have been conclusive, but as mortgagee, Frere has a prior equity to the amount of 2900l., and interest only; and he has no equity beyond that.

[490] This case, therefore, is not like any that I have ever met with. I have looked with all the diligence I could, (though, perhaps, it was not necessary) and I find no case at all in point, or which is applicable, distinguished as this is from the ordinary cases. There is, certainly, here a covenant to stand possessed of the legal estate; but then it is a covenant only for a given incumbrance, and to a limited extent. The case of *Mumfrell v. Mumfrell* which has been cited (10 Ves. 246) certainly is a case which one cannot read without admiration and respect. Great talents and learning are displayed throughout, both by Sir William Grant and the Lord Chancellor. That, however, is not a case which applies to this point. It was a case of dower. It is an anomalous judgment on a question of dower, as distinguished from a mesne incumbrance in respect of notice, and it decides simply this,—that if the legal estate, under a term anterior to the right of dower be outstanding, the purchaser will have the benefit of that term, if assigned, although he has notice of the right of dower.

The case *Ex parte Knott* (11 Ves. 609), we were also referred to, where there is a dictum of the Lord Chancellor that was very properly much pressed; but he does not decide it. He says, “Before I could decide that question in bankruptcy—a jurisdiction in which there is no appeal—I must be satisfied that there was no danger of error.” He does not therefore decide it; he only throws it out, in the fulness of his learning, as a matter for con-[491]sideration. If the Lord Chancellor had so determined, of course I should be bound to pay great attention to his authority.

In this case, the legal estate outstanding must be held to be in trust for the benefit of the plaintiff, to the extent of one security; another person has advanced his money, on the security of the same estate, and then the first mortgagee advances more money on a subsequent mortgage. Both of them have equal equities, beyond all question; and neither of them has the legal estate: for the covenant to stand possessed, does not make any difference.

Under these circumstances, my opinion is, that the legal estate should be divided according to the priority of the securities in point of time. First, Mr. Cooke must have his 1000l.: then Mr. Frere 2900l., with interest; next Hudson and Fallows must be paid their 1200l.; and then Mr. Frere comes next for the residue of what is owing to him, and secured by the last mortgage.

The case of *Barnett v. Weston* was cited. That was a decision of the Master of the Rolls, and was, probably, well decided; but, as that was a case of very different circumstances, I do not think myself called on to enter into any disquisition on it.

[492] LEGH v. GLEGG AND OTHERS. 8th July, 1820.—A custom of rendering one in ten of parcels of corn set up together in the quantity of ten sheaves to each, called kivers, or riders, in lieu of corn and hay produced in the same year:—Quære, whether a good modus?—Semble, not.

To this bill for the tithe of hay, clover, and grass, the Defendant set up a defence of the following custom “that every occupier of lands within the township producing corn and hay in the same year, has, from time immemorial, bound all his corn into

sheaves, and set up ten sheaves together in parcels, called kivers, or riders, and has from time immemorial paid, and of right ought to pay, to the rector of the said parish of Prestbury (Chester) for the time being, or to his lessee or farmer, the tenth kiver or rider of all such corn, in lien and satisfaction of the tithes of corn and hay produced in the same year, on the lands of such occupier."

This case was argued, principally on the effect of the evidence, by

Fonblanque, Shadwell, and Spence, for the Plaintiff, and by

Clarke, Agar, Pepys, and Simpkinson, for the Defendants.

The cause stood over for judgment, which was this day delivered by

THE LORD CHIEF BARON. He stated, in substance, that the Defendants had not made out their case by the evidence offered in support of [493] it. He therefore declined giving any opinion as to the legality of the custom of commuting the tithe of one species of titheable matter by render of another, or by service and labour connected: observing, that it was a very singular custom, and one which had never before been brought under his notice—that he was not aware of any instance of such a custom having been submitted to the consideration of a Court—and that it appeared to him to require the support of authority, and none had been mentioned.

His Lordship pronounced a decree for the

Common Account, with Costs.

8th July 1820. — An Accountant-General and two Masters appointed to this Court by Act of Parliament.—The duties of those officers.

AN ACT OF PARLIAMENT (1st Geo. IV. ch. 35) was this day passed, entitled, "An act for the better securing monies and effects paid into the Court of Exchequer at Westminster, on account of the suitors of the said Court, and for the appointment of an Accountant-General and two Masters of the said Court: and for other purposes."

It recites the order of the Court of Exchequer of the 17th July, 1747, for securing the suitors' money, then standing in the name of the Deputy Remembrancer in the books of the Bank and the South Sea Company: that the said Deputy Remembrancer should cause the money to be [494] transferred into his name, as Deputy Remembrancer, in trust to attend the orders of the Court in the several causes to which the same respectively belonged, and that at the time of passing this act there were standing in the said books in the name of Abel Moysey, Esq. the then Deputy Remembrancer of the said Court, large sums or securities belonging to the suitors; and reciting that it was expedient that a fit and proper person should be appointed to be Accountant-General of the said Court, in whose name all effects, stocks, funds, annuities, and securities belonging to the said suitors, might become and be from time to time securely vested for the use of the said suitors, and who might keep the account of the funds of the said suitors, but who should have no power to dispose of or otherwise intermeddle with such funds, further or otherwise than hereinafter directed.

It then enacts, by sect. 1, that no money &c. should be paid to the Deputy Remembrancer, under the said order, after the passing of this act.

By sec. 2 it is enacted, that to the end that the accounts between the suitors of the said Court of Exchequer, and the Governor and Company of the Bank of England, and every other body politic or corporate, or company whom it may concern, may be more regularly and plainly kept, and the state of such accounts be at all times seen and known; as soon as may be after the passing of this act, there [495] shall be appointed by the Lord Chief Baron of the said Court of Exchequer, by writing under his hand and seal, to be duly enrolled among the records of the said Court, one person who shall act and do all matters and things relating to the delivering, securing, and investing of the money and effects of the suitors of the said Court, and the payment, selling, and transferring of the same, and the keeping the accounts with the Bank of England, or any other body politic or corporate, or company, and other matters relating thereto; which said officer so to be appointed shall be called, "The Accountant General of the Court of Exchequer," and such person shall also be one of the Masters of the said Court, and shall hold such offices during his good behaviour in the said offices; and accounts shall be raised and kept causewise in the books of the Bank of England, and of every other body politic or corporate, or company whom it may concern, to be respectively intitled "The account of A. B. the Accountant General of the Court of

Exchequer," for and on behalf of the suitors of the said Court, in like manner as such accounts are kept between the Accountant-General of the Court of Chancery and the Bank of England, or any other company.

Then, after various enactments relating to the general business and minor duties of the new officer, and for the regulation of his office.

By the 17th section—which recites the 57th [496] Geo. III. ch. 18, and that, by the course and practice of the said Court of Exchequer for many years, the person holding the office of Deputy to the King's Remembrancer has taken the minutes of all decrees and orders of the said Court, as well in matters of revenue as in proceedings on the equity side of the said Court, and hath also been employed in reporting to the Court his opinion upon the several matters referred to him; and that in consequence of the division of the business of the said Court, pursuant to the said recited act, it had become expedient that there should be two joint officers to perform the said duties on the equity side of the said Court, in all suits and matters between subject and subject: It is enacted that it shall and may be lawful for the Lord Chief Baron of the said Court of Exchequer for the time being, and he is hereby authorized, empowered, and required, to nominate and appoint, by writing under his hand and seal, to be enrolled among the records of the said Court, two fit and proper persons, being Barristers at Law of not less than five years standing, to be and be called Masters of the said Court of Exchequer, and that one of such Masters shall be the Accountant-General of the said Court as hereinbefore mentioned; and that such two Masters shall hold the said offices during their good behaviour therein, and not be in anywise subject to the orders or control of the King's Remembrancer of the said Court, or his Deputy; and that each of the said Masters of the said Court shall act jointly or severally as the said Court or Lord Chief [497] Baron or other Baron to be nominated and appointed as aforesaid, from time to time shall direct, in all matters of reference from the Court or Lord Chief Baron or other Baron to be nominated and appointed as aforesaid, and proceedings relating thereto, in all suits and matters on the equity side of the said Court between subject and subject. And it shall be the duty and office of the said Masters to attend the said Court, and the Lord Chief Baron, or other Baron to be nominated and appointed as aforesaid, in their own proper persons, and not by deputy, and to take the minutes of all orders and decrees which shall be made by the said Court, or by the Lord Chief Baron thereof, or by the Baron to be nominated and appointed as aforesaid, as well in matters of revenue as on the equity side of the said Court, which orders or decrees shall be afterwards drawn and ingrossed by the Clerks in Court in each respective cause or suit, and shall and may be corrected, either in form or substance, by such Masters respectively, at the instance of any of the parties affected by any such order or decree, according to the minutes taken by such Masters respectively, pursuant to the directions of the said Court, or of the said Lord Chief Baron, or the Baron to be nominated and appointed as aforesaid, and shall be afterwards entered by the King's Remembrancer amongst the records of the said Court, pursuant to the antient course thereof. And it shall also be the office and duty of such Masters respectively to receive all such references on matters of account, and on all other [498] matters and things on the equity side of the said Court, as shall be made and referred to them by the said Court of Exchequer, or by the Lord Chief Baron, or by the Baron to be nominated and appointed as aforesaid, and to report thereon to the said Court, or the Lord Chief Baron, or to the Baron to be nominated and appointed as aforesaid, in such manner as heretofore was used and accustomed to be done by the person holding the office of Deputy Remembrancer, or as shall be directed and ordered by the said Court, or by the Lord Chief Baron, or by the Baron to be nominated and appointed as aforesaid, from time to time: and in all things to do, execute, and perform all such duties as Masters of the equity side of the said Court as they shall be required to do, by any order or orders to be for that purpose from time to time made by the said Court, or by the Lord Chief Baron, or by the Baron to be nominated and appointed as aforesaid.

Then follows the form of oath to be taken and subscribed by the two Masters, and several sections for the regulation of their office and prescribing their duties.

By the 19th section it is provided, that in case of illness or other cause preventing the Accountant-General from attending the duties of his office, the Court, or Lord Chief Baron may make an order directing the other Master to act for him and he is to be called, *pro tempore*, Accountant-General.

[499] By the 20th section it is enacted that one or more experienced person or persons may be appointed Clerk or Clerks to the Masters, by writing under their hands, and

By the 21st section, the Lord Chief Baron is empowered to appoint a person to be keeper of the reports and certificates filed in Court, to be called "The Clerk of the Reports," whose prescribed duty is to examine and countersign all certificates, checks, and drafts, by the act required to be signed by the Accountant-General; and to receive all such certificates, and all reports and certificates made by either of the Masters, and to file the same certificates and reports, and to receive the fees due to the Clerk in Court on filing and copying the same, viz. three shillings and four-pence for filing, and eight-pence per folio for copying; and he is duly and regularly to account to the Clerk in Court for such fees, and do all such other matters and things with respect to the certificates and checks of the Accountant-General, and with respect to the certificates, reports, and other business of the two Masters; and he is duly and regularly to attend at such times and places as shall from time to time be ordered, required, and directed by any order or orders to be made by the Court, or by the Lord Chief Baron from time to time.

By the 22d, 23d, 24th, and 25th sections, it is provided, that a sum not exceeding 65,000*l.*, of the money belonging to the suitors of the [500] Court, lying unemployed in the hands of the Deputy Remembrancer, shall, by order of the Court, be laid out in Government securities, and the interest received by the Bank, to be applied in the payment of the salaries of the Accountant-General and Master, and their Clerks—that if at any time the fees and salary of the Accountant-General and Master shall exceed 2500*l.* a-year, or those of the Master 2000*l.*, the surplus is to be paid into the Bank, to the account of the redemption-fund of the suitors of the Court; but that if the whole or any part of such sum of 65,000*l.* shall be wanted to answer the demands of the suitors, it shall be called in and carried to the cash account of the suitors.

The 26th section directs the fees to be taken in the offices of the Accountant-General and Masters to be fixed by order of the Court.

The 27th section enacts, that forging the handwriting of any person to any document, purporting to be an order for receiving money &c. of the suitors, with intent to defraud, shall be felony, without benefit of clergy.

[501] IN THE EXCHEQUER, TRINITY TERM, 1 GEO. IV.

GENERAL RULE.—The names of all the deponents to be written in the jurat of affidavits, or they will not be received.

It is ordered, that from and after the first day of next Term, upon every affidavit sworn in this Court, or before any Judge or Commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat; and that no affidavit be read or made use of in any matter depending in this Court in the jurat, of which there shall be any interlineation or erasure.

Affidavits made by illiterate persons must be certified to have been read to and understood by the deponents in the presence of the officer or person administering the oath.

And it is ordered, that when any affidavit shall be sworn in Court, or before the Lord Chief Baron, or any one of the Barons, by any illiterate person, the officer or person who shall administer the oath, shall certify upon the affidavit that the same was read to the illiterate person in the presence of such officer, and that the deponent appeared perfectly to understand the same.

R. RICHARDS.	G. WOOD.
R. GRAHAM.	W. GARROW.

[502] The following important orders, respecting the practice of the Court, made during the latter part of the late reign, are inserted here, in order to make the series complete, which is the more necessary, as some of the later utter and in other respect.

relate to the earlier. They have hitherto been duly noticed, and will be henceforth continued regularly as they are made, in order of time :—

GENERAL RULE. TRINITY TERM, 29 GEO. III. (1789). Friday, 26th June.—Notice of trial of causes entered for trial in London and Middlesex, within Term, to be given two days before the day of Sitting, except in cases of adjournment, and then notice must be given before eight o'clock in the evening of the preceding day.

It is ordered, that all causes to be entered for trial in London and Middlesex, shall be entered as follows : (that is to say) If notice of trial shall be given at any Sitting within Term two days before the day of Sitting : and if at a Sitting after Term, before eight of the clock in the evening of the day before the day on which such Sittings shall be adjourned : and that if the same shall not be so entered for such Sitting respectively, a *Ne recipiatur* may be entered.

RULE OF COURT. HILARY TERM, 38 GEO. III.—Bail are only liable for the sum sworn to and costs in the original action, and the costs of proceedings against themselves, where any shall have been taken.

Whereas doubts have arisen respecting the extent of the liability of bail in this Court in [503] actions endorsed for bail, by virtue of an affidavit of the cause of action : Now, in order to obviate such doubts, and prevent mistakes in future, the Court declare, that upon a recognizance of bail in any action brought in this Court, the bail therein are not jointly or severally liable in such action for more in the whole than the amount of the sum sworn to in such affidavit, together with the costs of such actions, unless any proceeding be had upon their recognizance, in which case they will also be subject to such other costs as they are now by law liable to.

A. MACDONALD.	R. PERRYN.
B. HOTHAM.	A. THOMSON.

RULE OF COURT. HILARY TERM, 39 GEO. III.—Notices of trial and of execution of writs of inquiry to be given by attornies and clerks in Court, and to be entered in the book of orders, and notices of such entries to be left on the seats of Clerks in Court

It is ordered, that from and after the last day of this Term, all notices of trial and of the execution of writs of Inquiry be given by the Attornies or side Clerks of the office of pleas in this Court, in causes instituted there, shall be entered in the book of orders kept in such office, and a written notice of all such entries shall be left at the seat in the said office of the attornies or Clerk in Court concerned for the Defendant, or at his chambers, or place of residence.

[504] Eight days notice to be given of the execution of writs of inquiry, except where the venue is laid in London or Middlesex, and the Defendants reside above 40 miles therefrom—and in those excepted cases 14 days notice must be given.

And it is further ordered, that from and after the last day of this Term, eight days notice shall be given of the execution of writs of Inquiry in all cases, except where the venue is laid in London or Middlesex, and the Defendants reside above forty miles distant therefrom : and that where the venue is laid in London or Middlesex, and the Defendants reside above forty miles distance therefrom, fourteen days notice of the execution of writs of Inquiry shall be given :

In country ejectments moved for in a Term not issuable, the Defendant entitled to four days time after the next issuable Term, to appear.

And it is further ordered, that in all country ejectments, which are moved in a Term which is not issuable, the Defendants shall have four days next after the end of the issuable Term immediately succeeding the respective Terms in which such ejectments are moved, to appear thereto.

A. MACDONALD.	R. PERRYN.
B. HOTHAM.	A. THOMSON.

HILARY TERM, 40 GEO. III. (1800).—Affidavits of illiterate persons to be read to them, and to be so certified in the jurat, and that the deponent understood it and signed it in the presence of the commissioner taking the same.

It is ordered, that from and after the last day of Easter Term next, where any affidavit is taken by any Commissioner of this Court, made by any person, who, from his or her signature, appears to be illiterate, the Commissioner taking such affidavit shall certify or state in the jurat that [505] the affidavit was read in his presence to the party making the same, and that such party appeared perfectly to understand the same: and also that the said party wrote his or her signature in the presence of the Commissioner taking the said affidavit.

A. MACDONALD. A. THOMSON.
B. HOTHAM. A. CHAMBERE.

GENERAL RULE. MICHAELMAS TERM, 43 GEO. III.—No judgment to be signed on any warrant of attorney not delivered to and filed with the Master.

It is ordered, that from and after the first day of Hilary Term next no judgment be signed upon any warrant, authorizing any attorney to confess judgment, without such warrant being delivered to and filed by the Master, who is hereby ordered to file the same in the order in which they shall be received.

Defeazances to be written on the same paper or parchment, and a memorandum of the substance thereof to be made by the person preparing the instrument.

And it is further ordered, that every attorney and side clerk in the office of pleas of this Court, or other person who shall prepare any warrant to confess any judgment in the office of pleas aforesaid, which is to be subject to any defeazance, do cause such defeazance to be written on the same paper or parchment on which the warrant of attorney shall be written, or cause a [506] memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeazance.

BY THE BARONS.

GENERAL RULE. EASTER TERM, 45 GEO. III. (1805).—Precipes for subpoenas and attachments issued in the office of pleas, with names of parties, returns of writs, dates of issue, and names of attornies and side clerks, to be given to the officer who signs such writs as require the signature of the clerk of the pleas. Affidavits of service of subpoenas on which attachments issue for want of appearance, to be filed in the office.

It is ordered, that from and after the first day of next Trinity Term, precipes for all subpoenas and attachments that are issued in the office of pleas of this Court with the names of the parties therein, the returns of such writs, the dates when they are issued, and the names of the attornies or side clerks issuing the same, shall be given to the officer who signs such writs as require the name of the clerk of the pleas to be set thereto, on issuing such subpoenas and attachments: and that, on the issuing of all attachment, for want of appearances, the affidavits of service of the subpoenas upon which such attachments are issued shall be filed on a file to be kept for that purpose in the said office.

A. MACDONALD. R. GRAHAM.
A. THOMSON. T. MANNERS SUTTON.

[507] HILARY TERM, 48 GEO. III. (1808).—No person to be held to bail in trover or detinue without a Baron's order.

It is ordered, that from and after the last day of this present Hilary Term, no person be held to special bail in an action of trover or detinue in this Court, without an order made for that purpose by the Lord Chief Baron, or one of the Barons of this Court.

BY THE BARONS.

EASTER TERM, 49 GEO. III. (1809).—Sitting in London to be at Guildhall on the second day next before the end of term—in Middlesex, on the day before the

end of Term—and the Sitting after Term on the sixth day of the Sittings next after the end of each Term.

The Lord Chief Baron has directed, that in this Term and for the future, the Sitting in [for] London shall be holden at the Guildhall of the said city, on the second day next preceeding the end of the Term, and that the Sitting for the county of Middlesex shall be holden in the Court of Exchequer in Westminster Hall, on the day next preceeding the end of the Term : and that the Sitting in London after each Term shall be holden on the second day next after the end of the Term ; and that the Sitting after each Term in Middlesex shall be holden on the sixth day of the Sittings next after the end of the Term.

[508] MICHAELMAS TERM, 51 GEO. III. (1810).—Bail to justify, in cases of sums exceeding 1000l., in 1000l. only beyond the sums sworn to.

It is ordered, that from henceforth in allailable cases for any sum exceeding 1000l., it shall be sufficient for the bail to justify in 1000l. beyond the sum sworn to.

BY THE BARONS.

MICHAELMAS TERM, 53 GEO. III. (1812).—On all process served personally, returnable before the last return of any Term, pursuant to 51 Geo. 3, c. 124, the plaintiff may file or deliver a declaration *de bene esse* at the return of such process, with notice to plead in eight days ; and judgment may otherwise be signed for want of plea, on plaintiff entering an appearance, *sec. stat.* such declaration having been delivered or filed, and notice given four days before the end of Term, and a rule to plead entered.

It is ordered, that from and after the last day of this Term, upon all process to be issued out of this Court, returnable before the last return of any Term, where the Defendant shall be personally served with a copy thereof, pursuant to the act of Parliament for preventing frivolous and vexatious arrests, or pursuant to the 51st Geo. III. c. 124, the plaintiff may file or deliver a declaration *de bene esse* at the return of such process, with notice to plead in eight days after the filing or delivery thereof ; and if the Defendant doth not enter an appearance and plead within the said eight days, the Plaintiff having entered an appearance for such debt, according to the said acts, may sign judgment for want of a plea, provided that such declaration be delivered or filed, and notice thereof given four days exclusively before the end of such Term, and a rule to plead be duly entered.

[509] And on writs of *distringas*, whereon notice shall be given pursuant to the 51st Geo. 3, c. 124, the plaintiff may take the same course.

And it is further ordered, that from and after the last day of this Term, upon all writs of *distringas*, whereupon notice shall be given pursuant to the said last mentioned act, the Plaintiff may file or deliver a declaration *de bene esse* at the return of such writ, with notice to plead in eight days after the filing or delivery thereof ; and if the Defendant doth not enter an appearance and plead within the said eight days, the Plaintiff having entered an appearance according to the same act, may sign judgment for want of a plea, a rule to plead having been duly entered.

BY THE BARONS.

IN THE EXCHEQUER, TRINITY TERM, 59 GEO. III. —Notice of justifying bail in person, to be served before eleven of the clock of the day on which such notice should be given, except time has been given, and in that case, before three o'clock in the afternoon of the day on which the order to enlarge be granted, and service must be so stated in the affidavit.

It is ordered, that from and after the last day of this Term, every notice for justifying bail in person shall be served before eleven o'clock in the forenoon of the day in which, according to the present practice, such notice ought to be served, except in case of a rule of Court or an order of a Judge for further time : in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the

day on which such rule or order shall be granted ; and [510] in all the cases aforesaid the affidavit of service shall state that such notice was served before the hour of eleven or three o'clock, as the case may be.

(By the Court.)

ROSE.

End of the sittings after Trinity Term.

[511] CASES ARGUED AND DETERMINED IN THE COURT OF EXCHEQUER, AND EXCHEQUER CHAMBER, MICHAELMAS TERM, 1 GEO. IV.

MEMORANDA.

Richard Richards, Esq. on the first day of this Term presented himself in his place to the Court on his appointment to the offices of Accountant-General and Master of the Court of Exchequer, under the 1st Geo. IV. ch. 35, with

Jefferies Spranger, Esq. who was appointed by the Lord Chief Baron, under the same authority, to the office of Master of this Court ; when the usual oaths, and that of their office, were administered to both.

[512] STOTT v. SMITH AND ANOTHER. 11th Nov. 1820.—A Plaintiff will not be permitted, on motion, to quash a writ of *capias ad satisfaciendum*, sued out by him and lodged with the Sheriff for the purpose of fixing the Defendant's bail, in the usual course, on the return of *non est inventus*, where the Defendant has voluntarily surrendered in discharge of his bail before the return of the *ca. sa.* and afterwards become bankrupt : although the Plaintiff undertake to enter an *exoneretur* on the bail-piece, and make an affidavit that it was never intended to take the Defendant in execution upon the *ca. sa.*—*Quære* how far the practice of making such formal return of *non est inventus* is sustainable, or whether it is not an abuse of the process ?

Parke moved, on the part of the Plaintiff, for a rule to shew cause why the writ of *capias ad satisfaciendum*, which had been sued out by him in this case for the purpose of proceeding against the bail, should not be quashed, —undertaking to enter on *exoneretur* on the bail-piece.

The affidavit on which it was moved stated, that on the 31st of October, the Plaintiff's Clerk in Court sued out a writ of *capias ad satisfaciendum*, returnable on the 6th of November, to satisfy the sum of 1129l. 16s. 11d. damages and costs recovered—that the sole object of suing out the writ was to lodge it with the Sheriff of Middlesex, for the purpose of being returned *non est inventus*, according to the practice in such cases, in order to ground proceedings against the Defendants' bail—that it was not the intention of the Plaintiff to take the Defendants, or either of them, in execution under the writ—that the Plaintiff had paid the Sheriff his fee for such return, —and that the Defendants had, in the mean time, surrendered themselves into custody upon the said writ.

The Defendants had since become bankrupts, on a commission sued out before the *capias*.

It was submitted, that under the circumstances, the Plaintiff ought not to be precluded from [513] proving under the commission by the fictitious satisfaction of execution against the person under a proceeding merely formal, and intended, according to the usual course of practice, as the foundation of a real remedy, and under which a render was never made in practice.

Per Curiam : If the Plaintiff, by his own proceeding, has precluded himself of any more productive remedy, the Court cannot interfere. He has elected to have satisfaction of the person—the highest remedy. It would be impossible, besides, to make such an order in the absence of the assignees, and it might affect the commission. The return of *non est inventus*, in such cases, is an abuse of the process of the Court. It is a bad practice, and ought to be corrected.

Rule refused.

WADE AND OTHERS *v.* SWIFT. 11th Nov. 1820.—The Court will not set aside a judgment entered upon a cognovit, and executed by levying the money, on the ground that no process had been actually served on the Defendant before he signed the cognovit, nor was at that time sued out,—where it appeared that instructions had been then transmitted to the agent of the Plaintiff's attorney in London from the country to issue a *quo minus*, which was afterwards accordingly issued, tested of course, after the date of the cognovit.

Jervis shewed cause against a rule which had been obtained by Jones, for setting aside the judgment that had been entered up in this case on a cognovit, confessing an action in which no process had been issued, for irregularity, with costs: and why the money which had been levied under it should not be restored to the Defendant.

[514] The affidavit on which it was moved stated that the Defendant, having been applied to for a sum of money (8*l.* 3*s.*) due from him to the Plaintiffs, and threatened with proceedings unless he paid it, or gave the Plaintiffs a promissory note, jointly with some other person, afterwards went (on the 10th of April,) to the office of the Plaintiffs' attorney, accompanied by another person, his intended surety, for the purpose of giving such promissory note—that the attorney informed him, if he would sign a paper, (which he produced) he would give the Defendant time till the 6th of June following, to pay the debt, and 2*l.* 7*s.* 6*d.* costs—that the Defendant did not read the paper, nor was it explained to him, but signed it: and that afterwards, on the 10th of May, he paid 1*l.* towards the debt and costs—and that, on the 3d of June, the Sheriff's officer levied, under an execution, on the Defendant's property for 22*l.* 14*s.* It was also sworn, that no writ at the suit of the Plaintiffs, or other process than the said execution, had ever been served on the Defendant.

An affidavit made by the Plaintiffs' attorney was now read, contradicting the Defendant's statements in all the material facts, except that of no process having been served, and alleging positively that the Defendant read and understood the nature of the instrument. It also stated that on the 10th of May, when the Defendant called on the Plaintiffs' attorney, as deposed to in his affidavit, he had previously, on the [515] same day, written to his agent in town with instructions to sue out a writ of *quo minus*; and that he had informed the Defendant, that it was not served, because the matter had been settled by the cognovit: and it stated that the usual charge for service had not, for that reason, not been made by the Deponent.

These circumstances were submitted to be sufficient cause for discharging the rule, the Plaintiffs' attorney having, in what he had done, acted for the ease of the Defendant.

On the other hand, it was insisted, that the cognovit could not legally have been taken before process sued out, as there was not, till then, any suit pending to authorize it.

Mr. Baron Garrow was at first of opinion, that process ought to have been sued out to warrant the cognovit.

Mr. Baron Wood, and the rest of the Court, however, held that under the circumstances disclosed, the cognovit had been properly executed and taken, considered as an authority to sign judgment for the mutual advantage of both parties. They therefore discharged the rule.

Rule discharged, with Costs.

[516] IN THE EXCHEQUER CHAMBER.

[In Error.]

GIBSON *v.* CARTER AND OTHERS, Bankrupts. Monday, 13th Nov. 1820.—The affidavit on which the application is founded, for interest on the balance of a banking account from the entering up till the affirmance of final judgment, must state that it was the custom of the bankers to charge interest on their advances, and at what rate.

Carter moved that it might be referred to the Clerk of this Court to ascertain the amount of interest upon the final judgment in this case, up to the time of its being affirmed.

The affidavit *1 on which the application was founded stated that final judgment was signed in the original action, brought to recover the balance of a banker's account with the Plaintiff, for money advanced by the Defendants in error, against the Plaintiff, on the 23d day of February last.

The subjoined cases were cited in support of the motion :—

IN THE EXCHEQUER CHAMBER, EASTER TERM, 52 GEO. III.

HAMEL v. ABEL.

Motion by Gaselee for a reference to the officer of the Court to calculate interest on the final [517] judgment obtained in an action for the balance of a merchant's account, which had been balanced and transmitted from time to time, with a charge for interest upon such balances. The Lord Chief Justice (Mansfield), after consultation with some of the Judges, observed that upon such accounts, and where no objection had been made to charges for interest, it was reasonable for the Court to allow it. —and it was allowed accordingly.

SAME TERM.

HARWOOD v. UNDERHILL.

This was an action for money advanced by Defendants, who were bankers *2, on account of the Plaintiff. The affidavit merely stated that the action was commenced for money lent by Defendants, as bankers, to the Plaintiff, and that they had been in the habit of charging him with interest on the sums advanced, and that such interest was allowed on the execution of the writ of enquiry. The Court were of opinion that those circumstances warranted them in making an order for allowing interest.

The Court, however, refused the present application, because the affidavit was insufficient, not [518] stating that it was the custom of the bankers to take interest, and at what rate.

Another affidavit was afterwards made by the cashier of the bankrupts, supplying that statement, and when the motion was again made the Court granted the order.

SWAN v. SWAN. 13th Nov. 1820. 8th January 1819.—Where it is stated by the answer to a bill filed for a partition that the Defendant has laid out money in building and improving the premises, the Court will not decree a partition, without a reference to the Master to take an account.—A mortgagee is not a necessary party to a suit for partition, because he is entitled to the whole. — Money laid out in improving the premises, does not, however, in strictness, create a lien on the premises, but it is a sufficient ground for a Court of Equity to refuse to interfere. —A supplemental bill, filed after the hearing of the original bill, stating additional facts which arose and were known to the Plaintiff before he filed his original bill, and praying that other matters might be taken into the account ordered to be taken before the Master, is demurrable, as not being the proper course to be pursued by the Plaintiff in such a case. He should have applied to the Court for leave to amend, or to file a supplemental bill, before the cause had been suffered to proceed so far.

[Commented on, *In re Leslie, Leslie v. French*, 1883, 23 Ch. D. 552, 564. Followed, *Sinclair v. James*, [1894] 3 Ch. 556; *Hill v. Hickin*, [1897] 2 Ch. 581.]

The Plaintiff in this case filed a bill against the Defendant for a partition of certain

*1 In *Doran v. O'Reilly and Others* (ante, vol. iii. p. 250), however, this Court refused an application for interest, founded on facts stated to them by affidavit, on the ground that the other party had no opportunity of contradicting them, and that where interest is given, it ought to appear on the face of the record, that the debt was such as in itself carried interest, and then no affidavit would be necessary (*Anon.*, ante, vol. ii., p. 7).

*2 Interest is allowed against bankers after the rate at which they are accustomed to allow it on money deposited with them. Vide ante, *Hin v. Budden*, vol. v. p. 536.

leasehold premises, to which the Plaintiff and Defendant were entitled in undivided moieties.

The Defendant, in his answer, stated that the premises (subject to a mortgage to a third person) had been for several years in his possession as the farmer and occupier thereof, and that, during his occupation, he had laid out considerable sums (as therein specified) in buildings, and other improvements, and claimed a lien to be paid a moiety of the amount before partition should be made, or that it should be allowed to him in the measure of his allotment.

[519] The cause was heard this day. The case of the Plaintiff was supported by Fonblanque and Meggison. They urged that a decree for a partition was now considered almost of course, and that the Defendant could not set up the lien insisted on by his answer as a bar to the prayer of such a bill.

Matthews, for the Defendant, contended that the mortgagee should have been before the Court, as she was a party interested—and that a Court of Equity would not compel a partition where any of the parties had such a claim as was set up by the Defendant, without securing to him a satisfaction of it: otherwise would leave the party to his remedy at law.

Per Curiam. The Court cannot make a mortgagee agree to a partition, because he is entitled to the whole. Although, in point of law, the Defendant may not, strictly speaking, have any lien on the premises, yet if he has been at expense in improving them, as stated, beneficially for the Plaintiff, the Plaintiff has clearly no right to take advantage of that expenditure, without making any allowance; and therefore the Court will not interfere but on such terms, although there is no doubt that a Court of Equity may interfere in cases where a writ of partition would not lie at common law.

The Court, therefore, ordered a reference to [520] the Deputy Remembrancer to take an account of what had been expended necessarily or with the concurrence of the Plaintiff.

12th Feb.—The Plaintiff now filed a supplemental bill, stating the former proceedings, and charging that the Defendant had received various sums of money to a considerable amount, during the period of his occupation, for rent; and that he had done great damage to the property by waste and bad management: and he prayed, in addition to the account already ordered to be taken, a further account of what the Defendant had received and of what was due to the Plaintiff on the whole.

11th Nov.—To that bill the Defendant demurred generally.

Matthews, in support of the demurrer, submitted that, as the matters of the supplemental bill must all have arisen and been known to the Plaintiff before the time of filing the original bill, the supplemental bill was demurrable: for the Plaintiff's only course was to amend before the cause was brought to a hearing, and he had no right so to make a new case. For that proposition he cited Mitford's Treatise (page 165, (3d edition)), where it is so stated, referring to the case of *Baldwin v. Markown* (3 Atk. 817). In this case, the Defendant had by his answer given full notice to the Plaintiff of the merits of [521] his defence, and they might have been met by amendments.

Fonblanque and Meggison, in support of the bill, contended, that the proper mode of supplying the defects of a suit is expressly stated by Lord Redesdale (*a*), to be by supplemental bill. He says, "Where the imperfection of a suit arises from a defect in the original bill, or in some of the pleadings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely." He also says, "And this may be done as well after as before a decree; and the bill may be either in aid of the decree, that it may be fully carried into execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or the defence made to it." (*Goodwin v. Goodwin* (3 Atk. 371.) This, they urged, was precisely the object of the present bill: and it would, on the facts stated, be an injustice if the prayer could not be effected where the proceedings are in such a state that the original bill cannot be amended for the purpose. *Jones v. Jones* (3 Atk. 111). *Dorner v. Fortescue* (ibid. 133). They also referred to Mitford's Treatise on Pleading, p. 262, 263, for the same doctrine.

The Court, after much consideration and enquiry if any thing resembling this case

(a) Treatise on Equity Pleading, pp. 48, 49.

could be [522] mentioned as having occurred in practice, determined that the demurrer should be allowed: for, they observed, that however just it might be that the account should be extended as prayed, this could not be the proper course for obtaining that end. The Plaintiff should either have amended his bill on the Defendant's answer coming in, or at least he should have applied to the Court for leave to amend or to file a supplemental bill in an earlier stage of the proceeding. Parties could never be secure in possessing a decree if this practice were allowed in a case like the present, where there was nothing like surprise: and there would be no end of supplemental bills.

Per Curiam. Demurrer allowed.

ALLAN AND OTHERS v. COPELAND AND OTHERS. Demurrer in Equity. Friday, 17th Nov. 1820.—A bill filed by underwriters for a discovery and a commission to examine witnesses abroad, and an injunction to restrain proceedings at law against them on the policy in the mean time—praying general relief, is not a bill for discovery merely, but for relief: and, as relief, by ordering the policy to be delivered up, might be decreed on the hearing, the Court held, that such a bill was not demurrable as being a bill for discovery, praying relief, for which there was no equity, because it was substantially a bill for relief also.

[Referred to, *Mellish v. Richardson*, 1823, 12 Price, 533.]

The Plaintiffs filed this bill for a discovery and a commission for the examination of witnesses on the coast of Africa, and other parts beyond seas, and for an injunction in the mean time to restrain the Defendants from proceeding in [523] actions at law commenced by them against the Plaintiffs, and for further relief generally.

The action was brought against underwriters for the amount of their subscriptions to a policy of insurance, on a ship and her return cargo, lost at sea.

The bill charged, in substance, fraud and collusion, and that the ship was, in fact, lost before she had bartered or parted with her outward-bound cargo, and whilst proceeding on her voyage to the coast of Africa: and it suggested that the Plaintiffs' names ought to be struck out of the policy.

A demurrer was put in on the part of two of the Defendants to the bill, assigning for cause, that the Complainants had not, by their bill, made such a case as entitled them to any relief in a Court of Equity against the Defendants—and that the bill was not such, in form and substance, as, according to the rules and practice of the Court, entitled the Complainants to any relief, or to any discovery against them, &c.—with the common conclusion.

7th Nov.—Spence, for the demurrer, now contended that the prayer for relief had rendered this bill for a discovery demurrable. He submitted, that the question would depend entirely on the enquiry whether this was in effect a bill for a discovery or a bill for relief, insisting that it was a bill for [524] discovery, with a prayer for relief to which the Complainants were not entitled in Equity, on their case as stated by the bill: and having no merits, it might be taken advantage of by general demurrer: and he cited *Price v. James* (2 Bro. Ch. Ca. 319), and *Collis v. Swanne* (4 ibid. 480), as establishing that a bill for a discovery, praying relief, was demurrable.

Fonblanque and Raithby, for the bill, insisted that this was effectually a bill for relief, and was supported by the merits disclosed. They submitted, that relief was of two kinds,—final and ancillary; and in this case the Plaintiffs specifically prayed ancillary relief, and such further and other relief as the Court should think their case required—and they insisted, that discovery and an injunction were, in fact, relief. They cited the case of *Brandon v. Sands* (2 Ves. jun. 514), as being precisely in point, and an authority determining that this demurrer could not be sustained, for that a prayer for discovery and general relief afforded no foundation for demurrer.

Spence, in reply, urged that the case cited was of very doubtful authority, and that the effect of such a mode of pleading, if permitted, would be to embarrass a Defendant, and fix him with costs, by giving to a bill, substantially for relief, the shape and form of a bill for discovery.

The Court (consisting of Barons Graham and [525] Wood) took time to consider, suggesting that they would consult with the Lord Chief Baron in the mean time, before they delivered judgment.

GRAHAM, Baron, now delivered the opinion of the Court.

After stating the circumstances of the case, his Lordship observed: This may be a case wherein, upon the hearing, the Court might think fit to order the policy of insurance to be delivered up; and there is a general prayer in the bill for relief. The demurrer is founded on the Plaintiffs' having no equity for relief, and therefore it extends to the discovery: and the question is, as was said in the argument, whether this is a bill for discovery or relief. Our first impression, certainly, was that it was a bill for discovery; and a strong case was cited (*Brandon v. Sands*) to shew that a bill, praying general relief, might still be a bill for a discovery only. I was somewhat staggered by that case at the time; but, on examining it, it stands on very clear and distinct grounds. That case has often, since its determination, been referred to, as establishing a precedent. On being looked at, however, it will be found to be one of particular circumstances. The bill there was not filed, as in this case, by a party Defendant in an action at law, but by a plaintiff, in aid of an action brought by him to recover back money won at play which could not be recovered in equity but only at law. That bill, therefore, could only have been filed to obtain, through the medium of [526] a Court of Equity, a disclosure of the circumstances under which the money lost had been paid.

In that case it was quite impossible to say that that was a bill for relief, because there could have been none afforded by the Court of Equity; and therefore it was that Lord Loughborough held, that it could not be considered a bill for relief. Under the circumstances of that case, the statute (9 Anne, ch. 14, sec. 3) gives the bill for discovery, and the party requires no relief, nor can he have any. We cannot say, that that is the case here: because he may, in fact, be ultimately relieved by this suit: and therefore this may well be taken to be a bill for relief, and also for a discovery. In this case, therefore,

The demurrer must be over-ruled.

BLACKBOURN, Administrator, &c. v. OGLE. Monday, 20th Nov. 1820.—If a debtor who has become bankrupt, and obtained his certificate, make a promise afterwards to a creditor to pay him at a future day the debt which was due to him before the bankruptcy, he not only revives the debt, and thereby renders himself liable to be sued for its recovery, but he may be held to bail in an action against him, founded on the demand so revived by the subsequent promise: because, as it becomes a good debt, recoverable at law, it must have all the incidents of a legal debt, and all the ordinary modes of proceeding to recover it are open to the creditor.—So held by this Court, on the authority of the subjoined cases, notwithstanding the decisions of the Court of King's Bench in *Bailey v. Dillon* (2 Burr. 736), and *Wilson and Another v. Kemp* (3 M. & S. 595); and therefore they refused to order a bail-bond entered into by a Defendant, under such circumstances, to be cancelled.

Jervis had obtained a rule in this case on the part of the Defendant, that the Plaintiff should [527] shew cause why the bail-bond given by the Defendant in this cause to the Sheriff of Middlesex should not be cancelled, on the Defendant's entering a common appearance, and why the proceedings against the Sheriff should not be stayed.

The affidavit of the Defendant on which the application was made stated, that the cause of action (if any) accrued in the year 1803 or 1804, on a debt claimed to be due to the intestate, who was then an innkeeper, for furnishing the voters of Boston, in the interest of the Defendant, then a candidate for that borough, with refreshments. The affidavit proceeded to deny the Defendant's liability, and stated that, in the year 1804, the Defendant (then a merchant at Liverpool) became a bankrupt, and obtained his certificate in July 1806. The Deponent finally stated that, in the month of October last, he was arrested at the suit of the Plaintiff for 764l., and that he thereupon entered into a bail-bond &c.

In opposition to the rule, an affidavit was filed, stating that within six years (in July 1817) the Deponent, by the direction of the Plaintiff, delivered to the Defendant a bill of particulars of the Plaintiff's demand, the balance being 764l. due to the estate of the intestate—that the Defendant then promised to pay the amount, and authorized the Deponent to call on a third person, to require payment, on behalf of the Defendant, of part of the money, requiring time for the [528] payment of the remainder,

which the Deponent agreed to. The affidavit concluded by stating, that the person to whom the Deponent was so referred did not pay any part of the money, and that he informed the Deponent that he had no effects of the Defendant.

On the part of the Defendant, in support of the rule, Jervis submitted, that a bankrupt who had obtained his certificate could not be held to bail for a debt due from him before his bankruptcy, even although he may have promised subsequently to pay it; and he relied on the authority of the case of *Bailey v. Dillon* (2 Burr. 736), where the Court discharged a person arrested under the same circumstances upon common bail, on the authority of a case of *Turner v. Schomberg* (2 Stra. 1233), holding that the promise was no new consideration, but the old debt (*c*): and in the case from Burrow, Lord Mansfield rests the determination on the fair ground that it would be taking advantage of the bankrupt's conscientiousness to use it against conscience.

In the case of *Wilson and Another v. Kemp* (3 Maul. & Sel. 595), a Defendant who had been arrested, was discharged upon filing common bail, on the same principle, which the Court there fully recognizes. That was a case of an insolvent debtor making a positive promise, after he had been discharged [529] under an insolvent debtor's act, to pay the very debt of which he had been thereby discharged¹.

He therefore insisted that the bail of the Defendant in this case was entitled to be discharged on his entering a common appearance.

Parke, who opposed the rule, contended, on the contrary, that the Defendant had been legally arrested—that the subsequent promise to pay had revived the debt, and, consequently, all its legal incidents, restoring to the creditor by the revival of the debt itself, all his remedies for the recovery of it by law, of which the proceeding by holding the debtor to bail was one.

In opposition to the authority of the case of *Bailey v. Dillon*, cited from Burrow, he relied on the authority of a much more recent case, referred [530] to by Mr. Tidd, in the last edition of his Treatise on Practice, by the name of *Drew v. Jefferies* (*a*), (11. 26 Geo. III. K. B.), where it is cited by him in support of this proposition: "It is settled that a bankrupt may be arrested upon a subsequent promise for a debt contracted previous to his bankruptcy."

He also cited, in answer to the other cases, those of *Hutt v. Verdier* (2 Blackst. 724), and *Horton v. Moggridge* (6 Taunt. 563), in both of which it was held that a discharged insolvent debtor might be held to bail upon a debt due before his discharge, when revived by a subsequent promise to pay it.

It was therefore submitted that this rule ought to be discharged with costs.

The Court were at first very strongly disposed to make the rule absolute, on the authority of the cases of *Bailey v. Dillon* and *Wilson v. Kemp*, which they considered forcibly in point, particularly the former; but they suspended their ultimate determination. On a subsequent day, however, having been furnished by Mr. Justice Burrough with the subjoined MSS. notes of the cases of *Drew v. Jefferies*, and *Best v. Barber*, which were read in Court by Mr. Baron Garrow, as the [531] foundation of their determination in discharging the rule, they pronounced the

Rule discharged^{*2}.

(*c*) See also *Trueman v. Fenton*, 2 Cowp. 549, and *Ford v. Chilton*, 2 Bl. 768.

^{*1} The Court of King's Bench in that decision notice a proposition put by Mr. Tidd in his Book on Practice, (5th edition, p. 207) that insolvent debtors, who have been discharged under insolvent acts, may be arrested for prior debts on subsequent promises to pay them, citing *Best v. Barber* (post, p. 533), and they distinguish that case as being inapplicable, because it was not a motion to discharge the person, but to set aside an execution against the goods of the debtor; and on that account, perhaps, it is now stated (in the 7th edition of that work), that an insolvent debtor, who has taken the benefit of the 54 Geo. 3, c. 28, is not liable to be arrested on a subsequent promise; and he cites the case of *Wilson v. Kemp*, omitting altogether that of *Best v. Barber* (or *Barker*). It will be found, however, on reading that case, that the judgment proceeds on the principle originally asserted by Mr. Tidd.

(*a*) 1 Tidd's Practice, page 231*.

^{*2} In the case of *Hesse v. Stevenson* (1 New Rep. 134), the general principle that the

* That case will be found in a note immediately following this, as it was furnished to the Court by Mr. Justice Burrough, by whom it is very clearly and succinctly stated.

B. R., HILARY TERM, 1786.

DREW v. JEFFERIES. 1820.—A bankrupt who has obtained his certificate, if he afterwards promise to pay a creditor a debt due from him before his bankruptcy, revives the creditor's right to sue him, and he may be arrested on such promise.

Motion to discharge Defendant, he having become bankrupt and obtained his certificate, and the debt having been contracted before the bankruptcy.

Cause shewn by Mr. Jekyll, that Defendant had, several times since the bankruptcy and certificate, promised to pay the debt.

[532] Mr. Justice Buller referred to the case of *Best v. Barker* *¹, as decisive of the question.

Mr. Gibbs, for the rule, contended that still the Defendant should be discharged on common bail. He mentioned *Bailey v. Dillon* (2 Bur. 737), as in point, and said that, in that case, Foster, J. said the case of *Turner v. Schomberg* (2 Stra. 1233), determines the point as to bail.

Mr. Justice Buller. If it is a debt in law, how can the Court say, he shall not be held to bail?

Lord Mansfield. How far would you carry it? Is he not to be taken in execution?

Rule discharged.

[533] B. R., MICHAELMAS TERM, 1782.

BEST v. BARKER. 1820.—The Court refused to set aside an execution against the goods of a person, who, having been discharged under the Insolvent Debtors' Act, gave a note to his creditor, the Plaintiff, for the part of the debt which was not paid under the assignment: holding, that where the remedy is taken away and not the debt, the debt may still be the ground of a future promise or security.

An insolvent debtor, after his discharge under the act, gave a note to the plaintiff for the part of the debt that was not paid under the assignment.

Motion [by Mingay *²] to [set aside an execution against his goods, which Erskine opposed.]

The Court took time to consider of it.

right to arrest is incident to the right to sue is recognized; but there is a distinction taken by the Court in giving judgment in that case, which implies a doubt whether there may not exist at least one exception, and that is, where a Plaintiff sues a Defendant, on a judgment, for the residue of the sum recovered after he has levied a part of the money under a fieri facias, and had arrested him in the original action.

In that case the Defendant was arrested on a judgment recovered for 1954l., after 400l. of the money had been levied under a fieri facias. In support of the rule which had been obtained, requiring the Plaintiff to shew cause why the Defendant should not be discharged on entering a common appearance, it was urged that the proper course of proceeding, on the part of the Plaintiff, was to have sued out a capias ad satisfaciendum, and that it was oppressive to arrest the Defendant under such circumstances.

The Court said that, assuming that the Plaintiff had a right to bring the action there seemed to be no reason why he might not hold the Defendant to bail, having never before arrested him for the same debt.

*¹ This is the case before alluded to (called *Best v. Barber* †). See the note of it in the next page.

*² The parts within brackets are no part of the learned Judge's note, which was in blank in that respect. The omission is therefore supplied by what was stated to have been the fact, so far, by Mr. Justice Le Blanc, after the judgment of the Court had delivered by Lord Ellenborough, in the case of *Wilson v. Kemp*, 3 Maule & Selw. 597.

† This case was also furnished by Mr. Justice Burrough.

On another day LORD MANSFIELD said, "Where the remedy is taken away, and not the debt, the debt is a debt in conscience, like the case of a debt, barred by the statute of Limitations, and it may be the grounds of a future promise or security."

[534] NAYLOR v. CHRISTIE. Wednesday, 22d Nov. 1820. —The Court will not restrain a party (by injunction) from taking out execution on a warrant of attorney, on an affidavit of merits, and that irreparable injury might be sustained before the common injunction could be obtained. —The Court of Law would grant relief on equitable grounds in such a case.

Fonblanque moved, on certificate of bill filed, and affidavit of merits before answer, for an injunction to restrain the Defendant from taking out execution on Plaintiff's warrant of attorney, on the ground that irreparable injury might be done before the common injunction could be obtained. It was admitted that there were no cases in point to authorize this application, but several in the recollection of the Bar in which the present Chancellor and Vice Chancellor had granted this motion, holding that the case of a warrant of attorney was an excepted case. One was mentioned wherein a Plaintiff, having given a warrant of attorney under a misconception that he owed the Defendant a balance, made a similar motion on certificate of bill filed and affidavit of merits, (before answer) and it was stated to have been granted by Lord Eldon; but

The Court refused the motion.

WOOD, Baron, said the Court of Law would, on equitable grounds, grant relief*.

[535] SUTCLIFFE AND OTHERS v. GREENWOOD. Wednesday, 22d Nov. 1820. —A plea to an action of trespass for breaking Plaintiff's close, that over and across &c. was a common and public highway, for &c. to pass along at pleasure, paying a certain toll, is not inconsistent or contradictory, particularly if not said to be immemorial, for it may be a highway created by act of Parliament.

This was an action of trespass, for breaking and entering the close of the Plaintiffs, "to wit, a certain close, being a private road," situate &c. and breaking down and destroying a certain gate, then standing and being in the same close. The Defendant pleaded, first, the general issue. Second, That over and across the locus in quo was a certain common and public highway for all the liege subjects to pass along at pleasure; that the gate obstructed a free passage, wherefore the Defendant prostrated it. Third, That over and across the locus in quo was a certain common and public highway for all the liege subjects to pass along at pleasure, paying a certain toll in that behalf, at a certain toll-house erected near to and on the said road; that Defendant, having tendered the toll therefore payable, passed along the said road; and, because the said gate obstructed a free passage, and because the gate-keeper refused to open it notwithstanding the said toll was tendered to him, Defendant prostrated it, and so committed the supposed trespasses complained of.

Replication joined issue on the first plea; as to the second plea, the Plaintiffs denied the right of road; and, as to the third plea, denied the tender: and issues were joined thereon.

The cause was tried at the last assizes for the [536] county palatine of Lancaster, and a verdict was entered for the Plaintiffs on the first and second issues, and for the Defendant on the third and last.

Alexander (with whom was Scarlett) obtained a rule to shew cause why judgment should not be entered for the Plaintiffs in this cause on the first and second issues, notwithstanding the verdict for the Defendant on the last issue, on the ground that the justification therein pleaded was insufficient in law, being inconsistent and contradictory in terms, as that could not be a common public highway, passable at pleasure, for proceeding along which the passenger was bound to pay a certain toll.

Alderson now shewed cause. He submitted that, as the point put in issue was a subject-matter of proof, and as it would have been a variance if not proved as laid, it was necessary to state it according to the fact. He cited *Bolt v. Stennett* (8 Term

* See the case of *Annesley v. Rookes*, reported in a note to *Ford v. F.* 1000, 3 Meriv. 226.

Rep. 606), where a plea, by way of justification to an action of trespass, that the quay was a public, open, and lawful quay, for landing &c. for a reasonable compensation to be paid to the owner: *Aspidall v. Brown* (b).

In this case the Defendant only justifies against the owner of the soil.

The Court called upon Alexander to support his rule.

[537] The question is certainly merely technical. It is whether the allegation in the last plea, of the road in question being "a common and public highway," and yet that passengers are liable to toll, be not repugnant in itself, and, consequently, the plea bad?

It is an established maxim in pleading, that every thing shall be taken most strongly against the person by whom it is alleged:—In other words, that, if the meaning of the expressions used be equivocal, they shall be construed most strongly against the party pleading them: for it is to be intended, that every one states his own case as favourably as possible. Now, every definition of "a common and public highway" that is to be found in the books contains, as a material ingredient, the quality of its being common to all persons: by which must be understood the free and unrestrained right of using it at all times, without being subject to any pecuniary or other imposition. It seems, therefore, to follow as a necessary consequence, that where a right of passage can only be enjoyed upon payment of toll, the road does not come within the strict and legal sense of the words "a common and public highway." The Defendant, therefore, has justified under a right, which, in the eye of the law, has no existence, and his last plea, setting forth such a justification, is repugnant in itself, and no judgment can be pronounced upon it. The plaintiff is therefore entitled to enter up judgment on the first and second issues, notwithstanding the verdict for the Defendant on the last.

[538] By the Court. The third plea is good, and the rule must be discharged.

Wood, Baron. The description is perfectly consistent with the road being a turnpike-road; particularly where it is not alleged, as here it is not, to have been a public highway from time immemorial. It may be a highway created by act of Parliament.

Rule discharged.

ANDREWS, Assignee of Pain, v. BOND. Saturday, 25th Nov. 1820.—Where a Plaintiff has been nonsuited, on the ground that a notice of set-off had given sufficient information of the sum intended to be set off against the demand, and that the Defendant was not precluded by his particulars of set-off, from entering into a proof of a counter demand not stated there: and that nonsuit was afterwards set aside, the Court (considering that he was precluded) and a new trial granted,—if before the second trial the Defendant obtain leave to amend his particulars, so as to obviate the objection taken before, upon payment of costs, the Plaintiff is not entitled to be paid the costs of the first trial, previous to and as the terms of the amendment: and the Court would not, under such circumstances, order the Master to review his taxation, on the objection that he had allowed the Plaintiff only 20s., the costs of a common amendment. The costs of the former trial ordered to abide the event of the cause.—The Court, on discharging an order granted to shew cause, refused, under the circumstances, to give the successful party the costs of the application.

The Plaintiff in this case had, in last Easter Term, made absolute an order for setting aside a nonsuit which had been directed in an action brought by him against the Defendant (vide ante, page 213), on the ground that the Defendant had not confined himself, in his proof of a sum claimed by way of set-off, within the particulars delivered by him of the subject-matter of his notice of set-off against the Plaintiff's demand. In Trinity Term following, the Defendant obtained an order of Mr. Baron Garrow (who had attended at [539] chambers by the agents of both parties, on summons) that he might be at liberty to amend such particulars, by introducing therein a sum of 34*l.* for money had and received, and 34*l.* upon an account stated. It was then urged, however, on the part of the Plaintiff, that, in consideration of the situation in which the parties stood in this case, in consequence of a new trial having

(b) 3 *ibid.* 265, and cited in 2 Wms.'s Saunders, *Rea v. Sloughton*, 158, note 4.

been ordered, upon this very ground of the restrictive effect on the particulars as they were originally delivered, the Plaintiff ought, on being permitted to amend in the way so proposed, to be subjected to the terms of first paying the costs of the former trial; for otherwise the consequence of allowing the Defendant to amend, in so material a respect, in this stage of the proceedings, would be that the Plaintiff would have to pay the costs of the nonsuit in all events, although the Court had determined by sending the cause to a new trial, that he ought not to have been nonsuited; whereas, if the Defendant had not been permitted to go into a defence which he had no right to avail himself of at the trial, because he had prevented the Plaintiff, by the particulars of set-off delivered by him, from preparing to meet it, the Defendant must, or at least, might have failed, and in that case he would have had to pay the costs in the result of the first trial, if the cause had gone to the Jury on the point to which the particulars then delivered had at that time confined the proof of the subject matter of the set-off. The learned Baron, however, gave the Defendant leave to amend his particulars, upon payment of costs.

[540] Upon the taxation, the Plaintiff attended the Master with his bill of costs of the first trial, and of the application to set aside the nonsuit, but the Master allowed only 20s. costs (the costs of a common amendment) considering himself not at liberty to allow more without the order of the Court, to whom it was open to the Plaintiff to apply.

In the early part of this Term, Merewether obtained a rule, calling upon the Defendant to shew cause, why the Master should not review his taxation of the costs of amendment of the Defendant's particular of set off after trial and nonsuit, and rule obtained for a new trial. He submitted, that in this case, whatever might be the general rule as to ordering payment of costs on granting new trials, the Plaintiff was entitled, on the amendment permitted to the Defendant, to be paid the costs of the former trial, because the question would now be different between the parties, and otherwise the Plaintiff would have been prejudiced by the amendment, which had precluded him from some of the merits of his original case, and that prejudice was what the Court had always been anxious to prevent in giving leave to amend. He cited *Alder v. Chipp* (2 Burr. 755), and *Parker v. Ansell* (2 Bla. 920).

Gaselee now shewed cause. He urged that this was an unusual and extraordinary application, and ought not to be granted in this in-[541] stance, where there was nothing of circumstance to distinguish it from the ordinary case, where the new trial had not been ordered on payment of costs.

THE LORD CHIEF BARON. I see no reason for the application. It does not appear that the Master has done wrong.

GRAHAM, Baron. The application is certainly premature. I know of no case in which this has ever been done.

WOOD, Baron, of the same opinion.

GARROW, Baron. There being no order respecting costs in making the rule for a new trial absolute, the costs of the former trial must abide the event of the cause. The Master has certainly done what alone he could do. If there be any error it is mine. The only questions are, whether this was a fit case for allowing the amendment, and what costs should be paid thereon by the Defendant. (His Lordship stated the circumstances of the case (a).) It was thought this was a proper case for permitting an amendment; and, as to the terms, if I had given any directions about them, as to the amount, the proper course, indeed, in that respect, was that taken—to refer it to the Master) I should have ordered only the common costs in this case, which the Master has allowed.

[542] The consequence is, that the parties will be in the same situation when the cause is tried as they would have been before, if there had been no slip in the proceedings on the part of the Defendant.

Rule discharged.

Gaselee then applied for the costs of the application to be paid to the Defendant, which the Court refused.

(a) See *Andrews v. Bond*, ante, p. 213.

IN THE EXCHEQUER CHAMBER.

[Error from the King's Bench.]

DAVIDSON AND OTHERS v. CASE. Nov. 27, 1820.—An abandonment by owners of a captured ship, insured by underwriters, subscribing a policy of insurance in the common and ordinary form, on the ship only, to such underwriters—and an abandonment of freight to other underwriters, subscribing a similar policy on freight only: the latter does not give the underwriters on freight any legal claim to freight earned by the ship on her re-capture after such abandonment; but all such freight belongs to the abandonees of the ship.—From the moment the ship is abandoned she becomes the property of the abandonee, and the property in the ship determines the right to freight, as an incident to the right of property in the ship.—In other words, the freight belongs generally to the owner of the ship. Quære whether freight is a subject-matter of abandonment?

[S. C. 2 Br. & B. 379; 5 Moore, C. P. 116, affirming 1816, 5 M. & S. 79. Applied, *Keith v. Burrows*, 1877, 2 A. C. 636, 656; *Midland Insurance Company v. Smith*, 1881, 6 Q. B. D. 567; *The Red Sea*, [1896] p. 24.]

The Defendant in error, an underwriter, with whom the owners of the ship “Fanny” had insured the ship, then on her voyage, had obtained a verdict in the Court of King’s Bench in an action of assumpsit for money had and received, against the Plaintiffs in error, who—by agreement between the owners and the underwriters who had subscribed the policy of assurance on the ship, but not those who had subscribed the policy [543] on the freight, both claiming to be entitled, under the respective abandonments, to the earnings of the ship for freight—had received and held the money due for the freight of the cargo for the use of the parties who should establish their claim, whether the underwriters on ship, or the underwriters on freight.

On a case reserved, the Court of King’s Bench (dissentiente Bayley, J.) gave judgment for the Plaintiff (a); but by leave of the Court, the case was turned into a special verdict, in which the material facts found were, that heretofore &c. certain persons were the owners of a ship called the “Fanny,”—that the said ship afterwards &c. was at Rio Janeiro, in parts beyond the seas, and was then a general seeking ship:—that whilst at Rio Janeiro she was loaded with and took on board there a cargo of goods, being the property of divers and distinct persons, to be carried therein upon freight from Rio Janeiro to Liverpool,—that the owners, according to the usage and custom of merchants, caused to be made and effected, and to be subscribed by divers underwriters, a certain writing or policy of assurance against the usual and customary perils and adventures on the said ship, on a voyage, &c. and that the said Thomas then and there became and was an assurer, and subscribed the said policy of assurance for the sum of 200l.;—that the said (owners) afterwards &c., according &c., caused to be made and effected, and to be sub-[544]-scribed by divers other underwriters, divers other writings or policies of assurance against the usual and customary perils and adventures on the freight of the said ship on the same voyage; and that the persons who became and were assurers upon and who subscribed the said policies on freight were other and different persons from those who subscribed the said policy upon the said ship.

It was also found, that after the ship was so loaded, she sailed with the said goods on board, and that afterwards, and whilst she was proceeding on her voyage, with the goods on board, she was captured by enemies of the King; and that afterwards &c. the said (owners) gave several and respective timely notices of abandonment of the said ship or vessel, and also of the said freight, at the same time, to the said several assurers who had subscribed the said several policies, as well upon the said ship or vessel as also upon the said freight, which said several and respective assurers then and there accepted the said notices—that the said ship or vessel, with the said goods on board thereof, afterwards &c. was, by a ship of war of the King, recaptured and brought into London, and that a suit was thereupon instituted by the re-captors, against the said ship and cargo in the High Court of Admiralty; and by a decree of

(a) See *Case v. Davidson and Others*, 5 Maule & Selw. 79.

the said Court the ship and goods were ordered to be and were restored to the respective owners, on payment of salvage to the re-captors and of expences,—and [545] that the ship, with the goods on board, afterwards arrived at Liverpool, and there delivered her cargo to the respective owners thereof, and earned the freight payable in respect of the carriage and conveyance of the said goods.

The verdict (having found that it was agreed between the said owners and the said assurers on the said ship or vessel, but not by the said assurers on the freight, that the Plaintiffs in error (Defendants below) should sell the ship and receive the produce, and should also receive the freight of the cargo for the use and benefit of all persons who should be found to be entitled thereto respectively) then found that as well the assurers on the ship as the assurers on the freight, had severally paid the (owners) for a total loss of one hundred pounds per cent. on the said valuation on both the ship and the freight; and that the assurers on ship paid the total loss on the ship before the assurers on freight paid the loss on the freight—that (the Plaintiffs in error) afterwards &c. sold the ship and received the money, and afterwards &c. paid and divided the money produced by the sale of the ship to and amongst the assurers upon the ship, rateably and in proportion to their respective subscriptions to the said policy of assurance on the said ship—that the Plaintiffs in error afterwards &c. received for the freight of the said goods certain sums of money (35l. 16s. 6d. per cent.) on the sum insured on the freight, and which they (the Plaintiffs in error) held in their possession upon the [546] terms and for the purposes in the said agreement mentioned; that as well the assurers on the ship as the assurers on the freight, had respectively required (the Plaintiffs in error) to pay to them respectively the amount of the said sums of money so received by them for the freight of the said goods as aforesaid, and that the said (Defendant in error) having so subscribed the said policy of assurance on the said ship for the sum of 200l. as aforesaid, claimed to be entitled to a proportion of the money so as aforesaid received by the said Plaintiffs in error for freight, But whether &c.

In last Trinity Term the case was argued in the Exchequer Chamber*, by

Littledale for the Plaintiff in error, who contended that the underwriters on freight were as clearly entitled to the freight, on an abandonment to them of freight, as the underwriters on ship were to the ship on a specific abandonment.

He submitted that there were no authorities precisely in point upon this question, as all the cases bearing upon it depended wholly on the particular circumstances of each, and therefore this case must be determined on principle.

He contended that ship and freight were in fact and in law, separate and distinct subject-[547]-matters of insurance, and were capable of being separately insured in this country, where there was not, as in some others, any prohibition on the insurance of freight. Without regard to each other, ship and freight, he observed, were not only distinct in themselves, but distinct in their incidents. The insurer of ship insured the safety of the vessel only, the wood, copper, iron and cordage, agreeable to the terms and form of the policy, and he was accountable for no risk but what should happen to the ship. The insurer on freight made himself responsible for the cargo, the subject-matter of the freight; and in the policy of insurance, the single word "freight" only is introduced. The risk on ship is confined entirely to such accidents as may happen to the vessel and her tackle: and the underwriters have nothing to do with damage done to the cargo, or with the vessel returning without earning freight. The underwriters on freight may sustain loss by accidents, producing no injury to the ship, and also by accidents happening to the vessel which may prevent her earning freight. There can be no reason, if, on an abandonment of ship, the underwriters become entitled to the ship, why the underwriters on freight should not also be entitled to freight earned, after an abandonment of freight, unless insurance on freight were to be considered an anomaly: or why any difference should be made between those who insured freight and any other class of underwriters. Abandonment of ship gives the insurers on ship a right to the ship, and abandonment on freight must, on the same principle, give the insurers on freight a right [548] to freight: and each party can only be entitled to what either has actually and expressly insured under his separate contract with the owners: and there is nothing in an abandonment which can entitle him to more, especially to the disadvantage and loss of

* Mr. Justice Richardson and Mr. Baron Garrow were absent.

another underwriter, who has insured another subject-matter of risk, to which he also derives title under a similar abandonment.

Anticipating the argument that an abandonment of ship to the underwriters on ship was equivalent to an actual and general assignment, and that all the incidents of the ship follow the title to the ship—he denied the first proposition, on which the second rested; and contended that there were several material points of difference between an abandonment and an assignment of a ship at sea. A general assignment of a ship at sea will pass freight, because all the vendor's interest and use in the vessel are disposed of by sale; but between the owners and underwriters nothing is transferred by abandonment but the thing insured. A ship might be sold, reserving the freight; and why may she not be insured to a limited extent, under express contract, as well as sold? Nor is there more hardship or ground for complaint in one case than in the other: and in this case, the owners' contract with the insurers on ship did not extend to freight. In *Mestier v. Gillespie* (11 Ves. 629), the Lord Chancellor held, that an assignment which was not good as to the ship, might yet be good as to the freight; and he con-[549]-siders, that there may be a separate property in the freight, distinct from that of the ship, and so insurable—that depending entirely on the terms of the contract. A ship sold at sea, with freight insured, would be worth a proportionably larger sum to a purchaser than she would be if freight were not insured.

It was also urged, that there was no mutuality between the different parties. The insurers on freight would, in any event of freight not earned, be obliged to make good the whole loss; and yet, if the insurer on ship, (who is not bound to pursue the adventure for the sake of the freight, the voyage being put an end to by the perils of the sea) were entitled, under the policy, to her freight earned after abandonment, he ought, in case of the vessel being lost, to contribute a proportion of the freight lost. There are cases wherein it has been held, that freight does not uniformly follow the right of property in the ship. That was so determined in *Splutt v. Bowles* (10 East, 279), and *Chinnery v. Blackburne* (1 H. Bl. 117 (in notis)), where the Court held, that the assignees of a bankrupt owner were entitled to the freight earned after sale of a ship at sea, and not the vendee. Those cases proceed on the ground that such claims to ownership are not subject to liabilities, as in the cases of a mortgagee or vendee of a ship at sea; and an abandonee under an insurance is a claimant of the same description, as he also incurs no liability as owner.

[550] It was submitted to be a mere technical rule, that gave the underwriter on ship generally, where there were no circumstances to rebut it, a right to freight; but where a distinct bargain was made, as in this case, that rule could not apply; and if plain and simple engagements were not permitted to be construed according to their particular import in these cases, there could be no safety in dealing with insurances, which, whatever might be the different subject-matter, ought to be governed by the same rules. It would be most injurious to establish the doctrine, that of different insurers on ship and on freight, the latter were to be at the mercy of the owner of the ship, who should be held to have a power, by his voluntary act, to defeat their rights under his express contract for the advantage of one set of underwriters to the prejudice of another, amounting in fact to fraud on the insurers of freight, by the abandonment of the ship.

On the whole, he submitted that, in the absence of any authority deciding this doubtful question, it ought to be determined on the broad and fair principle that, under such an abandonment as this, the ship should go to the underwriter on ship, and the freight to the underwriter on freight.

Scarlet, for the Defendants in error, relied on the cases determined on this question, which, although not expressly in point, furnished authority to support the doctrine on principle that, on [551] an abandonment of ship, the after-earned freight belonged, as incident to the property in the ship, as much as rent to that in a house or land, to the abandonee of the ship; abandonment, to insurers, being in all respects as effectual a transfer of the property in law, as an actual assignment would be to a purchaser.

He submitted also that, on principle as well as authority, the abandonee of ship was entitled to freight earned after abandonment—that there was nothing in the nature of an insurance which went to affect the general principle in any question arising upon it—and that this was merely a mode, under the insurance law, of transferring property in ships, which would give a right to an insurer to demand an

assignment, in conformity with the Register Acts. There could be no reason, therefore, why an ownership, acquired by such means, should not have all the incidents which belonged to property conferred by means of any other mode of transfer, and it is not contended, that the abandonee does not, by the abandonment, derive a perfect title to the ship. As to any hardship which may arise to underwriters, in consequence of the law affecting any supposed understanding amongst themselves on such matters, every man making a contract must be considered to be acquainted with all the legal consequences of it, and is bound by them.

In the cases of *Canden v. Anderson* (5 Term Rep. 709), and [552] *Morrison v. Parsons* (2 Taunt. 407), the rule that the right to freight results from the right to the ownership of the vessel, is carried very far, and may be considered as settled.

The doctrine that freight is inseparably connected with ownership, is settled by the cases of *Chinnery v. Blackburne* (1 H. Bl. 117), and *Splidt v. Bowles* (10 East, 279): for the sort of ownership in those cases is shewn to make an exception to the general rule which has always been recognized incidentally in all the cases; and, in *Morrison v. Parsons*, it is expressly decided.

In *Thompson v. Rowcroft* (4 East, 34), the right of the abandonee of the ship to after-earned freight is still further favoured. Lord Ellenborough says, that if the question had been between the two sets of underwriters, he should have considered the underwriters on ship as having the stronger claim: and he afterwards says, that the underwriters on ship, from the time of abandonment, stand in the same situation of owners, and must bear the expences from that time. [Dallas, C. J. But in that case, the Court carefully avoided this question which did not arise there, by narrowing the discussion to the claim of the parties really concerned in the subject matter of the litigation.]

The principle of the decision in *Splidt v. Bowles*, [553] is merely that as a charter-party of affreightment is a mere personal contract, without seal, for the payment of freight, and an ideal and incorporeal thing, it cannot therefore be assigned: because it is not only a mere chose in action; but there being no privity between the freighter and the intermediate vendee, no action could be maintained by one against the other, and the vendor transfers none of his personal contracts or liabilities, whereas in the case of an abandonment, he does: and the wages of the master and crew, and repairs and all expences of earning the freight are afterwards cast upon him. It is, in effect, a continuance of the same ownership. On the same point were cited *Macarthur v. Abel* (5 East, 388), *Sharpe v. Gladstone* (7 ibid. 24), and *Leatham v. Terry* (3 Bos. & Pull. 479).

He also submitted, that it may be controverted, for it was a question of considerable difficulty, whether freight insured be, in point of law, a subject of abandonment!

[The Court suggested the case of *Green v. The Royal Exchange Assurance Company* (1 Marsh. Rep. 447).]

In addition to the objection taken in that case, that freight was not a specific tangible thing, and therefore incapable of such an abandonment as would give a right of possession to the abandonee, it was insisted, that it could not be abandoned, [554] because it was a chose in action giving the party a mere equitable claim, on which no action could be maintained. If this were correct, therefore, the law of abandonment could not be applied to a question of right under an insurance on freight.

Difficulties and inconveniences would arise from a different doctrine, which should establish that freight was a distinct subject-matter of insurance, and that the right to it did not follow the right to the ship. If ship were insured by one underwriter and freight by another, and the owner should sell the vessel, or deviate during the voyage, the policy on the freight would be discharged: or, suppose ship and freight insured, and ship abandoned, nothing being said of freight, and the underwriters on ship changed her destination, as they might do: in that case the policy on freight would be vacated. Again, in case of her capture, and being carried to a port, from whence notice is sent to the owners who abandon, the underwriters are not, in that case, bound to pursue the voyage, on taking possession, for the purpose of meeting the insurance on freight. They may, however, complete the voyage if they chuse: and, if they do, they would be entitled to the freight earned thereby on their own account, because the ship becomes their property. In all cases, therefore, unless there be a special and express contract to the contrary, the right to freight is incidental to the ownership of the vessel.

[555] Littlehale, in reply, denied that there was any analogy between the right to freight, as with respect to a ship, and the right to rent, as with respect to a house or land, which were never made the subject of separate contracts, as the former were.

The case of *Splidt v. Bowles* shews that all depends on the terms and nature of the contract between the parties; and that the right to freight, on the part of owners, depends on technical distinctions, and does not always follow the right to the ship. There is no provision for that in the policy, in case of abandonment; and it is not, ipso facto, such a transfer as carries with it the right to freight—at least, when separately insured. It is made in contemplation of actual loss; and capture is only fortuitous, and out of the contemplation of the parties.

He also urged that it had been always customary in practice, on settling losses, to consider equally the claims and liabilities of the underwriter on freight, as of the underwriter on ship; and the insurers of freight always contribute their proportion of salvage.

If freight were not the subject of abandonment, still the insurers on freight, being liable on a general loss, ought to have the benefit of what had been saved; and the equitable claims of the insurer on freight are entitled to be protected. It can make no difference if freight were only, as [556] has been urged, an ideal and not a tangible thing, as long as it may be the subject-matter of a beneficial agreement.

DALLAS, Chief Justice, now delivered the judgment of the Court.

This case came before the Court on a writ of error from the King's Bench. It is unnecessary to state the facts in detail, as they will be found fully and accurately set forth in the printed report of what passed on the original argument in the Court below. It will be sufficient on the present occasion, to observe, that there had been two separate insurances—the one on ship and the other on freight. The ship had been captured and re-captured in the course of the voyage, and had ultimately earned freight. There having been an abandonment of ship to the underwriters on ship, and of freight to the underwriters on freight, the question now to be determined by us arose—whether, upon such abandonments, the abandonment of ship includes freight, and entitles the underwriters on ship to the freight also, wholly and exclusively, under that abandonment: or, whether the underwriters on freight are entitled to the freight, as having insured the freight specifically, and having from the assured an abandonment of such freight under the insurance so made.

This question, long depending, but always avoided, because in former cases not necessary to [557] be decided, has at last been determined by that Court from whose judgment error is now brought, in which three of the learned Judges held, that an abandonment of ship included freight; and a different opinion was delivered by Mr. Justice Bayley, who considered that an abandonment of freight gave the abandonee a right to such freight as a subject-matter of insurance, separate and distinct from that of the ship, with reference to contracts on policies of insurance.

It would be an idle parade, and a waste of time, to go into the subject at large, fully treated of as it is in all the elementary works on insurance law, and more particularly, as the printed report to which I have already alluded contains all, in point of authority and observation, that can properly belong to the question.

I shall therefore merely advert to the general grounds on which the argument has proceeded, and on which the decision must now depend.

First, it is not denied that, generally speaking, an assignment of ship includes freight; but it is said that it does so, because such is the natural effect and consequence of such assignment where there is no agreement between the parties to the contrary; whereas, in cases of abandonment under insurance, such agreement is to be implied from the practice of making separate insurances, which the law of this country—different in this respect from the law of other countries—permits: and [558] that the law will therefore keep the interest of the parties separate and distinct, giving to the underwriter on ship the ship abandoned, and the freight to the underwriter on freight abandoned.

That such a practice has prevailed is undoubtedly true; but there is a fallacy in confounding the fact of that practice with the legal effect of a contract for insurance. It is the practice itself that raises the legal question. To make the practice decisive of the law, it would be necessary to go further, and to shew a practice of settling losses in conformity to it, and that the underwriters on ship have never claimed the freight, and the underwriters on freight have constantly received it. Such a practice,

if of sufficient prevalence and notoriety to raise the presumption of general knowledge, would shew the understanding of parties with reference to which they must be taken to deal, and would therefore form the basis of the contract between those who were respectively privy to it. But it was admitted in the argument in the Court below, and adverted to upon the Bench, and has again been admitted in the argument here, that there has been no such settled practice; but that, on the contrary, the question has altogether hitherto been the subject of controversy, the underwriters on ship having, in every instance, resisted the claim of the underwriters on freight, asserting, that the freight belonged to themselves, as owners of the ship, on the abandonment being made.

[559] It is not pretended that there has been any actual agreement to the contrary in this case, and it seems to follow of course that no such agreement can be implied from the mere practice of insuring separately, when we find that the practice stops with the fact of so insuring, and the effect of such fact has constantly been matter of dispute. I have dwelt on this the more, because I observe that, in the Court below, the argument was mainly pressed, on the ground that such an agreement was to be implied—which I think it cannot be for the reasons which I have given.

It then becomes our business to enquire—there being no actual or implied agreement between the two sets of insurers—what, in point of law, is the effect of the contract into which they have respectively entered with the owners. I say the two sets of insurers; because it is not necessary to consider the consequence of a separate insurance and abandonment of freight between the insurers on freight and the assured, under all circumstances that might possibly arise on the contract directly made between them. Confining, therefore, the consideration in the manner stated, what is the legal operation of the respective contracts? In resolving this question, I put no stress upon the fact that freight passes under a general assignment of ship; because that appears to me to be begging the question—the question arising on a supposed distinction, existing in cases of abandonment, as being different from common transfer by the ordinary modes. The effect of it, [560] correctly considered, is only to remit the question to the general operation of law, supposing the distinction contended for to fail. Nor do I place reliance on the assignee of the ship becoming the owner of her, in a common case; for there again the question turns upon the asserted distinction. Neither do I give weight to the mere fact of separate insurances; for this also would be to take that point for granted: and they are not separate but connected, if made under a general understanding that each shall refer to and be regulated by the other.

But the case seems to me to result to this:—if, in every other case of transfer, the freight follows the assignment of the ship; and if abandonment be but a different term for assignment, and the same in effect, unless modified to a different purpose by the agreement of parties; and if in this case, so far from there being any such agreement, either actual or in fact, or to be presumed in law, the contrary is to be implied—the case only amounting to claim on one side, and resistance to such claim on the other—the reason fails for taking this case out of the general law: and, consequently, the underwriters on ship, under the abandonment to them of ship, are entitled to freight.

In so deciding, we shall not break in upon the general legal principle, by engrafting upon it an anomaly of doubtful convenience; nor will the decision lead to any difficulty in future, as [561] ship and freight may be made the subject of one and the same insurance; or, if there be any practicable objection to this of which I am not aware, the parties may contract, with reference to the law as now finally settled, supposing the case to end here.

I will merely further state that I have avoided going into much that has on former occasions been closely or loosely applied to the subject, having confined myself for the reasons given, and which I will not repeat, to a single and general view of it.

The consequence of our opinion is, that the judgment of the Court of King's Bench must be affirmed.

Judgment affirmed.

[562] IN THE EXCHEQUER CHAMBER. CORAM RICHARDS, LORD CHIEF BARON.

LEATHES (Rector of Mepal and Vicar of Sutton,) *c.* THOMAS NEWITT THE YOUNGER, WILLIAM COLE (Occupiers of Lands &c. in Mepal), PHILLIP CAWTHORNE, WILLIAM CAWTHORNE THE YOUNGER, AND THOMAS MAYLIN, Executor of Joseph Maylin (Occupiers of Lands &c. in Sutton), THE DEAN AND CHAPTER OF ELY (Patrons of the Churches of Mepal and Sutton, Lords of the Manor of both Parishes, claiming to be Impropriators of part of the Great Tithes of Sutton), TOWNLEY CLARKSON (Sublessee of the Fellows of Jesus College), RICHARD LORD BISHOP OF BATH AND WELLS, EDWARD R. RAYNER, WILLIAM D. PLAMPLIN, AND T. P. FOLEY, Fellows of Jesus College (Lessees of the Dean and Chapter of Ely). Tuesday, 21st Nov. 1820.—Principle of Costs.—A vicar claiming from occupiers great tithes, having by his bill made the Rector a party defendant and his lessees and their sub-lessee,—the Rector and his lessees not only insisted on their title, but examined witnesses, and the Court decreed an account of certain tithes against the occupiers, and issues to try moduses, and whether the great tithes in question belonged to the Rector or Vicar. The Rector accepted that last issue, and went to trial. The Plaintiff (in Equity) failed in the issues on the moduses with the occupiers, and succeeded on the issue tried with the Rector as to the great tithes claimed.—The cause coming on to be heard on the postea for further directions, it was ordered that the Plaintiff (in Equity) should pay the defendants the costs of the issues in which he failed: and it was also decreed, that the Defendants the Rector and his lessees should pay the Plaintiff (in Equity) the costs arising from the interrogatories and depositions and otherwise occasioned by the commissions issued by the Rector for the examination of witnesses, to be taxed &c. and the costs of the issue at law, and the subsequent proceedings thereon. The lessees were decreed also to pay the Plaintiff the costs incurred by the Plaintiff in the executing a commission for the examination of witnesses on their part: for although it might have been necessary to make the Rector a party, if he had only insisted on his title by his answer, examining no witnesses and not accepting the issue (which he was not bound to accept), nor taking any other step, he might not have been liable to costs on the Plaintiff's succeeding; but, having become active when he should have been passive, he made himself liable.—So also his lessees.—The sub-lessee not having examined witnesses, nor taken any step to put the Plaintiff to unnecessary additional expense, his costs were ordered to be paid to him.—This Court never directs costs ordered to be paid, to be taxed as between attorney and client.

By the decree made on the hearing of this cause, in July 1817 *, the Lord Chief Baron de-[563]-creed an account to be taken of all the tithes claimed, (except milk) of lands in the occupation of Newitt and Cole, in the parish of Mepal; and he directed the following issue to be tried: whether there existed, as pleaded, a modus of 1s. for every milch cow in lieu of the milk of such cow: the Defendants Newitt and Cole to be Plaintiffs, and the Plaintiff to be Defendant.

An account was also decreed of the small tithes of the titheable matters, (except milk and calves) taken from the lands within the vicarage of Sutton, in the occupation of the Defendants P. Cawthorne, W. Cawthorne, and Maylin, and the following issues were directed, to try

First, The Plaintiff's right, as vicar, to the great tithes of the lands in the occupation of the same Defendants in North Fenn &c. part of a certain district of marsh land in Sutton, in which issue the Plaintiff in Equity was to be Plaintiff, and the Defendants the Dean and Chapter of Ely, were to be Defendants.

[564] Secondly, A modus of 5d. for every milch cow, in lieu of the tithe of milk of such cow; and

Thirdly, A modus of one halfpenny for every calf fallen or dropped in the parish, in lieu of the tithe or tenth part of the price, if sold.

In those two last issues the Defendants the Cawthornes and Maylin (the occupiers in Sutton) were to be Plaintiffs, and the Plaintiff was to be defendant.

* Vide *Leathes v. Newitt and Others*, ante, vol. iv. p. 355.

The Plaintiff declined to take any of the issues decreed, except as to the claim of the great tithes in Sutton. That was tried, and the Plaintiff (in equity) succeeded in establishing his right so claimed.

The cause came on to be heard on the postea for further directions on the 23d of November, 1819, when

Jervis and Raithby appeared for the Plaintiff.

Clarke and Newland, for the Defendants the Dean and Chapter of Ely.

Boteler and Richards, for the Defendants Newitt, Cole, the Cawthornes, and Maylin.

Dowdeswell, for the Defendant Clarkson, and

Blake for the Defendants the Bishop of Bath [565] and Wells and the other lessees of the Dean and Chapter of Ely.

The sole matter remaining to be disposed of in this stage of the cause, was the question of costs between the parties, and particularly the apportionment as between the several different Defendants. It was principally agitated as it affected the Dean and Chapter of Ely, who contended, that—being involuntary parties to the suit, and not litigants, having been made Defendants by amendment, because the Plaintiff could not proceed unless they were made parties; and having themselves no direct or immediate interest in the event—they ought to be allowed the costs of the suit, which proved, in the result, to be a very difficult and intricate one: and *Berney v. Eyre* (3 Atk. 387) was cited.

On the other hand it was urged, that the Dean and Chapter were parties interested in the cause; and, having set up a claim which they could not support, they ought to pay their full proportion of costs. They had attempted to avail themselves of an advantage from the suit, and had much embarrassed the Plaintiff by the defence which they had set up, and, in consequence, were no longer a merely formal party. That defence they had failed in, after having examined witnesses to prove it. Their situation was therefore reduced to the ordinary case of Defendants failing in their defence, and they ought, consequent [566]-ly, to pay their fair proportion of the costs, or at least such costs as they had been the means of adding to the expenses of the suit.

On the part of the Defendant Clarkson it was urged that he would, *a fortiori*, be entitled to be paid his costs, as he was a party merely formal, and had been altogether passive in the course of the cause.

The Lord Chief Baron. I take it to be the clear Law of the Court, that generally speaking, a decree can only be made against the party liable to account; and an account can only be taken against the occupier; and there can consequently be no decree against any other person. It is difficult to say that any decree can be made against the owner of the estate: and the Court cannot give costs against a party against whom it can make no decree.

The Plaintiff's proper course, in the first instance, was to have confined his bill to the occupiers, and, in point of law, he could not insist on any other persons being made parties. It is, however, oftentimes very convenient for a Plaintiff, and sometimes even very necessary to have other parties before the Court*; and in this case it might have been difficult for the Plaintiff to have avoided making the Dean and Chapter and their lessees Defendants. There is, certainly, nothing litigious, as has been observed, in the de-[567]-fence set up by the Dean and Chapter: but they might have been told, that they made a defence which they could not succeed in. They relied on the argument and decree of the Court of Equity; and it is clear, that ever since Lord Northington's time, such a defence could not be sustained. The Plaintiff proceeded, notwithstanding, to a hearing of the cause, against the occupiers and the other parties, the Dean and Chapter insisting on a title to the tithes, or to some of them. They and their lessees, however, do not content themselves with merely putting in an answer insisting on their title, but they take part with the occupiers and mingle in the cause. They actually go into evidence in support of their case, and examine witnesses; and they thereby caused a very considerable increase of expense to the Plaintiff. If they had not done so, I might have thought that they were not liable to pay the Plaintiff's costs down to the hearing. Whether I should have given them costs is another matter.

* Vide *Petch v. Dalton*, ante, p. 12, S. P.

When the cause came to a hearing, it turned out to be one of very considerable difficulty, and it occupied a great portion of time. The Court then were of opinion, that the Plaintiff had not satisfactorily established his case: and being desirous that other evidence should be furnished, affording more satisfactory information than could be derived from depositions on paper, issues were directed. One was to try a modus set up by the occupiers of lands in Mepal, and in that the [568] Plaintiff failed: of course, therefore, he must pay the costs connected with that part of the cause. In two other issues, directed to try the moduses set up in Sutton, he also failed. The costs of those also must be paid by him. In all other respects, however, and in the most important issue, he succeeded; and if he is to pay the costs where he has failed, it is surely no more than just that he should receive costs where he has succeeded.

The difficulty of the case, and the length of time which it occupied, I must put out of the consideration; because the difficulty did not arise from the principles of the decree, but from the facts of the case.

The Dean and Chapter having made themselves efficient parties, and having taken an active part in the defence, by which they augmented the expences of the suit, it seems to me to be just that they should pay all the costs incurred before the hearing, which were occasioned by their examination of witnesses. That examination was altogether unnecessary. They might have done without it: but having taken that course, it is but reasonable, I think, that they should pay the costs. I shall therefore order that the Dean and Chapter pay the costs of the interrogatories and depositions under the commissions issued by them for the examination of witnesses in this cause.

After the hearing, the Dean and Chapter still [569] proceeding, accepted an issue, and they certainly were not bound to do so. They therefore acted voluntarily in so doing. They put the Plaintiff to further litigation by that step; and, the parties having gone to law, costs must be paid to him who succeeded. The Dean and Chapter failed: they must therefore pay to the Plaintiff the costs of the trial of the issue—that is, all the costs incurred after the hearing.

The occupiers stand in the common case of occupiers. They do not dispute whether one or the other of them are liable. They only say, the Plaintiff is not entitled to costs. In this case the Dean and Chapter are identified with the occupiers: they are all as one person in many respects. The only distinction is, the Plaintiff must have his costs as against the occupiers from the beginning, and as against the Dean and Chapter as I have already pointed out.

With respect to the Defendant Clarkson, as he has not examined any witnesses, and as there was no absolute necessity for making him a party, because the Plaintiff might have gone on without making him a Defendant, his costs must be paid by the Plaintiff. I do not, however, mean to say, that any blame attaches to the Plaintiff for having, out of abundant caution, perhaps, made him a Defendant: but, as I can make no decree against him, the Plaintiff must pay him his costs (*vide Petch v. Dalton*, ub. sup.).

The Bishop of Bath and Wells, and the other [570] lessees, are in *pari casu* with the Dean and Chapter, inasmuch as they have occasioned costs to be incurred, by the examination of witnesses, and those they must also be decreed to pay to the Plaintiff. Had they not occasioned any such expense they would have been in the same situation with Clarkson.

Dowdeswell, at the conclusion of the Lord Chief Baron's judgment, applied, on the part of Clarkson, that directions might be given in the order to be drawn up for taxing the costs that they should be paid to him as between attorney and client; but

The Chief Baron observed, that it was an invariable rule in this Court never to make any such order. He said, he was aware that the Lord Chancellor does sometimes so order, but that it was what he never should do, as he much approved of the different practice of this Court in that respect, from experience of the evils attending the present course in the Court of Chancery.

The following decree was afterwards drawn up. The bill to be dismissed, with costs, as against Defendant Clarkson to be taxed by the Deputy Remembrancer, and paid by the Plaintiff.

It was also ordered to be referred to the Deputy Remembrancer to tax the Plaintiff's costs to the hearing, and he was to distinguish what costs had been incurred by the Plaintiff for interrogatories, depositions, and otherwise occasioned by the com-

[571]-missions issued by the Defendants the Dean and Chapter of Ely, for the examination of witnesses in this cause: and that such costs be paid by the said Dean and Chapter to the Plaintiff.

And the Deputy Remembrancer was also ordered to distinguish what costs, if any, had been in like manner incurred by the Plaintiff in the executing a commission for the examination of witnesses on the part of the Defendants the Bishop of Bath and Wells, and the other Defendants the lessees of the Dean and Chapter of Ely, who were to pay the Plaintiff such costs. And the remainder of the Plaintiff's costs, when taxed as aforesaid, to be paid by the Defendants T. Newitt the younger, and William Cole, P. Cawthorne, W. Cawthorne the younger, and T. Maylin, (the occupiers) to the Plaintiff. And it was referred to the Deputy Remembrancer to tax the Plaintiff's costs of the trial of the issues at law in which he succeeded against the Defendant the Dean and Chapter of Ely, and of the subsequent proceedings thereon to be paid by Defendant the Dean and Chapter of Ely. And he was also to tax the Defendants (the occupiers) their costs of the suit, as to the tithes demanded in kind of the titheable matters covered by the moduses, in respect of which issues had been directed, and which the Plaintiff had declined trying, to be paid to the Defendants' Clerk in Court.

The Deputy Remembrancer to tax the Plaintiff his subsequent costs of the suit to be paid by all the Defendants, except the Defendant Clarkson.

[572] Nov. 21.—Boteler now moved, on the part of the several Defendants the occupiers, pursuant to notice, that one of the Masters should review the taxation of the Plaintiff's costs in this cause, and tax off all such costs as were allowed the Plaintiff as against the Dean and Chapter of Ely, in respect of their separate defence, and that the Defendants the occupiers might be allowed such costs, to be added to their costs when taxed.

Jervis appeared for the Plaintiff, and

Clarke, for the Defendants the Dean and Chapter of Ely, to oppose the motion, which

The Court refused, with Costs.

FOREMAN AND HATCH, Assignees of Wright (a Bankrupt), Lessee of Vicarial Tithes, *v.* SOUTHWOOD. SAME PLAINTIFFS *v.* OTHER DIFFERENT DEFENDANTS IN FIVE OTHER SUITS *. Saturday, 25th Nov. 1820.—After a decree had been obtained by the Plaintiff in a suit for tithes, of which he was lessee, and whilst an appeal from the judgment was pending in the House of Lords, the assignees of the Plaintiff, who had in the mean time become bankrupt, filed six different bills against six different Defendants to the former suit, for an account of tithes, the Court refused a motion to consolidate the causes: nor would they order that the proceedings in all the suits but one should be stayed, that all might be determined by the decision in that one.

Jervis moved that the above suits might be consolidated and considered as one suit, and that [573] the Defendants might be at liberty to put in a joint and several answer thereto.

This motion was made on an affidavit of one of the Defendants, stating that the bankrupt, as lessee of the vicar of Pitminster (Somerset), Michaelmas Term, 54 Geo. 3, filed one bill against all the Defendants, (occupiers of lands in the parish) except one, for the tithes. The Defendants answered, and witnesses having been examined, the cause was heard, and an account decreed. The Defendants, conceiving that they were entitled to an issue to try the moduses set up by them, appealed to the House of Lords, which was then pending. The Deputy Remembrancer afterwards made his report, which was confirmed.

The affidavit then stated that the present Plaintiffs (who were, on the bankruptcy of Wright, made Plaintiffs in the original cause as his assignees, before the cause came on to be heard) after the decree had been pronounced, filed these six several bills, praying the same accounts as had been prayed against them in the first single bill—and that the Plaintiffs had instituted many other suits against other occupiers, and it

* Vide *Foreman v. Blake*, ante, vol. vii. p. 654.

concluded by the Deponent expressing his belief that such suits were unnecessarily multiplied for the sole purpose of causing the Defendants vexation and expense.

It was urged that, under the circumstances of this case, the application was fair and reasonable, [574] and ought to be granted, on the principle on which the practice was now universally adopted in the Courts of Law, of consolidating actions in all cases where it appeared that the whole question between the parties might be disposed of in one suit, whereby expense and trouble might be saved on all sides. And he submitted, that in this case, the application was free from any objection which might be urged in the case of a common suit for tithes immediately between the clergyman and occupiers, as the Plaintiffs were merely the assignees of a bankrupt who was lessee of the vicar to whom the tithes belonged: and it was a simple question of right between the parties which only awaited the determination of the appeal.

Martin opposed the motion, submitting that there was no analogy between cases of suits for tithes and actions at law. He contended, that on every principle, the present Plaintiffs were to be considered as standing in the situation of the vicar, and insisting on his rights. An insuperable objection to this motion was, that the effect of it would be to enable a whole parish to combine successfully against the parson, so as to oppress and harass him in pursuing his legal remedy, by placing him under many disadvantages. He also urged, that by a consolidation the Plaintiff would be tied down to proceed with the suit at the risk of costs, when it may happen that he might find, with respect to some of the Defendants, that the suit ought to be stopped: and [575] it was impossible to say that the defences would be the same. Some of the Defendants, too, might be disposed to submit and settle with the Plaintiff without further litigation, and some might have a good defence whilst others may not.

He cited a case of *Ducies v. Mosely*, wherein a similar application was made to this Court in May last, which was refused with costs: and he stated that another motion of the same kind had been made in the original suit in this case, and refused*.

THE LORD CHIEF BARON (with whom Graham and Garrow, Barons, concurred) adopting the argument pressed in opposing the motion, declared it to be his decided opinion that there could be no ground stated on which this sort of application, which was unprecedented in a Court of Equity, could be sustained.

WOOD, Baron, on the contrary, expressed a strong conviction that this was a very proper application, and made in a case which fully authorized it, and therefore it ought to be granted. His Lordship said, there was no reason on which the practice in the Courts of Law had been founded which would not apply to suits of this nature, and the objections, if there were any, to the practice in Courts of Equity might be urged against it in Courts of Law. If the suits could [576] not be consolidated, at least there could be no objection to staying the proceedings in all but one, the decree in which might bind the whole. The greatest advantages to all parties had been found to result from such a practice in cases of actions upon policies against several underwriters, which had been introduced with so much success by Lord Mansfield, whereby all the expense and delay of multiplicity of suits were avoided. Courts of Equity, in adopting a similar practice, might, as the Courts of Law were in the habit of doing, oblige Defendants who came to make the application, to submit to any reasonable terms which might tend to facilitate the enquiry into the justice of the case.

Motion refused, without Costs.

LAKEMAN v. M'ADAM. 18th Nov. 1820.—An extent at the suit of the Crown against the debtor of its debtor has not, before inquisition taken, the effect of divesting the Crown-debtor's right to sue his debtor, or to receive the debt.—An action, commenced after an extent issued against the debtor of a Crown-debtor, but before the taking of an inquisition under it—and proceeded in by the assignees of the Plaintiff (who had in the mean time become bankrupt) in his name, after inquisition taken and the debt so sued for had been seized under it into the hands of the Crown, and an amoveas manus issued, on the application of the bankrupt after issue joined: Held, to have been well proceeded in; and the Court discharged a rule for setting aside the verdict obtained and entering a nonsuit,

* Vide *Foreman v. Blake*, ante, vol. vii. p. 654.

which had been granted on the ground that the Plaintiff had no right to continue the suit under such circumstances.

The Plaintiff had obtained a verdict against the Defendant at the last assizes for the county of Lancaster, for 300l., in an action for money had and received.

The cause was tried before Mr. Justice Parke, and the objections now made were taken at the [577] trial, but were over-ruled, with leave to move for a nonsuit.

Littledale, in the early part of this Term, obtained a rule to shew cause why that verdict should not be set aside, and a nonsuit entered, on the following facts:—The action was commenced on the 9th of December, 1816, when the Defendant was arrested at the Plaintiff's suit, on process returnable on the first of Hilary Term. By an inquisition taken under an extent against Bruce and Co., one Ikin was found indebted to them; and, by an inquisition taken on the extent which issued thereupon against him, on the 25th of September, 1816, the Plaintiff was found to be indebted to him, and an extent issued against the Plaintiff on the same day. By an inquisition taken on that extent on the 23d of January, 1817, the Defendant was found to be indebted to the Plaintiff in the sum of 300l. for so much money had and received to his use, and that debt was seized into the King's hands. On the 25th of April, 1820, a rule, obtained by the Plaintiff for an *amoveas manus*, was made absolute, on an affidavit filed the 11th of February, 1820, stating that the debt found to be due from him (Lakeman) to Ikin, was due from him as the acceptor of a bill of exchange, which had been since paid by the drawer, and that the assignees of the Plaintiff, who had at that time become a bankrupt, under a commission dated the 2d of August, 1817, and his estate assigned 20th Sept. following, were then proceeding in this action, in his name, against the [578] Defendant; and the Sheriff of Lancashire returned that he had restored the possession of the said debt to the Plaintiff.

On these facts it was submitted that the debt belonged to the Crown when the action was brought—that the *amoveas manus* should have been applied for by the assignees of the Plaintiff, as the debt ought to have been restored to his assignees—and that the Plaintiff ought to have discontinued after the *amoveas manus* had been obtained, if by that proceeding the debt was restored to the Plaintiff; and he should have brought a new action, because, when the present action was commenced, he had a right to sue.

23d Nov.—Tindal now shewed cause*. He contended that the extent had not the effect of divesting the right of the Plaintiff to sue for the debt due to him from the Defendant, and that it did not vest in the Crown from the teste of the extent, nor until after it had been found by inquisition; and, in this case, that was subsequent to the commencement of the action. The inquisition is in its nature an inquest of office, founded on the old legal notion of assigning debts to the Crown, which, in modern times, has given way to seizure under the inquisition—Gilbert's Treatise on the Exchequer, p. 167. He admitted that although the debt might be bound, for many purposes, from the teste of the extent, it is not transferred [579] or assigned to the Crown till the day of taking the inquisition; and even then the creditor's right is only suspended, but not extinguished.

He also submitted, that if there were any thing in the objection, it ought to have been pleaded in bar of the further maintenance of the action, as was done in the case of a Plaintiff becoming alien enemy after action brought, because it is in the nature of a plea *puis darrein continuance*—*Le Bre v. Papillon* (4 East, 502), and thus, one technical objection would be answered by another.

If, however, notwithstanding what had been urged, the Court should be of opinion that the right to sue was taken out of the Plaintiff, the *amoveas manus* must be considered to have restored him to his original right of action: for the effect of that was to re-vest that right, if it had ever been divested. But that it had not was clear from the effect of the *amoveas manus*, which alone operated to remove the Plaintiff's liability without requiring any re-assignment of the debt, and, had it been transferred, that would have been absolutely necessary. After that proceeding, therefore, the parties were placed again in the same situation as if no extent had been issued.

He ultimately adverted to the statute of the 57th of Geo III c. 117, s. 3, which,

* The objection that the *amoveas manus* should have been applied for in the name of the assignees was given up.

he submitted, had provided that the rights of creditors should not be prejudiced by the seizure of debts [580] into the hands of the Crown, reserving to parties all their remedies as if the Crown process had never interfered.

Littledale, in support of the rule, submitted that it was not necessary in an extent to have an inquisition in order to vest the debt in the Crown. The object of the inquisition is to find the debt merely, and, when found, it is bound, by relation, from the teste of the extent, which is the award of execution, and, in respect of chattels personal, binds them, into whatsoever hands they shall afterwards come—*Vin Abr. Prerog. of the King (D.)*, pl. 4. Debts are personal chattels—2 *Roll. Abr.* 157; and are bound from the teste of the extent. *The Queen v. Arnold* (7 *Vin. Abr.* 104). If so, the seizure could not be pleaded as matter puis darrein continuance.

As to the amoveas manus having restored the parties to their original situation, he contended that it had not that effect in this instance at least, because it had not issued till after the cause was at issue; and the Defendant having in the mean time become bankrupt, the debt was restored to his assignees, and not to him, and it vested in them. If the Defendant had pleaded the extent, the Plaintiff could not have replied the amoveas manus, because it was not then in existence: or if he had applied to withdraw his replication for the purpose of replying the new matter, that would have been liable to the objection [581] that it was a replication by a Plaintiff of matter puis darrein continuance, which would have been bad, because the use and object of pleas puis darrein continuance is to stop the Plaintiff from proceeding further, and not to enable him to go on. His only course, therefore, would have been to have discontinued, and brought a fresh action. He should have began de novo, and that is what he may still do; so that he is not without remedy if he proceed in the proper manner.

The Court intimated at the close of the argument that they considered this to be a question which required much attention, and therefore they deferred their decision.

Adv. vult.

The Court this day discharged the rule. They did not state any reasons for so determining. From what fell from the Court in the course of the argument, however, they appeared to consider that the extent did not operate to divest the right of the Crown-debtor, or so to transfer the debts due to him as to disable him from suing his debtors to recover his debts: and that if they were paid bona fide, without collusion, between the teste of the extent and the day of taking the inquisition, such payments would be good as against the Crown. They observed that the extent and inquisition operated rather to give the Crown a lien on the debts due to its debtor than to divest the debt, or deprive [582] him of his right to sue, being analogous in effect, when perfected by the taking of an inquisition, with the old writ of protection, by which the debts due to Crown debtors were secured to satisfy the Crown.

JARROLD v. ROWE. 27th Nov. 1820.—The Court refused an application for a rule to compute interest and costs on a sum recovered by verdict, up to a given period, during which the plaintiff had been delayed, by every possible expedient and proceeding, for two years and a half, made on an affidavit, stating the circumstances, and which made out, certainly, a case of unparalleled delay and vexation, by which the Plaintiff was put to an expense in costs of upwards of 1000*l.* in an ordinary case of an action on bills of exchange.

Littledale moved for a rule to shew cause why it should not be referred to the Master to compute interest on the Plaintiff's debt from the 26th of May, 1818—up to which time the Jury had computed interest on the trial of this cause, and assessed damages, including such interest—and to enquire the amount of the money recovered against the Defendant's Bail in an action on their recognizance, over and above the costs of the action against the principal: and why the Plaintiff should not be at liberty to issue execution against the Defendant, and to levy what should be found due to the Plaintiff on the judgment recovered (after deducting the money recovered against the Defendant's bail &c.) and to levy the sum adjudged to the Plaintiff, sec. stat., for his damages, costs, and charges, sustained and expended by reason of the delay of the execution of the judgment, on pretence of the prosecution of the writ of error—on the ground of various dilatory and vexatious proceedings taken for the purpose of delay.

[583] The application was founded on an affidavit, detailing, at great length an unprecedented series of proceedings taken on the part of the Defendant both at law and in equity, tending to delay the Plaintiff, and suspend the judgment originally recovered by him in an action on three bills of exchange. It stated that, in consequence of a proposed arrangement for forbearance being broken off, Plaintiff commenced the suit—that Defendant put in special bail, and pleaded five sham pleas—that after an unsuccessful attempt to put off the trial, the cause was tried in May, 1818, when the Plaintiff recovered a verdict for 1298*l.*, the amount of the bills, with interest—that since that time all kinds of subterfuge had been resorted to, to defeat the Plaintiff, by which he was delayed two years and a half. A bill in Equity had been filed for an injunction, and writs of error were brought in the Exchequer Chamber and in Parliament, both on the judgment in the original action and that in the action against the bail, which latter was defended (by the Plaintiff in substance) for the purpose of delay; and the money being at last paid into the hands of the Sheriff of Devon by the bail, the Defendant served a notice on him, requiring him not to pay it over to the Plaintiff, as the Defendant meant to move to set aside the execution, and to apply to the Court of Chancery for an order to have the money paid into Court, to abide the event of the suit there—that no such motion or application had been made, and (the Sheriff being ruled to return the writ) it had been at length paid over to the Plaintiff's Clerk in Court.

[584] The affidavit concluded by stating that the Plaintiff had, in consequence of such proceedings, been put to an expense in costs of upwards of 1000*l.*, being 300*l.* and upwards beyond the amount of the probable allowance to him of costs on the taxation, and that the costs occasioned by the Defendant's writ of error in the Exchequer Chamber were still unpaid.

It was admitted that the application was novel in practice, but it was submitted to be reasonable and just under the extraordinary circumstances disclosed in the affidavit on which it was founded.

The Court, however, refused the motion.

BENINGFIELD v. STRATFORD. Tuesday, Nov. 27 1820. This Court will remove an action brought in another Court against an officer of excise for refusing to accept the duty on goods warehoused, and to grant the usual certificate, whereby &c. (suggesting loss), where part of the goods having been afterwards seized, an information for their condemnation is depending in the Court of Exchequer. And they will order the trial of the action removed to wait the result of the trial of the information.

The Plaintiff, who was a tobacco manufacturer, had brought an action in the Court of King's Bench (of which he had given notice the 30th of August) against the Defendant, the collector of excise for the port of London, for having refused to sign two certificates of the payment of the excise duty due upon the delivery, for home trade consumption or manufacture, of two several quantities of tobacco, the property of the Plaintiff, the full amount of the duty (1*s.* per pound) being alleged to have been tendered in the month [585] of July, after having been weighed by the proper officer; by means whereof the Plaintiff had been prevented from obtaining the delivery of the tobacco from the warehouses of the London Dock Company, and had in consequence sustained great loss, by being thereby hindered from selling the goods.

Walton now moved (on notice) that the action might be removed into this Court, to await the trial of the issue of an information depending therein for the condemnation of one of the quantities of tobacco, touching the seizure and non-delivery of which the said action had been brought. The motion was founded upon an affidavit, stating that the Defendant had refused to take the duties tendered, and to sign the required certificates, because a large part of the tobacco had been seized, in the month of September, by an officer of excise as forfeited, and that the seizure had been, in the present Term, returned into this Court in a certain writ and indenture of appraisement, for condemnation, and a claim had been entered in the Plaintiff's name. He submitted that this was, under the circumstances, an action, the subject matter of which concerns the King's revenue; and therefore he was entitled, on the authority of the case of *Cuthorne v. Campbell* (1 Anstr. 205), to the order prayed for the removal of the cause into this Court. In this action the questions would be of the growth of what country

the tobacco was? and what was the amount [586] of the duty chargeable? It was stated that a similar application had been granted by this Court in Michaelmas Term, 1818, having been unsuccessfully opposed by the Common Serjeant.

Jervis, on the part of the Plaintiff, opposed the motion. He admitted the principle generally, that the Court might remove actions which concern the revenue or touch the profit of the King; but he insisted that, in the present case, this was not such a matter, and therefore not properly and exclusively cognizable in this Court. This was an action for refusing to take the duties tendered merely. It has nothing to do with the seizure, which is a distinct and independent question; and, in fact, when the Plaintiff's cause of action accrued the seizure had not been made, nor indeed till after the action was brought.

[The Court suggested that a higher duty may have been due than that tendered.]

In that case the Plaintiff would be nonsuited; and, with respect to a large proportion of the tobacco, there had been no seizure; and the Court will not remove the cause where a part of the subject-matter of the action is compounded of goods actually condemned and of goods not seizable. *Barkley and Another v. Walters* (Bamb. 306).

He also objected to that part of the application which prayed that the cause might be ordered to [587] abide the event of the pending information, as operating to delay the Plaintiff.

Walton, about to reply, was stopped by

The Court, who granted the order, observing, that there could be no doubt about the propriety of the application.

THE KING v. JOHN VILLERS. 28th Nov. 1820. —Sheriffs are not entitled to poundage on money seized in the Crown-debtor's possession, under an extent against him:—Nor on money paid by the Sureties of a Crown debtor who has been arrested on the Crown-process, in order to obtain the release of his person.—Sheriffs have no authority, under the extent, as Sheriffs, to collect debts due to the Crown-debtor; and if they receive such debts, they cannot make it the ground of a charge for poundage on the amount.

[For further proceedings see 1823, 11 Price, 575; Wight. 95.]

[In a Matter of Stamps—on several Writs of Immediate Extent.]

The subject-matter of this case was the amount of a claim of poundage, and for extra expences set up by the Sheriffs of Coventry, on a levy made and money received by them under certain writs of extent, issued against the Defendant, a distributor of stamps, for a debt due to the Crown.

The Defendant J. Villers had been for many years, previous to the year 1806, distributor of stamps for the county of Warwick and city of Coventry. In the month of April in that year these extents were issued against him, for an alleged debt of 29,000*l.*, and upwards. The real balance found due to the Crown, on a return of stamps, was 13,671*l.* 5*s.* 5*d.* The levies were made [588] under the circumstances stated below in the report of the Deputy Remembrancer, to whom, after many applications to the Court on the several claims, it was ultimately referred, to take an account of the debt due to the Crown at the time of issuing the extents, and of all the money levied and raised under them, and its application, and to take an account of the sum of 5000*l.* deposited with the Receiver General of Stamps by William Villers and William Belcher, the Defendant's sureties, on account of the debt due to the Crown, and of the interest and accumulations, and the application thereof. And the Deputy Remembrancer was further ordered to state to the Court the different dates of the receipts and payments of the Sheriffs of Coventry, as well under the process against the Defendant as under other writs of extent and venditioni exponas issued against other persons implicated in those proceedings, and to ascertain the Sheriff's poundage on executing the said writs of extent, or any process under the same.

The Deputy Remembrancer, accordingly, by his report (dated the 8th of July, 1820), found that there was due to the Crown from the Defendant the sum of 13,809*l.* 8*s.* 8*d.*, and that the whole of that debt had been paid in the manner mentioned in the first schedule annexed to his report.

That the Sheriffs of Coventry had, under the writs of extent, taken the body of the

Defendant, and kept him in custody, and had seized various [589] freehold and leasehold estates, notes, bills, monies numbered, and other property belonging to the Defendant of considerable value; and that they had also returned upon the inquisition debts due to the Defendant to a large amount.

He also found that, upon the arrest of the Defendant and seizure of his property, the Defendant's sureties, W. Villers and Belcher, applied to the Commissioners of Stamps to obtain the Defendant's discharge out of custody, to which the Commissioners consented, on the sureties depositing with them a sum of 5000*l.* of their own monies, to be laid out in Exchequer bills, to indemnify the Crown against any deficiency, according to the terms and conditions of a written agreement, the substance of which was—that that sum should be deposited to secure to the Crown any deficiency that should appear on the sale of the Defendant's effects, to satisfy the Crown's debt out of the produce the 5000*l.* to be laid out in Exchequer bills—and at the expiration of twelve months from the date of the venditioni exponas, or before, as soon as the Defendant's effects should be converted into money, the 5000*l.*, or a sufficient part thereof, to be applied to supply the deficiency, and pay what should be then found remaining due to the Crown on the said debt, the surplus to be returned to the sureties.

That the 5000*l.* was accordingly paid on the 2d of May, 1806, into the hands of the Receiver [590] General of Stamps, in Exchequer bills, and the Defendant was the next day discharged out of custody by supersedeas.

He further found, that the Sheriffs of Coventry, before they had made any return to the writs of extent, and without process, or any authority from the Court of Exchequer, but in conformity with a letter* addressed to the Undersheriff by Edward Estcourt, esq. the then solicitor for the Stamp Duties, dated the 18th of April, 1806, applied to various debtors of the Defendant, residing in the counties of Warwick, Somerset, Northampton, Worcester, Stafford, and elsewhere, out of the jurisdiction of the Sheriff of Coventry, and received debts due to the Defendant from such debtors to the amount of 2700*l.*; and that they had obtained payment of other debts due to the Defendant from persons residing within their [591] bailiwick to the amount of 2000*l.* and upwards, in the whole 4830*l.* 11*s.* 7½*d.*

That, under the writ of venditioni exponas afterwards issued, the Sheriffs had levied, previous to December, 1808, 9604*l.* 3*s.* 7½*d.*; and that they had, out of that sum, paid and applied, in part satisfaction of the said extents, and had retained for their extra costs and expenses in the execution thereof, as allowed pursuant to an award made in this cause on the 10th of July, 1818, and for their poundage, the sums mentioned in the third schedule to the report, amounting in all to the sum of 8314*l.* 2*s.* 4*d.*, which, deducted from the said sum of 9604*l.* 3*s.* 7½*d.*, left a balance in the Sheriff's hands, in respect of the monies so received by them, of 1290*l.* 1*s.* 3*d.*

He also found, that the said sum of 5000*l.* had been deposited with the Receiver General in Exchequer bills, which were renewed from time to time as former bills were paid off.

That the accumulations accruing thereon by interest amounted, on the 8th day of August, 1810, to 1070*l.* 19*s.* 9*d.*, making together 6070*l.* 19*s.* 9*d.*; and that, on the same day, the Commissioners returned to the sureties 4000*l.* in Exchequer bills, leaving in the hands of the Receiver General 2070*l.* 12*s.* 9*d.*, which, by accumulation, amounted on the 5th of March, 1813, to the sum of 2315*l.* 13*s.* 3*d.*, part of which (2128*l.* 1*s.* 8*d.*) the Commissioners on that day appropriated, being the amount of the balance [592] due to the Crown; and that the remainder, with subsequent accumula-

* That letter was in the following terms, stating the extent of the power given by the Solicitor of the Stamp Duties, and his authority for so doing. It is transcribed here because it will be found to have produced some animalversion from the Court:—

"I have received your letter of the 17th instant, and I have communicated the contents to the Commissioners of this revenue, who desire me to inform you, that they see no objection whatsoever for your receiving any of the debts due to Mr. Villers, when the balance is clear and not disputed by him, but not otherwise, previous to your taking the inquisition; and you will of course state in your return to the writ the several sums so received. If you should find it necessary to have further time, there seems no objection to enlarging the return of the writ for a short period: and, in that case, you will have the goodness to send the writs to me for that purpose."

tions to the 23d of September, 1818, left on that day in the hands of the Receiver General, 228l. 17s. 6d.

He finally found, that he had taxed the costs of the Crown, amounting to 1868l. 5s. 6d., at 513l. 0s. 4d.—that he found the poundage of the Sheriffs, on executing the said writs of extent, and all process thereon, amounted in the whole to 209l. 7s. 10d., and which had been retained by them out of the 9604l. 3s. 7d. received by them, as stated in the third schedule, in which schedule he had distinguished in respect of what particular sums he had allowed such poundage.

The three schedules referred to were annexed to the report.

The first contained an account of monies paid in satisfaction of the debt due to the Crown, and was as follows:—

Paid by W. Villers, the Receiver appointed by the Court, to the Receiver General of Stamp Duties	£	s.	d.
	2,765	1	4
Paid by the Deputy Remembrancer, pursuant to orders in the cause, the produce of freehold property sold under the extents	589	5	7
Poundage and other allowances to Defendant by the Commissioners on his debt	618	0	1
Paid to the Receiver-General by the Sheriffs	7,700	0	0
Paid by the Receiver-General out of the produce of the Exchequer bills mentioned in the Report	2,128	1	8
	<u>£13,800</u>	<u>8</u>	<u>8</u>

[593] The second schedule contained an account of the sums received by the Sheriffs under the writs of extent, as stated in the report, amounting to 9604l. 3s. 7½d., on some of which poundage had been allowed as in schedule 3, and on others not as in the exceptions.

The third schedule contained the account of the several sums paid and applied by the Sheriffs out of the 9604l. 3s. 7½d. received by them, distinguishing the particular sums in respect whereof they had retained and been allowed poundage, as follows:—

Paid Receiver-General of Stamps by various drafts, amounting together to	£	s.	d.
	7,700	0	0
Retained by the Sheriffs for extra costs and expences, as awarded to them pursuant to order of 24th of April, 1818	404	14	6
Poundage on the following sums, at 1s. 6d. in the pound for the first 100l., and 1s. for the residue:—			

Sums received on which the Sheriff held to be entitled to poundage.	On amount of produce of sale of household furniture and other like effects	£	s.	d.
		1,137	15	6½
	On amount of sale of wines, &c. in trade	1,713	11	10½
	From sale of leasehold at Keresley	215	0	0
	The like of a field	2	2	0
	„ of a close	12	12	0
	„ of stamp office	14	14	0
	„ of vaults	80	0	0
	„ of coach house and stable	16	0	0
	„ contingent interest of Mr. Villers', under Mr. Belcher's will	350	0	0
	[594] From sale of the Wyrly and Essington canal shares	276	0	0
	„ „ Grand Junction canal shares	118	3	0
	„ „ Union canal shares	72	1	0
	„ „ Crinan canal shares	11	0	0
	Amount of goods and effects of Joseph and Enelisha West, sold under writ of extent	118	18	6
		<u>£4,137</u>	<u>17</u>	<u>11</u>
			— 209	7 10
			<u>£8,314</u>	<u>2</u> <u>1</u>

To that report the Sheriffs of Coventry filed the following exceptions:—

For that the Deputy Remembrancer had allowed to the said Sheriffs the sum of £209l. 7s. 10d. for poundage only on the several sums hereinafter mentioned, viz. &c. (stating the particulars and sums as set forth above, in that part of the third schedule which distinguishes the sums on which poundage was allowed) amounting to the sum of 4137l. 17s. 11d.

Whereas the said late Sheriffs claim to be also entitled to poundage on the several sums hereinafter mentioned:—viz.

	£	s.	d.	
1st.—On monies found, seized, and extended in the hands and possession of the Defendant, under the said writs of extent, and received, paid, and accounted for by the said late Sheriffs, amounting to the sum of	250	5	4½	
[595] 2d.—On the amount of notes and bills found in the hands and possession of the Defendant, and extended and received by the said late Sheriffs, and accounted for under the said writs of extent	281	0	9	
3d.—On the amount of the produce of two notes in the hands of the Defendant, seized under the extent, and received by the said Sheriffs in part satisfaction of debts, before the return of the said writs of extent, and accounted for by the said Sheriffs under the said writs of extent	50	1	1	Sums produced by means, held not to give the Sheriff a right to poundage.
4th.—On the amount of debts extended and received by the said late Sheriffs, and accounted for and paid under the said writs of extent	4,807	7	3½	
5th.—On the amount of rents extended and received by the Sheriffs, and accounted for and paid under the said writs of extent	22	4	9	
6th.—On the amount of 5000l. paid by William Villers and William Belcher, the sureties of the Defendant, in order to obtain the liberation of his person from the custody of the said Sheriffs, under the said writs of extent	5,000	0	0	
7th.—On the amount of monies received by the Sheriffs of Thomas Sharpe, for stamps on certain hat linings, and paid and accounted for under the said writs of extent	18	4	6	
8th.—On the amount of debts due to the Defendant, and extended by the said late Sheriffs, under the said writs of extent	3,402	0	6	

In all which particulars &c.

Saturday, 18th Nov.—The exceptions now came on for argument.

[596] Hullock, Serjeant, Tindal, and Parke, in support of the exceptions, insisted that the Deputy Remembrancer had not done right in confining the allowance of the Sheriffs' poundage to the amount of the produce of the effects seized, and which had been sold; and in rejecting the claim of poundage on the sums received and accounted for and paid by the Sheriffs under the writs of extent, and which were the subject-matters of these exceptions to his report: and that, in rejecting the Sheriffs' claim, he had proceeded on a mistake of the legal principle on which their right was founded.

They submitted, that the Sheriffs were entitled to poundage on all the money which had been collected by virtue of the process, and whilst it was in force, and even for that which had come to the Sheriffs' hands in consequence of the extent being issued, although paid to him through the medium of a Receiver appointed by the Court, if paid under coercion of the process.

Taking the sixth exception first, they contended that Villers, having been in custody for some time under the writ, during all which time the Sheriffs were responsible for his safe keeping, as soon as the 5000l. was paid for his liberation, as found by the Deputy Remembrancer's report, the Sheriffs became entitled to poundage on that sum, as so much money levied in discharge of the Crown's debt; and that their right then vested, and could not be displaced by the appointment of a Receiver,

or any other act of the parties, or of any [597] other person. The money was paid in consequence of the arrest of the person of the Defendant, founded on and by virtue of the process, and was therefore raised by virtue of the execution by the Sheriff of the writ of extent.

Having adverted to the terms of the statute 3d Geo. I. c. 15, s. 3, giving Sheriffs a poundage on all monies by them "levied or collected," they cited the case of *The King v. Jetherell* (Park. 177), and *Sir Daniel Norton's case* (Lane, 74), as determining that money paid under such circumstances is to be considered as levied or collected within the words of the act, and that the Sheriff is entitled to poundage thereon. They cited the case of *The King v. Burrell* (Punb. 305), as deciding that the Sheriff may retain his poundage where any should be due,—and *The King v. Barber* (3 Anstr. 717), and *The King v. Fry*, in the note to that case (ib. page 718), where it was held, that the Sheriff having seized goods was entitled to poundage on the money being paid by compulsion of the levy; although before a venditioni exponas was issued; and although it were not paid to the Sheriff, but to the Receiver General. In those cases the words of the statute were construed liberally, the Court there giving the Sheriff the benefit of the distinction observed by the Legislature between the terms "levying" and "collecting," treating the latter as introduced to give the Sheriff for his encouragement in exe-[598]-cuting his duty, the poundage, where he should by any means after entering on the execution of the process, collect the money which he was thereby directed to levy, lest, by any strict interpretation of that last word, he might be considered tied to the letter, and not entitled but in cases where he had levied in the confined technical sense of the term. They urged, however, that the term "levy" was not really so confined in its meaning as it would probably be contended to be.

The Legislature, they observed, had, in the various statutes passed on the subject of Sheriffs' duties, and their remuneration by allowance of poundage, had made no distinction between common and Crown cases, except in the 7th of Geo. III. c. 29, which recites and explains the 29th of Eliz. in respect of proceedings by Sheriffs in their own names where they are merely trustees for the Crown; and that there was a distinction in favour of the present claim, in this, that where the person of the debtor is taken at the suit of the Crown, it is considered a satisfaction of the debt; but it is not so in the case of the Crown. In common cases, if the money to be levied were paid to the Sheriff, or if he had seized the debtor's goods, and a compromise were afterwards effected, he was still entitled to poundage; *Alchin v. Wells* (a); and that even where the execution has been afterwards set aside for irregularity; [599] *Bullen v. Ansley* (6 Esp. N. P. C. 111). *Rawstorne v. Wilkinson* (4 M. & Sel. 256). When the Sheriff has completed his levy, he becomes absolutely entitled to poundage, and no transactions between other persons can affect him—*Ibb v. Caldwell* (1 Anstr. 279). Applying these principles to the various exceptions, they insisted that, if the decisions cited were law, the exceptions must be allowed. The subject-matter of the first exception they urged as one on which poundage might be claimed; because money might be seized under an extent; for by the writ, the Sheriff is ordered to seize all sums of money belonging to the Defendant. At all events, it can form no ground of objection in this case, that there could be no sale of money: for by the terms of the writ, the Sheriff could do no more than seize such property as he might find.

As to the second, third, fourth, fifth and eighth exceptions also, they contended, that in this case, where neither the Crown nor the Defendant, nor the parties to the bills &c. raised any objection, the Sheriff was entitled also to poundage; for although it was not within the scope of his duty to convert the bills and notes into cash, or to receive the rents of debts, yet it was within his authority to do so as matter of arrangement; and having done so, as it was for the benefit of the Crown certainly, and probably for the other parties also, he was therefore entitled to poundage. The process, the *finis et fructus* of which ought to be [600] the criterion of the Sheriff's duty and remuneration, had been rendered more efficacious by his so doing, and his own trouble and risk had been increased.

The seventh exception was not much pressed, as well on account of the smallness of the sum, as the greater degree of doubt admitted to exist with respect to that charge.

Jervis, *contra*, contended, that the Sheriff was not entitled to poundage on any of

(a) 5 Term Rep. 170, and vide *Edmonds v. Watson*, 7 Taunt. 5, and 2 Marsh. 330 S. C.

the sums specified in the exceptions, as having been disallowed by the Deputy Remembrancer.

The Sheriff's right to poundage arose on the statute 3 Geo. I. ch. 15, and was expressly given to him in consideration of his care, pains, and charges in the execution of the Crown process: and the risk which had been so much relied on formed no part of the consideration in the contemplation of the Legislature; and for that reason it is that the Sheriff is not entitled to poundage on the arrest. As to the sixth exception, therefore, he contended that money paid by the surety to release the person of the principal, afforded the Sheriff no claim for poundage. It might, perhaps, have been a question if his goods had been released on that arrangement; but if on that occasion the Crown had agreed to receive payment of any given sum by instalments, it is clear the Sheriff would not have been entitled to poundage on the amount.

[601] As to the first exception, the seizure of money being attended with no trouble, no poundage could be claimed, and no poundage ever has been allowed in such a case in practice.

With respect to the second, third, fourth, fifth, and eighth exceptions, he contended that the Sheriff was not entitled to poundage, because he has no authority under the extent to collect or receive the debts due to the Crown-debtor. He can only make a seizure, and that is merely a seizure in Law; but he has no power of enforcing payment. He cannot therefore be entitled to poundage for any trouble which he is not bound to take. Another objection to that claim was, that many of the debts were received out of the jurisdiction of the Sheriff of Coventry.

On the subject-matter of the claim insisted on by the seventh exception, he insisted there was no pretence for it, as the stamps were clearly the property of the Crown:—*The King v. Villers* (1 Wightw. 97).

He distinguished the cases which had been relied on, by the difference that an actual levy had been made in all those, by the seizure of the Crown-debtor's goods, and the goods were released on certain persons paying the sum which the Sheriff had been directed to levy.

Cur. adv. vult.

THE LORD CHIEF BARON now delivered the judgment of the Court.

[602] We have given this case our most attentive and careful consideration; and the result is, that we think the Deputy Remembrancer's report is correct.

We think that the Sheriff is not entitled to any poundage on the sum of 5000l. which was paid by the Defendant's sureties in order to obtain the release of his person. Poundage is allowed to the Sheriff by the statute, for his care, pains, and charges in executing the process by levying the money due. What care, pains, or charges can have been incurred by him in that case? On that principle alone we think that the question raised by that part of his claim may be disposed of.

We are also of opinion, that he is not entitled to poundage on the debts collected by him in the county, under the circumstances stated in the report. Those debts were not received by him as Sheriff of the county of Coventry, in consequence, probably, of some arrangement for that purpose, unconnected with his character and power as Sheriff.

As to the claim of poundage on the sums paid by the Receiver appointed by the Court, it would be quite wild to think seriously of that for a moment. For the same reasons as I have already stated respecting the debts collected, we think he is not entitled to poundage on the amount of the rents received by him.

As to the money found and seized by the [603] Sheriff in the Defendant's house, which is the subject-matter of the first exception, we have directed enquiries to be set on foot in the office of the Deputy Remembrancer, as to what has been the usual practice in such cases: and we find that it has always been considered there, that the act of Parliament does not authorize the allowance of poundage on money so found, although, in some instances, it has been allowed, as between the Crown and the party. We know, however, that in cases of extents, the practice in certain cases is not necessarily to be regarded as proving the law; for parties do not always consider it expedient to dispute the matter. The writ of extent, certainly, orders the Sheriff to seize all such sums of money as the Defendant hath in his bailiwick, in whose hands soever the same may then be; but we must not lose sight of the words of the act of Parliament on which the Sheriff's right to poundage is founded. Giving strict attention to that, and the form of the writ, I am of opinion that the sums of money there

meant are such sums as the Sheriff should receive, not from the Crown-debtor himself, but from other persons indebted to him, or having his money in their hands.

We are of opinion that these exceptions cannot be supported, and they must therefore be

Disallowed (with Costs).

[604] *HOLMES v. WARING*. Tuesday, 28th Nov. 1820.—A demurrer having been called on, it was suggested by the counsel for the bill that a very material averment had been omitted accidentally, by mere oversight, and they asked for leave to amend. The Court, with much reluctance on the part of the Chief Baron, permitted the amendment, directing the minute to be entered specially, that the reason might appear.

[Referred to, *Luton School v. Scarlet*, 1824, 13 Price, 74, n.]

This demurrer being called on, and Wilbraham having stated the grounds on which it was founded,

Jervis and Shadwell, who appeared to support the bill, applied to the Court for leave to amend, on a suggestion that for want of a very material allegation, which had been omitted by an oversight merely, the bill could not be sustained: submitting, that in such a case, the Courts of Law allowed amendments of declarations, on application, as matter of course, and that in pleadings in Equity, the Court of Chancery had frequently of late permitted the same thing.

THE LORD CHIEF BARON (having been informed at the bar that there were cases of special circumstances wherein the Lord Chancellor had permitted amendments in this stage of the proceedings) expressed himself strongly of opinion that the forms of proceeding were infinitely too much relaxed by the indulgences resulting from such new practice, from which much mischief frequently ensued, and declared himself inclined to refuse the application.

GRAHAM and WOOD, Barons, being of opinion that, in a case of this sort, by analogy with the [605] practice in Courts of Law, the Plaintiff might be permitted to amend,

THE LORD CHIEF BARON said that he would consent to the application in this case, as his Brothers were disposed to permit it: but he declared that he felt great reluctance in extending such indulgences: and he required that it should be entered as part of the minute, that the permission which was granted in this instance, had been given on special grounds, and in consequence of the accidental circumstance of the very destitute state of the bill.

ORDER.

Allowed to amend,—the Court being informed by the counsel for the bill that the application for a lease was not stated by the bill to have been made within six months, in consequence of a mere mistake. The Plaintiff to pay the costs of the Demurrer.

[606] *LUBIN v. LIGHTBODY*. Tuesday, 28th Nov. 1820.—The Court will not, on motion, after an order for a reference, direct the Master to enquire (if he have found that a good title can be made to premises, the subject of a suit for specific performance,) when such good title could first be made. Such direction should be applied for at the hearing, when the Court is in possession of the merits.

Shadwell, supported by Wray, moved that if Master Spranger (to whom it had been ordered to be referred to enquire of the title) should be of opinion that a good title can be made to the premises, the subject of this suit (for specific performance), he might be directed to enquire, when such good title could first be made, with a view to the future consideration of the question of costs.

Girdlestone opposed the motion.

The Court refused the application, saying that the subject-matter of the motion, which, as a new practice, was often attended with advantage, could not be brought under the consideration of the Court by motion. The proper time and mode of obtaining such an enquiry is at the hearing: as the Court could not direct such an

enquiry on a mere motion, on account of not having all the merits of the case before them. The application was therefore

Refused, with Costs.

[607] DARLEY, Executor &c. v. BROWN AND ANOTHER. Tuesday, 28th Nov. 1820.—An execution sued out against the goods of a Defendant on a judgment recovered set aside, and the money which had been levied under it ordered to be restored, the Defendant having been, pending the action, discharged under the insolvent act (1st Geo. 4, c. 199).—The Court, considering the proceeding reprehensible, made the rule absolute, with costs.

A rule had been obtained in this case by Puller, requiring the Plaintiff to shew cause why the execution (*fieri facias*) which had been issued against the Defendant should not be set aside: and why the money which had been levied under it should not be restored to him; and why the Plaintiff should not pay the costs of the application.

The fact on which the motion was founded was, that after the action was commenced, and whilst it was proceeding, the Defendant obtained his discharge under the insolvent act, 1st Geo. IV. c. 119; and upon that ground, it was contended, that the personal estate of the insolvent having become from that time vested in the provisional assignee appointed by the Court, the levy was wrongful, and could not be supported. It was also urged that the Plaintiff should not have proceeded further in the action, after notice had been given by the Defendant of his intention to apply for his discharge, and that he should not have brought the cause on for trial when the debt had been admitted in the schedule returned by the insolvent; so that there could have been nothing in dispute between them: and the expences had been therefore unnecessarily and wan-[608]-tonly encreased thereby from about 8l. or 9l. to 40l. and upwards.

In point of law, it was insisted, that, under the construction of the insolvent act, the future goods of a Defendant, who had been once discharged, were protected from seizure under executions on judgments recovered, the statute having given, in effect, a general judgment and execution, and one of its principal objects was, to equalize the division of the insolvent's present and future estate amongst all his creditors, without preference. The act in that respect, therefore, has taken away the jurisdiction of other Courts, with regard to the power of awarding execution against the person and goods of discharged insolvents. By the 28th section it is enacted, that after the Court shall have declared a prisoner entitled to the benefit of the act, no writ of *fieri facias* shall issue on any judgment before then obtained against such prisoner for any debt due before the commencement of his custody, except upon the judgment entered up by order of the Court. It was stated, as matter of authority, that Mr. Justice Bayley had made an order for setting aside an execution on the same grounds very recently.

Reader and Jones shewed cause, contending that the levy under the execution was legal, and ought not to be set aside. The facts stated by the Plaintiff's affidavit were, that in November, 1818, the Defendant being at that time a respon-[609]-sible farmer, was arrested by the Plaintiff's testator for a debt due on a joint and several promissory note made by the Defendants—that Defendants went to prison, and afterwards put in insufficient bail, who were rejected—that the Plaintiff declared in due course, and that in April, 1819, and the Defendants pleaded the general issue—that Brown then gave notice of his intention to apply for his discharge under the insolvent act, and was opposed by the Plaintiff—that the action was afterwards (Easter Term, 1819) tried in Middlesex, and Plaintiff recovered a verdict—and that the Defendant Brown having subsequently become possessed of property by marriage, the Plaintiff had revived the judgment in last Trinity Term, sued out execution, and levied &c.

Under these circumstances, it was contended that on a judgment recovered after the insolvent's discharge, execution might be sued out and executed—that the insolvent's person only was protected—and that subsequently acquired property was liable at all times. In this case, although the debt accrued before the Defendant was discharged, the judgment was not obtained till afterwards; and this being a joint action, the Plaintiff was warranted in proceeding after Brown alone had given notice

of his intention to apply for his discharge. It was also urged that the Defendant should have pleaded his discharge under the section of the statute which had been relied on, when the Plaintiff would have had an opportunity of replying.

[610] The Court were of opinion that the application should be granted, and, as they considered the proceeding a harsh one, with costs. They therefore made the Rule absolute, with costs.

WALKER v. MAPOWDER. Tuesday, 28th Nov. 1820. Practice.—The Court refused to order a bail-bond, on which proceedings had been stayed by order on perfecting bail, to stand as a security, although the Plaintiff had lost a trial, where the Defendant had previously made an offer, to the Plaintiff—after the bail-bond had been assigned, and proceedings had in consequence of bail not being perfected in time—to justify at Chambers, to pay the costs of the proceedings on the bond, to plead to the declaration, and take short notice of trial for the next assizes, to which the Plaintiff refused to consent; so that he lost the opportunity of going to trial by his own conduct.—A rule to shew cause why an order made at Chambers, for staying proceedings, should not be amended, by adding such terms, discharged with costs.

A rule to shew cause was granted, on the motion of Archbold, for amending an order made by Mr. Baron Wood (on the 8th November, on summons to shew cause) for staying the proceedings on the bail-bond assigned, the bail having justified on the 6th, and the costs being paid, by inserting therein the words “and that the bail-bond do stand as a security for the debt and costs in this action.”

From the affidavit on which the motion was made, it appeared that the Defendant was arrested on the 7th of June, and a declaration was filed, and if bail had been perfected in time, the Plaintiff might have proceeded to trial at the last Cornwall assizes; but that not being done an assignment of the bail-bond was taken on the 10th of July, and on the 15th a writ issued—that bail was not filed till the 22d, and notice of justification was given for the first day of this Term.

[611] The affidavit also stated that Mr. Baron Wood, on cause being shewn, had refused to make the amendment now applied for part of the order.

Jones, D. F., shewed cause on an affidavit, stating that bail was put in in the country, on the 18th of July—that on the 22d, after the time allowed for justifying bail had expired, an affidavit of the sufficiency of the bail was left with the Plaintiff's Clerk in Court: that it was then proposed to him, on the part of the Defendant, to pay him the costs of the proceedings on the bail-bond assigned, and to plead to the declaration, and accept short notice of trial for the then next ensuing assizes, which might then have been done, the commission day being the 23d of August—and on those terms the Plaintiff's Clerk in Court was requested to consent to a justification of the bail at Chambers, and that he, having communicated with his client, had afterwards said, that he was instructed not to consent, although there was ample time to enquire of the sufficiency of the bail.

The Court were unanimously of opinion, that the circumstances stated in that affidavit were amply sufficient to take the case out of the general rule, as the Plaintiff might have proceeded to trial if he had consented to so reasonable and fair a proposal. They therefore pronounced the

Rule discharged, with costs.

[612] **NEW ARRANGEMENT RESPECTING THE COURSE OF BUSINESS.** 28th Nov. 1820.—The Junior Baron will in future sit every day during Term, a few minutes before ten o'clock, for the purpose of taking the justification of bail and motions of course, and all such matters must be then brought on.

The Court announced, at the conclusion of the business of the day, that in future the Junior Baron would attend in Court alone, a few minutes before ten o'clock every morning during Term, for the purpose of taking the justification of bail, and such motions as were merely of course.

And it was intimated that it would be expected, that all such matters would be

then brought on, in order that they might be disposed of before the Court should be full, that it might not interfere with the more important business.

End of Michaelmas Term.

[613] SITTINGS AFTER MICHAELMAS TERM, 1 GEO. IV. GRAY'S INN HALL.

WOODS AND OTHERS v. STANE AND OTHERS. Wednesday, 13th Dec. 1820.—Course of proceeding by parties beneficially interested under a will where one of executors and trustees has renounced and disclaimed, and the other is dead, to obtain an appointment of new trustees, for the purpose of executing the trusts of the will.—Distinction between establishing a will and proving it for certain purposes. In the former case, the attestation of all the witnesses must be proved, and that they are abroad or dead—and the proof must be positive. In the latter, such proof as shall satisfy the Court will be sufficient: and in such a case leave will be given to exhibit an interrogatory for further proof of the will for the former purpose.

The Plaintiffs in this cause now presented a petition to the Lord Chief Baron, stating that, in pursuance of an order of the Court of the 25th of February, on a suit instituted by the Plaintiffs against the heir at law of the executor, and the heirs at law and trustees under the will of the testator (out of the jurisdiction), by bill, praying an account and payment out of the assets, and that the will might be declared to be proved and might be established, and that trustees might be appointed for the execution of the will of the acting executor of the person under whose will they claimed his property, it had been referred to the Deputy Remembrancer, to appoint a trustee or trustees of the will under which the Plaintiffs claimed an interest; and that thereupon the Deputy Remembrancer had reported the will, the interest of the Plaintiffs therein, the disclaimer [614] of one of the executors, and the death of the other; that there was consequently no person authorised to act in the trusts of the will; that the Plaintiff Wood, who had taken out administration with the will annexed, was entitled to a share of the residue of the trustee's real and personal estate; and that the Plaintiffs having proposed him to be such trustee, it appeared to the Deputy Remembrancer, that from his competency to undertake the management of West India property (great part of the testator's real estate consisting of plantations in the West Indies), and being himself possessed of an independent estate, and already constituted the attorney of most of the parties beneficially interested in this suit, he was a proper person to be such trustee—and that he had appointed him accordingly.

The petition prayed that the report might be confirmed—that the Defendants, the executors, and heir of law of the acting executor of the deceased, might be ordered to convey and assign to Wood the plantations and real and personal estates of the testator devised &c. upon the trusts of the will, &c.

Shadwell appeared on behalf of the petitioners, and having, in support of the petition, proved the hand-writing of the subscribing witnesses to [615] the will, and that one of them was dead, tendered a deposition, to prove that the other was living abroad, stating that he was living at Barbice, as Deponent verily believed—that the *Barbice Gazette* of the 7th of November, gave an account of his having attended a funeral there—and that a person who came from there in the course of the last month, had informed Deponent that he had seen him there. The deed of disclaimer was proved *vivâ voce*.

The Lord Chief Baron objected that the evidence of the witness being abroad was not sufficient. His Lordship observed that a will could not be established by proof of the attestation by one of the witnesses only, without proving by positive testimony that the other witnesses are dead or living abroad—and that the Court ought to see the deed of disclaimer (by the renouncing executor) as many doubts and difficulties often arose on that.

* He had renounced the probate, and executed a deed of disclaimer of the devise of the real estates and the trusts. The executors were also appointed trustees under the will, with a power of appointing others.

You may, however, (added his Lordship) have a decree for several purposes, in order to carry the will into execution, so as, for instance, to appoint new trustees to execute the trusts, without establishing the will if satisfactorily proved *¹. I shall, in this case, give leave to exhibit a further interrogatory for the purpose of proving more formally the absence of the witness living [616] abroad. At present the evidence is certainly insufficient. [His Lordship stated it.] The cause must stand over in the mean time.

Prayer of the petition ordered.

[MINUTE—AS TO THE CAUSE.]

This cause stands over, with liberty to exhibit an interrogatory for the further proof of the will, the original will produced and read, and evidence as to the proof of it read; but further proof required.

WHITMORE v. FRANCIS. Demurrer. Thursday, 14th Dec. 1820 —Demurrer allowed to a bill stating that money was lent by the Defendant to the Plaintiff, on his promissory note, for the amount and interest, and that it was agreed between them that interest should be paid after the rate of 6l. 10s. per cent., and that no interest had been in fact paid; and praying that the Defendant might answer an interrogatory as to the fact of such agreement; and for an injunction to restrain proceedings commenced at law on the note, but the Plaintiff did not make any offer to pay the money so admitted to have been lent. The objection on which the demurrer was founded was, that the statute had not imposed forfeitures or penalties on the agreement to take, but on the taking of illegal interest, having in the case of an usurious agreement only made the instrument void.

The bill, which was filed in this case for a discovery, stated that the Plaintiff resided with his father, a brewer, and assisted him in that business—that the Defendant kept a public house, and that the defendant applied to the Plaintiff, through a third person, to take defendant's son as an apprentice, offering to lend the Plaintiff 2000l.—that the Plaintiff refused to take the Defendant's son as an apprentice, but acceded to a subsequent offer by the Defendant to lend the Plaintiff 2000l. at 6l. 10s. per cent. per annum, which was afterwards lent and advanced accordingly, and for which the Plaintiff gave the Defendant his promissory note, dated 6th October, 1819, [617] payable on demand for 2000l., with interest, mentioning no rate—and that in the month of June, 1820, the Plaintiff was arrested, and held to bail at the suit of the Defendant for that sum, without any previous application to be repaid, and that the defendant had since declared on the said note of hand.

The bill then, after suggesting pretences, prayed that the Defendant might be interrogated as to the facts of the alleged agreement as to the rate of interest; and that the bill might be taken as a bill of discovery only: and for an injunction.

It was alleged that no interest had been paid.

The Defendant demurred—stating that it appeared by the bill that the Defendant lent the Plaintiff the sum of 2000l., and that the scope and end of the bill was to discover whether the Defendant did not lend the money on an usurious agreement, demurring in law therefore to the discovery of matters which might subject her to penalties and forfeitures, and render her liable to forfeit and lose the sum of 2000l., demanding the judgment of the Court, and praying to be dismissed, with costs.

Shadwell and Bickersteth, in support of the demurrer, contended, that the Defendant was not compellable to answer the direct naked question put by the bill, whether this were not in fact an usurious transaction, and founded on an usurious [618] contract. They cited *Morse v. Wilson* (1 Term Rep. 353), *The Attorney-General v. Reynolds* (1 Eq. Ca. Abr. 131, ca. 10), *Wrottesley v. Bendish* (3 P. Wms. 235), *The Earl of Suffolk v. Green* (1 Atk. 450), *Channey v. Tahourden* (2 Atk. 392), *Honeywood v. Selwyn* *² (3 Atk. 276), *Lord Urbridge v. Stoveland* (1 Ves. sen. 56), and *Baker v. Mellish* (11 Ves. 68).

*¹ Vide *Powell v. Cleaver*, 2 Bro. C. C. 504. *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231. *Lord Carrington v. Payne*, 5 Ves. 404. *Bernett v. Taylor*, 9 Ves. 382.

*² In that case the Defendant insisted in his answer that he ought not to be compelled to discover what would vacate his seat in parliament under the 12 & 13 W. III.; and so the Lord Chancellor held.

Wakefield, contra, distinguished the present case from those which were cited in support of the demurrer, in that the covenant in this case to lend the money at an illegal rate of interest, where the bill alleged that no interest had been paid, did not expose the lender to forfeiture or penalties, but merely rendered the note void; the statute (12 Anne, ch. 16) having declared that contracts for the payment of money lent, whereby more than 5l. per cent. shall be reserved on such loans, shall be void: and it is in cases where a greater proportion of interest shall be taken that the forfeiture of treble the amount of the sum advanced is imposed as a penalty. And he insisted that no case had yet gone so far as to determine that a discovery sought, which did not subject the party required to disclose the transaction liable to forfeitures or penalties, but merely [619] vacated his security, might be avoided by demurrer to a bill filed for that purpose: on the contrary there were many contracts which would be rendered void by proof of the circumstances attending them, which nevertheless the parties interested in were not on that account protected from disclosing, by being permitted to demur to a bill for discovery. In this case it was urged the statute of Anne had itself made the distinction upon which the objection to this demurrer was founded. And it was contended that, where the security is made void, it is not incumbent on the party seeking a discovery, in order to be enabled to avail himself of the law to avoid the security on the ground of usury in the contract, to offer to pay the amount.

The Court, however, determined that this was a fit case for the demurrer which had been put in to the discovery; observing, that it appeared on the face of the bill that the sum had really been lent: and there was no allegation that the Plaintiff was ready to pay what was due to the Defendant.

Demurrer allowed.

[620] CORAM RICHARDS, LORD CHIEF BARON.

MILNES v. COWLEY AND OTHERS. Friday, 15th Dec. 1820.—Agreement in 1778, whereby the father of the Plaintiff engaged to give his son 500l. on his marriage, and the father of the wife agreed to give 250l. to his daughter. That agreement was suffered to be dormant till 1810, when the wife and her father were dead (the latter died in 1808). Then an agreement was entered into between the Plaintiff and the two eldest sons of his wife's father's five surviving children, whereby the two sons agreed to pay the Plaintiff the 250l. in satisfaction of the marriage portion. In 1816 the Plaintiff filed a bill against the trustees under the wife's father's will, the two sons and the other children praying that the agreement might be established, and the plaintiff paid the 250l. Held, that the last agreement of 1810 was valid, and would support the bill against the parties who signed it, but against them only, there being no fraud or misrepresentation shewn—that, however, the engagement of 1778 was a mere simple contract agreement, and did not create a trust, but that the Defendants who signed the agreement of 1810 had concluded themselves thereby, although in 1809 a bill founded on the first agreement must have been dismissed. The Defendants who signed the agreement were therefore decreed to pay the Plaintiff two fifths of the 250l. Bill dismissed as against all the rest, with costs. The Plaintiff to be paid no costs.—The short ground of the above decision was, that the Court cannot relieve a party from a binding agreement obtained without misrepresentation. In other words, mere folly, without fraud, is no foundation for relief.—Quere, whether the statute of Limitations would not have been a good plea to such a bill?

The prayer and most of the material facts stated in this bill appear in the report of this case in vol. iv. p. 103, of these reports, where a plea of the statute of Limitations was argued.

The substance of the defence set up by the answers of the Defendants, who were the trustees under the will of John Marples, and his five surviving children, was that the agreement signed by John Dobb Marples and Robert Marples, at the meeting on the 19th March, 1810, was conditional only, and that in case the other Defendants should refuse to sign it, it was to be void: and they submitted generally, that the Plaintiff's claim could not be supported under the circumstances of his case.

[621] [Such parts of the case as it was proved, and are material to the points in

question, are stated and observed on by the Lord Chief Baron, in delivering his judgment, to preserve the unity and entirety of which they are necessarily stated there.]

At the hearing of the cause, Clarke and Roots for the Plaintiff contended that the claim was well founded, as the agreement of 1778 was a sufficiently binding settlement; or, at least, was the basis of a settlement which the Plaintiff was now entitled to have carried into execution, acknowledged and confirmed as it had been by the subsequent agreement of 1810. In *Perkins v. Thornton* (Amb. 502), it was determined, that under an agreement to settle a jointure on the wife, in consideration of a portion to be paid by her father, she would be entitled although the portion were never paid, there being no covenant on the part of the wife, as she had, by the marriage, entitled herself to the jointure. In the case of *Luders v. Anstey* (4 Ves. 501, and 5 Ves. 213), a settlement was decreed according to the terms of a mere letter written previous to marriage. They submitted, therefore, that the Plaintiff was entitled to a decree in the terms of the prayer of the bill.

Phillimore for the Defendants, contended that whatever might have been the effect of the agree-[622]-ment, if followed up at the time, it could not now be decreed to be carried into execution in the manner proposed: and that if it were an existing claim against the estate of John Marples, the person entitled to it would be the personal representative of the wife, Margaret Milnes, and not the Plaintiff.

He also strongly insisted on the lapse of time being a bar to the demand now set up, founded on an engagement of the nature of the agreement of 1778, and contended that that was not revived by the subsequent agreement entered into by the two Defendants in ignorance of their rights, and at all events it clearly could not bind the other Defendants who were no parties to it, and he cited *Row v. Lord Newbury*, Vin. Abr. (vol. xv. page 125), tit. Limitation (T.) pl. 3, where on a demurrer to a bill filed twenty years afterwards, on a note given to assure lands on the marriage of a woman, the Plaintiff was barred by the statute of Limitations. He contended generally, that there was no pretence for setting up this claim, and that there was nothing in the facts of the case to support it.

THE LORD CHIEF BARON now delivered judgment, having intimated a reluctance to pronounce any decree, stating that it was one of those unpleasant cases which sometimes came before the Court, and which, therefore, the Court must dispose of in the best manner it could:—

[623] As to the first agreement of November, 1778, on which the claim first arose, that was attended with several remarkable singularities, which were worthy of notice in this case. [His Lordship read it *.] In the first place it was proved to have been all in the hand-writing of John Marples, the father of the Plaintiff, and to have been signed by him in the first instance. It was not signed by John Marples, the father, till half-a-year afterwards, and the observation which naturally arises upon that is, that it has a very odd appearance that such an agreement not witnessed, should be executed in such a manner. It has struck me throughout that it is a considerable question, and by no means satisfactorily solved, whether this marriage was afterwards had in pursuance of, and according to the terms of the agreement, as they appear on the face of that paper.

Margaret Milnes, the wife, died in 1790: and it was justly observed that her representative was entitled to the benefit of the agreement. Her father, who should, as it is said, have paid the money, did not die till thirty years after he signed the agreement, and on his death the Defendants Cowley and Fouldes obtained letters of administration with the will annexed. It will first be necessary to examine the nature of the original engagement of the wife's father. He un-[624]-dertakes, in consideration of the father of his daughter's husband giving his son 500l. on the marriage, to give his daughter also, in lands, goods, money or securities, 250l. That is the contract. Now it is quite clear that this was nothing more than a mere simple contract engagement. There was no trust created by the transaction, nor any thing in the nature of a trust, unless, indeed, a man becomes a trustee for his creditor on executing the instrument which creates the debt. From that time down to 1810, there is not the least appearance of any act done or attempted on the part of the

* The substance of this article of agreement (as it was called) is set out in the report of this case, ante, vol. iv. page 103.

Plaintiff. Then on the 19th of March, 1810, at a meeting appointed for that purpose, it appears all the parties interested under the will, as it is phrased, attended to settle disputes which had arisen respecting the dower of John Marples' wife, and this 250l. claimed by the Plaintiff: and on that occasion, it seems, this extraordinary engagement of that date was entered into. John Dobb Marples, the testator's heir at law, and the Defendant Robert Marples, another son of the testator, signed an agreement (the trustees being present), whereby (after reciting that they were children and legatees, and persons interested under the will of John Marples) they authorised and empowered the trustees (amongst other things) to pay the Plaintiff the sum of 250l. out of the money arising from the estate and effects of the testator, in satisfaction and discharge of the marriage portion agreed to be paid by the testator to Plaintiff on his marriage [625] with testator's daughter, and they authorised the trustees to charge that sum in their account as such trustees accordingly. The execution of that paper is attested by the solicitor for one of the trustees (Bower) and his clerk.

In this case I am sorry to say that I am bound to give the parties concerned in this transaction, credit for having acted *bonâ fide* in what they did; for there is no fraud or imposition proved: and therefore this must be considered as binding as any other signed paper would be.

It appears that John Dobb Marples, the heir at law, was afterwards discharged under the insolvent Debtor's Act, and all his estate was assigned in September, 1812, to Bower, in trust for the general benefit of his creditors, and therefore Bower's representatives are made parties to this suit.

Another agreement is set out in the pleadings, which was entered into in 1809 (16th December *), but I do not think it has much bearing on this question. It was introduced to shew that the parties interested in the property left by the testator John Marples, had recognized the Plaintiff's claim. The agreement was on the part of John Dobb Marples, and two persons who had married daughters of John Marples, to allow Robert Marples, who com-[626]-plained of having bought a part of the property, 5l. each out of their respective shares, and at the foot of it was written for the signature of the Plaintiff, "I agree to allow according to my share." What that means I really do not know; I confess I do not understand it.

The whole, however, in my view of this case, turns upon the agreement of 1810, and that agreement I think the Plaintiff is entitled to have carried into execution. It was not, as I have before observed, entered into under any misrepresentation on the part of the Plaintiff, and it has not been attempted to be impugned on that ground. The Defendants have endeavoured to prove that it was signed under an understanding that if the other children of John Marples did not also sign it, it was to be void, and that Milnes was not to be paid the money if the other children did not agree: but there is nothing of that sort in the agreement itself, and I cannot, on such parol evidence, alter it so violently. I am not at liberty to act on such evidence, which goes to affect a written agreement so materially.

As to the old agreement, that is objectionable in very many important respects, some of which I have already stated. Then it does not appear where or by whom it had been kept, or where or in whose custody it was found. A great space of time elapsed without any attempt being made to act upon it: and it does not satisfactorily appear that the marriage was concluded.

[627] If this case had come before me in 1809, I should have had not the least difficulty in dismissing the bill.

The statute of Limitations was pleaded, and that plea, it seems, was overruled, it will not be necessary, therefore, for me to say any thing on that point now.

This claim was neglected till 1810, thirty years after the agreement was entered into, which I repeat was only a simple contract engagement to pay the 250l. on certain terms, and the claim would in the mean time have been quite a question for a Court of law upon the agreement, for an action might have been brought on it: yet nothing was done till this singular paper of 1810 was obtained. That paper, however, such as it is, I am of opinion was, as an acknowledgment of the debt, binding upon the parties who signed it. But I am also of opinion that it cannot bind the other children who were not parties to it. The other children are quite distinct parties, and are in no way connected with those who signed this paper, except as they are entitled under

* Vide ante, vol. iv. page 105.

the father's will to have the property he left divided among them. The agreement being binding only on the two brothers who signed it, the Plaintiff is entitled to be paid by them two fifths of the 250l.; and therefore there must be an account taken of what is due to the Plaintiff for those two fifth parts, with interest from 1810, and not earlier. As to [628] all the other parties (excepting those two and the trustees), the bill must be dismissed with costs. I cannot give the parties against whom I decree costs, but I give the Plaintiff no costs. I decide this in his favor, with infinite reluctance against the parties who so foolishly signed the agreement of 1810.

DECREE.

That the Plaintiff, upon procuring letters of administration to his late wife, is entitled as against the Defendants, Robert Marples and the Defendants, the representatives of John Dobb Marples deceased, to two fifth parts of the sum of 250l. in the agreement, bearing date the 12th day of November, 1778, in the pleadings mentioned, together with interest at 4l. per cent. per annum, from the 19th day of March, 1810, the date of the authority or agreement in the pleadings also mentioned to have been signed by the said Defendant Robert Marples and John Dobb Marples deceased; such interest to be paid to the Plaintiff by the Defendants Leonard Cowley and John Foulds, the administrators, with the will annexed, of the testator John Marples, if they should admit monies sufficient for that purpose, in their hands, arising (&c.) sufficient to answer the said two fifths and interest; but in case they shall not admit sufficient personal estate and monies arising [629] from the sale of testator's real estate to answer the same, then an account to be taken of the real and personal estate of the said testator John Marples, and what sum is coming thereout due to the said Defendants Robert Marples and John Dobb Marples in respect thereof; and let the said Defendants pay such sum as the Master shall find due to the said Robert Marples and John Dobb Marples.

Bill dismissed against the other Defendants, with costs to be taxed by the Master, and to be paid by Plaintiff to the Clerk in Court of the Defendants.

After having pronounced judgment, his Lordship intimated that his not having been present when the plea was argued, was a circumstance very much in favor of the Plaintiff on that occasion.

[630] *THE KING v. BRICKDALE.* Friday, 15th Dec. 1820.—The consent of the owner of property, sold under a decree, is necessary to a motion to vacate a bidding.

Shepherd, on the part of the Crown, moved that the purchaser of premises, sold under the decree in this cause, might be discharged from his bidding, and that his purchase might be vacated, the purchaser consenting—but

Per Curiam. We cannot make such an order merely on the consent of the purchaser. The consent of the owner of the property must also be obtained. He may have a large interest: for he may possibly be entitled to a considerable sum.

Nil.

QUARLES v. KNIGHT. Saturday, 16th Dec. 1820. Motion to enlarge the time for foreclosing, is not of course, although the interest be paid up, and the costs paid.—

Where there is no opposition, the Court will give further time in its discretion.

Shadwell moved to enlarge the time for foreclosing the mortgage in this case*, submitting that, according to the practice, where the interest were paid up and costs, it was a motion of course.

The Lord Chief Baron. It is certainly not of course. Non constat that the security may be sufficiently ample.

It was said at the Bar that there should be a suggestion of that objection on the other side: [631] otherwise the Court could take no notice of it; but

The Lord Chief Baron dissented from that. There being no opposition, however, he gave them till the second day of the next Term.

* This was the second application, but the Court did not appear to be aware of that.

SOLLY AND OTHERS v. MOORE AND OTHERS. Saturday, 16th Dec. 1820. Injunction.—A. chartered and loaded a ship from England, consigned to a house at the Havannah, to be loaded there with produce for Trieste, out of the proceeds of the Havannah shipment, and to be consigned to B. there, on whom A. drew bills on the credit of the cargo, which B. agreed to accept, and the bills were drawn and indorsed by C., and sent to B., who accepted them under protest as to A. for the honor of C., and they were paid when due. In consequence of a disagreement between A. and the Havannah house, A. disclaimed the cargo proceeding to Trieste, and apprized B. that he had done so, directing him to attach so much of it as would be sufficient to cover what was due to him from the Havannah house on account of the Havannah shipment, and which was more than enough to repay B. the amount of the bills so accepted and paid by him. B. agreed to do so, and required a power of attorney to be sent out to him for that purpose, which was sent. The Havannah house afterwards employed B. to dispose of the cargo at Trieste on their account, and B. wrote to A., stating that he had agreed to do so on account of the large commission, whereupon A. gave him notice that he should hold him responsible.—Under these circumstances —B. having brought an action against C., the indorser of the bills —It was held, that B. was the accredited agent of A., and had so bound himself by what he had done as to have made it his duty to act for A. as directed—that as he might have paid himself out of the goods which he would have had in his hands if he had done so, but had in breach of his trust neglected to do so, to the prejudice of his principal, he ought not in conscience to be suffered to proceed in his action at law against the indorser, in which he must necessarily succeed, and then the indorser would be entitled to recover the amount from the drawer, who had an equity against the Plaintiff at law, although at law he had a clear right to recover: and that therefore he ought to be enjoined from proceeding further in the action.—But the Plaintiff at law having a legal right against the indorser, and there being some doubt in the case of the Plaintiff in equity, with respect to the question in whose favor the balance was, the injunction was continued on the terms of his paying the amount into Court, with such interest as would be recoverable at law.

This bill was filed against Moore and De Herrera & Co. for an injunction to restrain the Defendant Moore from proceeding further in an action at law, commenced by him against the Plaintiffs, on the bills of exchange mentioned in the pleadings—for an account of the dealings and transactions between the Plaintiff Solly and [632] the Defendants Messrs. Herrera and Co., and of what was due to the Plaintiff Solly in respect thereof—and that he might be declared entitled to have the amount of such balance, as should appear to have arisen from the proceeds of goods mentioned in the pleadings to have been directed by Plaintiff Solly to be invested in a cargo for the "Woodpark," paid out of the proceeds, &c. &c.

The substance of the statements in the bill was as follows:—

The Plaintiff Solly, who was a merchant, carrying on business in London on his separate account, had consigned to the Defendant Moore, who carried on business as a merchant at Trieste, and whom Solly had been in the habit of employing as his agent and correspondent there, goods by different vessels for sale: in consequence of which Moore, in March, 1819, was indebted to the Plaintiff Solly in a considerable sum of money.

In 1818 the Plaintiff Solly consigned to Defendants De Herrera and Co., carrying on business at the Havannah, goods by two vessels, called the "William" and the "Woodpark," which last mentioned vessel had been chartered by Solly in his own name, and on his own private account, for a voyage from London to the Havannah, and thence to Trieste; and he instructed Messrs. Herrera & Co. to invest the proceeds in the purchase of a cargo of sugar and coffee for the "Woodpark," and to load such cargo when purchased on board that vessel for the said voyage [633] to Trieste: and they were to consign the same to Defendant Moore, as the agent of the Plaintiff Solly at that place.

Solly advised Moore of the consignment about to be made to him, and at the same time drew drafts upon him in favor of Messrs. Blankenhagen and Co. for 30,000 florins, of which he advised him by letter of the 30th day of March, 1819, in which,

after acknowledging the receipt of one from Moore, advising arrival and sale of a cargo of fish, and another of the 5th, covering a remittance of 500l. on the Treasury, out for acceptance, requiring Moore to negotiate as with a former remittance, requested his best exertions in the disposal of the cargo, adding, that it might suit him to let his drafts of that day be against the consignment per "Woodpark," and in that case desiring Moore to make returns in good bills for his remittances on Blanckenhagen and Co.

Bills upon Trieste not being negotiable at the time when the bills in favor of Blanckenhagen and Co. were drawn by Plaintiff Solly, the bills for 30,000 florins were cancelled, and other bills for the same amount were drawn by Plaintiff Solly upon Defendant Moore on the 20th April, 1819, payable in Vienna two months after date to his (Solly's) order, and the Plaintiff duly advised Moore of the cancelling of the first bills, and of the drawing of the last-mentioned bills, by letters dated the 13th and 20th April, 1819.

[634] The Defendant Moore, in answer to the Plaintiff's former letter of the 30th March, 1819, promised to accept the bills by letter of the 19th April, 1819, stating that the draft for 30,000l., order Blanckenhagen and Co., would meet due honor on presentation, and that he should consider the difference between the amount of the drafts and the produce of his Constantinople, as an advance upon the next consignment, per the "Woodpark." Moore afterwards, on the 29th April, wrote to the Plaintiff Solly a letter, containing (after giving an account of the negotiation of the bills on Constantinople) a statement of the operation, shewing a balance in his favor of 5126 florins, 10 kreutzers, which, deducted from his drafts for 30,000 florins, due 30th May, left 24,873 florins, 50 kreutzers, as an advance on his expected consignment of sugar and coffee for the "Woodpark" from the Havannah. The goods consigned by Solly to said Herrera and Co. by the "William" and the "Woodpark" were received by them, and sold on account of Plaintiff Solly, and the proceeds invested &c. as directed, in the purchase of coffee and sugars shipped on board the "Woodpark," and consigned to Moore at Trieste.

Herrera and Co. having neglected to comply with the directions of the Plaintiff Solly in some important particulars with respect to the shipment of the cargo, and instead of remitting the bills of lading to Solly as they ought to have done, they remitted them to their own agent, with instructions not to deliver them to the Plaintiff, [635] except upon the previous payment by him of 11,000l., the amount of their alleged advances, contrary to the regular course of dealing; and one of the firm, in transmitting the directions to their agents, expressed regret for such a procedure.

The Plaintiff Solly, on the 30th April, sent an answer, upon the communication of those directions, to the agents of Herrera and Co., announcing, that as they (Herrera and Co.) had in no wise conformed to the instructions given by him respecting the loading of the ship, he considered that he was warranted in refusing to acknowledge the cargo as on his account. Herrera and Co. therefore adopted the cargo on their own account; and in consequence they became indebted to Solly in the sum of 4500l. and upwards, in respect of the proceeds of the goods which had been consigned to them by Solly, which money had been invested in the purchase of the cargo loaded on board the "Woodpark," and he thereby became entitled to a lien upon the cargo for the amount of the money so due to him. Solly accordingly, for the purpose of enforcing such lien, and of securing the payment of the money due to him out of the proceeds, by attaching the same, wrote to Moore on the 4th of May, 1819, advising him that Herrera and Co. had made it necessary for him to refuse acknowledging the cargo for his account; and as the "Woodpark" was chartered by him agreeably to the enclosed copy of the charter-party, the ship-[636]ment must be considered as a delivery into his warehouse, and could not be assigned over to the agents of Herrera and Co. without his consent; and as Herrera and Co. had received property from him to the amount of 5000l., he requested Moore to retain for him the nett proceeds of the cargo to that amount, or not to let the cargo be taken out of his hands without security for his demand to that amount, desiring him at the same time to bear in mind that he had refused to acknowledge the cargo for his account, and was only seeking the re-imbursement of what was his due.

On the 7th May, 1819, the Plaintiff Solly wrote another letter to Moore, stating that he was the more indebted to him for allowing the 30,000 florins, drawn on him, to remain as an advance on the home cargo, per the "Woodpark," although the

Havannah shippers, Herrera and Co., had thought proper to direct that the cargo be withdrawn from him—repeating that he, on the other hand, in consequence of their deviating from the instructions given them respecting it, had refused to acknowledge it for his account; but that still he could not forego his lien on the cargo for the amount of the property in the hands of the shippers; and should it be necessary to take any legal steps to secure his claim on Herrera and Co. by an attachment on the cargo for the amount, whatever might be necessary to attain that object he recommended to Moore's friendship and care.

[637] The bills for 30,000 florins, so drawn by the Plaintiff Solly on Moore, were indorsed by the Plaintiff Solly to the Plaintiffs Isaac Solly and Thomas Solly, in their partnership firm of Isaac Solly and Sons, and the Plaintiff Solly received full value for them. I. and T. Solly having indorsed them, they were presented on their account to Moore for acceptance on the 10th of May, 1819. And the bill charged, therefore, that Moore ought to have accepted them according to his undertaking, and to have deducted the amount out of the cargo of the "Woodpark" consigned to him: but that instead of accepting the bills, he caused them to be protested for non acceptance, and then accepted them under protest, and, as he alleged, for the honor of the Plaintiffs, I. and T. Solly.

On the 10th May, 1819, Moore wrote a letter to the Plaintiff Solly, informing him of what he had so done, and excusing it, on the ground of necessary caution, stating that it was in consequence of Dirckheim (agent of and a partner in the Havannah house) having ordered him to hold the cargo of the "Woodpark" at his (Dirckheim's) disposal.

On the 14th May, 1819, Solly wrote Moore a letter, referring to the subject of the cargo per "Woodpark," stating that he should, by next post, send over a power of attorney enabling Moore to act in his behalf in securing the property, and repeating his requests that Moore [638] would attach so much of the nett proceeds of the cargo, per the "Woodpark," as would cover the amount of nett proceeds of his (Solly's) goods, amounting to 18,139 florins, at 46, 4148l. 15s. 6d., and informing him that Herrera and Co. had still on hand property of his (Solly's) amounting to 431l. 9s. 11d., to which he should wish the attachment to be extended.

The "Woodpark," with her cargo, arrived at Trieste to the consignment of Moore, and all the goods forming the cargo were delivered to him; and Moore, as the bill alleged, promised and undertook, as the Plaintiff Solly's agent, and according to the directions contained in his letters of 4th and 7th May, 1819, to attach or retain out of the proceeds the monies due to him. Moore accordingly on the 24th May, 1819, wrote to the Plaintiff to acquaint him that the "Woodpark" had arrived, and would have pratique on Thursday next, and that he should then receive the goods into store; and if Solly wished to secure there the amount of the debt due to him from Herrera and Co. he recommended his sending him his power of attorney, properly attested by the Austrian Consul or Ambassador, authorizing him to attach sufficient for that purpose.

Solly accordingly, on the 15th June, 1819, sent a power of attorney to Moore, empowering him to recover his demand upon Herrera and Co., and to take all necessary proceedings for that purpose. By a letter, dated 7th June, 1819, De [639] fendant Moore represented to Plaintiff Solly, that it was doubtful whether, by the Austrian laws, property could be attached at Trieste in a question between two foreigners; but he promised to retain out of the cargo in his hands the amount of Solly's debt, if he would agree to indemnify him in so doing; and accordingly on the 25th June, 1819, (Plaintiff Solly having then heard of the protest of the bills for 30,000l. by Moore) wrote him a letter, wherein, after again very particularly adverting to the facts, he requested him to hold as much of the cargo as would cover his whole demand on Herrera and Co.; and he engaged, if necessary, to hold him harmless from all consequences that might result from his detaining it.

Moore afterwards wrote to H. Solly (24th June, 1819) again requiring that Solly would engage to indemnify him from all consequences of holding back sufficient property to cover his claim, Messrs. Graymuller and Co. (the Vienna house) having drawn upon him 30,339 florins, 41 kreutzers, against his drafts for 30,000 florins, and stating that he had transmitted the necessary documents to his correspondents, with his account, amounting to 3282l. 18s. 1d., with which he had requested them to

do the needful, regretting, that under the system of caution which he had laid down for himself, he could not, under the circumstances, act otherwise.

Moore, according to that letter, drew a bill for [640] 3282l. 18s. 1d. upon the Plaintiffs I. and T. Solly, in their partnership firm of Isaac Solly and sons, being the amount, as he alleged, of Plaintiff H. Solly's bill for 30,000 florins, with interest, charges, and expences: and he remitted the bill to his agents by the post by which he sent the letter to Plaintiff Solly.

The bill charged that Herrera and Co. were aware of Plaintiff Solly's claim upon the cargo, and knew, that by the laws of Trieste the Plaintiff Solly could, by means of Defendant Moore, enforce such claim against the said cargo; and that with the view of defeating such claim, and depriving Plaintiff of all means of obtaining payment of his debt, they applied to Defendant Moore, and proposed to employ him as their agent, and to allow him a large commission upon the sale of the said cargo, if he would abandon the Plaintiff's interest, and would act as agent for them, and hold the whole proceeds at their disposal, instead of retaining part of such proceeds in satisfaction of the Plaintiff's debt: and it charged that Moore, for the sake of obtaining such commission, agreed to do so: and that he had so agreed and determined at the time when he wrote the last mentioned letter to the Plaintiff; and that he drew the bill of exchange for 3282l. 18s. 1d. for the purpose of obtaining payment thereof from the Plaintiff, instead of deducting the same, as he had agreed to do, out of the proceeds of the cargo, although he concealed that agreement from the Plaintiff Solly at the time when he advised him [641] of having drawn the said bills: and that he so concealed the same in hopes that his bill would be accepted before the Plaintiff H. Solly should discover the fraud which he, in collusion with Herrera and Co., had practised upon the Plaintiff.

The bill also stated that a few days afterwards, expecting that the bill would be accepted before the arrival of his letter, Moore wrote to Plaintiff Solly, stating that he had received his letter of the 15th, with the power of attorney; and that he had been advised that he should either give up the cargoes and act for Plaintiff, or indorse over the power of attorney to some other person in order that he might act on the Plaintiff H. Solly's behalf: and that as he himself could not act with sufficient energy for both parties at the same time: and as to put the cargo into the hands of another would be depriving himself of a handsome commission, without in any manner benefiting the Plaintiff, he had therefore come to the determination to act for Herrera and Co.: and he allowed the Plaintiff twenty-five days, after the receipt of his letter, to send out another power of attorney, or to instruct him to indorse the power already sent over to whom ever he should think fit.

On the 23d July, 1819, the Plaintiff H. Solly wrote to Moore, in answer to his letter, highly censuring his withdrawing himself from the agency which he had undertaken for him, and apprising him that he (Solly) should hold him (Moore) responsible [642] for 4500l., or the amount of his claim on the "Woodpark's" cargo, against the assets of his, appropriated towards the purchase of the cargo by Herrera and Co., reminding him that he had had the cargo in hand when the power of attorney and the documents substantiating his (Solly's) claim were forwarded to him, at his own desire, for the purpose of attaching it.

The Plaintiffs I. and T. Solly having, from the drawing of the said re-draft, suspected some collusion between Moore and Herrera and Co., (although the last-mentioned letter of Moore had not been received by H. Solly) when the bill was presented for acceptance, refused to accept it: and afterwards the Plaintiff Solly also refused to accept it. An action was thereupon commenced by the Defendant Moore against the Plaintiffs I. and T. Solly, to recover against them the amount of the bill of exchange, so alleged to have been accepted and paid for their honor by Defendant Moore, which action was still depending.

The bill then charged that if Moore should recover against the Plaintiffs I. and T. Solly, the Plaintiff H. Solly would be liable to pay to them the amount of what Moore should so recover, together with the costs, and that he (H. Solly) had in fact undertaken to do so, and to indemnify the Plaintiffs I. and T. Solly against all the consequences of the said action; and that the Plaintiff H. Solly was in fact defending the action in the name of the Plaintiffs I. and T. Solly.

[643] The Plaintiffs I. and T. Solly therefore submitted that they were entitled to the same relief against the said action that the Plaintiff H. Solly would have been

entitled to if the action had been brought against him: and they alleged that Moore had then in his hands, in respect of the cargo of the "Woodpark," monies which he was entitled by the laws in force at Trieste to retain on account of the Plaintiff H. Solly greatly beyond the amount of the said bill for 3282l. 18s. 1d; and they submitted, that under the circumstances he was bound to retain the amount of the bills so paid by him as aforesaid out of the monies so in his hands.

The bill also alleged that the Defendant Moore and the several partners in the firm of Herrera and Co. resided in parts beyond the seas, and out of the jurisdiction of the Court, and suggested, that if the Defendant Moore should recover from Plaintiffs I. and T. Solly the amount of the said bills so paid by him, the Plaintiff H. Solly would lose the whole amount, and also the amount of the money due to him from Herrera and Co.

The answer of the Defendant did not materially vary the state of facts as charged by the bill. The defence set up was, in effect, that as Herrera and Co. were the shippers of the goods to be delivered at Trieste to their order, and as they were consigned by them to the Defendant, subject to their further order, the Defendant Moore was not bound to retain the cargo as required by H. Solly, [644] particularly as he was then indebted to Herrera and Co., as appeared by their letters to him, and which also stated that Solly's refusal to acknowledge the cargo was a pretence to throw on them the loss which would arise from a fall of price in the Trieste market, he was justified in what he had done—that he had from the first moment determined not to accept the drafts for 30,000 florins by way of anticipation on the cargo of the "Woodpark"—that when he recommended Solly to forward to him a power of attorney, he was not aware of the laws of Trieste respecting attachments, which did not permit goods to be attached as between two strangers—that having no right to retain the cargo, and consequently no security for his acceptances, which were paid by his bankers at Vienna on his account, he had drawn the bill in question, and had commenced an action against I. and T. Solly for recovering the amount due to him, denying the several charges in the bill, of fraud, concealment, breach of trust and collusion.

Under these circumstances, Roupell and Pemberton now shewed cause against the order nisi for dissolving the injunction, which had been obtained on the answer coming in; and

Agar and Lovat supported the order, on the part of the Defendants.

The argument turned principally on the peculiar circumstances of the case.

[645] For the Plaintiffs it was urged that the equity which the drawer of the bills had, as against the Defendant Moore was sufficient to call for the interference of the Court to protect him from the consequence of Moore's recovering against the indorser, who would have, in that case, a right to be paid by the drawer, who had an equity against Moore.

On the other hand it was contended on the part of the Defendant, that a Court of Equity could not interfere to restrain a Plaintiff from proceeding against persons liable to him on a bill of exchange, by reason of any equity which a third party (the drawer) might have against the person entitled to recover on it at law against the immediate indorser.

RICHARDS, Lord Chief Baron, now delivered judgment—having stated the facts of the case—

The question is whether, under the circumstances, this injunction ought to be continued. Although the pleadings are very voluminous, the question on the merits is very short and simple: and it will not be necessary to go into the facts at any length, for a mere outline of them will be sufficient. [Here his Lordship stated the general result of the case, as it appeared on the pleadings, as far as related to the indorsement of the bills by I. and T. Solly, and the acceptance by Moore for their honour.]

[646] There is no doubt that Moore has a right to recover at law against I. and T. Solly in this action, but the question is whether, under all the circumstances of this case, a Court of Equity should interfere to restrain him from proceeding in the action at law.

The Plaintiff's case is that, under the circumstances, he has an equity against the Defendant Moore, who, it is urged, must be considered, with respect to this transaction, as being in the same situation as if he had been actually paid, or at least secured; inasmuch as he might and ought, in justice to H. Solly, under the trust

reposed in him, to have paid himself, or at least have acquired a lien, on the opportunity which he had of doing so, and by neglecting which, in breach of that trust, he has placed Solly's claim in jeopardy. If that be so, unquestionably it is against conscience that Moore should proceed to recover this money against the other Plaintiffs; although by law he would have a right to do so if there were nothing in the case calling for the interference of a Court of Equity to restrain him.

The real question therefore is, whether the Defendant Moore has bound himself in this transaction by what he has done; and whether, by neglecting the opportunity of being paid, as he might have been if he had done what was required of him, to the prejudice of the Plaintiff, he has precluded himself in equity from suing for that demand which ought, in equity at least, [647] to be considered as paid for that purpose and in that view of the case.

[Having again adverted to the facts relating to that part of the case, and the correspondence between H. Solly and Moore, on the subject of attaching the "Woodpark's" cargo,] I consider that Moore was, beyond all question, the agent of H. Solly, who having been improperly treated by Herrera and Co. became indignant at their conduct and disclaimed the cargo. He however directed Moore to attach it, in order to secure to him thereby the produce of the former cargo, which, as well as the ship, belonged to him: and that I am of opinion he had a right to do. It appears quite clearly and satisfactorily I think, from the correspondence between Moore and H. Solly, that Moore was the accredited agent of Solly. There may perhaps have been some doubt whether Moore could attach the cargo, but then it is quite clear that he had at one time the produce of H. Solly's property in his hands, through the medium of the consignment to him of the Havannah cargo, to an amount more than sufficient to pay himself, with ample authority for so applying it; and if he had sold it and paid himself out of the proceeds, which would have been a direct payment, or if he had kept it in his hands to secure himself, which would have given him a lien, this Court would certainly not in either case have suffered him afterwards to proceed in an action at law on these bills against the indorsees.

[648] I can have no hesitation in saying, that beyond all question Moore did not act with fidelity in his character of agent to Solly, in the conduct which he thought proper to adopt during the latter part of these transactions, in dealing with the property as he did, and in delivering it to Herrera and Co. when he ought to have made it available to Solly. Instead of doing so, as it was his duty to do, he delivered it over to the enemy, which it was not his duty to do; and that, from all that appears, for the sake of obtaining a commission on the whole, by becoming employed in the disposal of it for Herrera and Co., instead of having a commission only on part of the cargo, which would have been the case if he had continued agent for Solly, whose lien was limited to a certain extent only. Moore's behaviour in that respect was certainly very reprehensible.

There may perhaps be some doubt on the facts in this case whether the balance of their accounts between the Herrera house and H. Solly was, in point of fact, in favour of them or of him. If, instead of their being indebted to Solly, he was indebted to them, or if nothing was due to either, the conduct of Moore would certainly not be so blameable as I at present think it was: but that depends on the result of the account to be taken between them. Moore certainly gives a very particular account throughout: and he appears to have been furnished by Herrera and Co. with all Solly's letters which were addressed to them.

[649] For the present, therefore, the injunction must be ordered to be continued on certain conditions. As there is undoubtedly a clear *prima facie* title in Moore to proceed at law, and as it is possible that the facts of this case possibly may not ultimately turn out as I at present expect, Solly must, by way of securing the money to abide the result, pay the amount of the 30,000 florins, reduced into English money, into Court, for that purpose, on or before the second day of next term, and with interest, as far as interest would be recoverable at law, with liberty to apply.

Injunction continued—The Plaintiff to bring into Court the amount of the bills and interest by a short day.

The injunction was afterwards dissolved on motion, the Plaintiff H. Solly having neglected to comply with the terms of the order of the Court, by paying in the money.

[650] TAYLOR v. COOK AND ANOTHER. Saturday, 16th Dec. 1820. Evidence. — In this suit, which raised a question of the weight of conflicting evidence, the Plaintiff, in support of his claim for the tithe of hay in kind, made out a clear and conclusive case. That was opposed by evidence, some of which was of a very extraordinary nature, principally recitals in agreements for compositions, wherein two recent rectors admitted that there were moduses for hay; yet they and the compounding parties, the occupiers, agreed to a composition for the full value. There was also evidence given of a former suit in the Ecclesiastical Court, where a prohibition had been issued, some few memoranda in old books, making mention of moduses in a very loose way, and some receipts for tithes and moduses indiscriminately. The Lord Chief Baron held, after considerable doubt, that the evidence, extraordinary as it was, and against so strong a case, was yet such as to make it necessary there should be an issue to try the nature and character of the money payments — Evidence of a rector's hand-writing to receipts by comparison with his signature in the register's books, the entries in which it was his duty to sign, held sufficient. — Testimony of occupiers wholly inadmissible for any purpose.

This bill was filed by the rector of the parish of Willand (Devon) for an account of the tithe of hay and agistment.

The Defendants set up a modus of 2d. an acre for meadow ground mowed and made into hay, and 1d. for every acre of dry ground or land grass mowed and made into hay — 2d. for every calf for milk and calf; 1d. for every colt; 2d. for every hog's-head of cyder; 2d. for cabbages, carrots, turnips, and other garden stuff, growing in every garden; and 2d. for hoard fruit, in lieu of the tithe of apples hoarded and kept.

In support of that defence the answer stated that no tithes in kind of the articles alleged to be covered by the moduses, had ever been paid; and it stated that the rectors of the parish, or many of them had entered into agreements or deeds of composition with the owners or occupiers of lands, whereby, after reciting the said several moduses and other moduses therein mentioned, it was agreed that such owners or occupiers should pay yearly to the rectors, who entered into such agreements, so long as they should continue rectors, certain fixed sums in lieu and satisfaction of the moduses and tithes payable &c.; and that it was thereby agreed that such annual payments and compositions should be made without prejudice to the said moduses or customary payments.

It then adduced instances of such agreements, and of the payments being made and accepted under them, and set forth a notice from one of the Defendants to the Plaintiff to determine the composition, proposing to pay in future his tithes in kind and the moduses.

On the part of the Plaintiff a great number of witnesses were examined, the general tenor of whose testimony went to prove that certain fixed compositions were always paid for the tithes of the parish; and amongst others a composition of 6s. for an ancient meadow of two acres, called Stock's Mead, in the occupation of the Defendant Cook, which was stated to be more than an equivalent for the tithe of the hay, if taken in kind — that general compositions were also made from time to time for the lands in the parish, of sums which were a fair equivalent for the tithes in kind — and none of the witnesses had ever heard of any modus being payable for tithes.

On the part of the Defendants, the Deputy Registrar of the Episcopal Consistorial Court of the Bishop of Exeter produced from the Record [652] Room of the Court a book containing the acts of the Court, from 1631 to 1633, in which was the personal answer of Philip Hall, then rector of the parish of Willand, given in to an allegation exhibited in that Court by one John Binford, and also the personal answer of Binford to a libel and schedule exhibited against him by Hall in the same Court, in a cause for subtraction of tithes, and a proctor's bill of costs in the suit. That answer so far admitted the existence of moduses that a prohibition was obtained thereon. There were also old books put in which referred to the existence of moduses generally, without specifying any, and some receipts for tithes and for moduses indiscriminately; but which did not however state any specific modus.

They produced a book belonging to one Binford, which contained entries of receipts of a person of that name, who was an inhabitant of the parish in 1734. The receipts were subscribed with the names of Acland and Walrond the then rectors, and

their hand-writing was proved by a witness who had compared it with their signatures in the register books of christenings, marriages, and burials.

[Binford's depositions being proposed to be read to prove the authenticity, history, and custody of the book, the Plaintiff's counsel objected that, as he was an occupier, his testimony could not be received.

[653]-The Lord Chief Baron held the objection good, saying that it was the invariable rule in this Court not to admit the testimony of an occupier in a tithe cause.

The book having been authenticated by other testimony, it was objected that the hand-writing of Acland and Walrond had not been sufficiently proved by the evidence of comparison with his hand-writing in other books: non constat that he had signed the books to which his name appeared; and in support of that objection they cited the case of *Randolph v. Gordon* (ante, vol. v. p. 312).

The Defendants' counsel cited on the other hand the cases of *Morwood v. Wood* (14 East, 328), in which Mr. Baron Hotham had admitted evidence of a presentment on proof of the subscription being the same as the signature to the subscriber's will, and *Roud. Brune v. Rawlings* (7 ib. 282).

The Lord Chief Baron determined that the proof was sufficient—distinguishing the present case from those cited; and observing that the signature in books, the entries in which it was the duty of the person, whose name appeared written therein, to sign, must be presumed to be of his hand-writing.]

The Defendants also put in two agreements and a deed. The first agreement was dated the 30th of May, 1789, between Edward Drewe the [654] then rector, and several owners and occupiers of lands in the parish, by which, after reciting that certain moduses or customary payments (enumerating them), and amongst others, "for every acre of meadow ground mowed and made into hay, the sum of 2d. and no more, at Easter;" and for every acre of dry ground or land grass mowed and made into hay, one penny and no more, at Easter, for and in lieu &c.—and for barren cattle nothing; and also reciting that the said owners and occupiers had agreed to pay the rector the several sums set forth opposite against their respective names in a schedule thereto, "in lieu of payment, full satisfaction and discharge, as well of the aforesaid moduses or customary payments as of the great tithes, and all other tithes, except flax &c. &c. as long as Drewe should continue rector. It was witnessed that such sums were agreed to be paid and received: and the agreement contained a proviso that such payments were to be made without prejudice to the moduses recited. The second agreement was dated 13th September, 1806, and was to the same effect. The deed, which was between Mr. Newcombe, the person who succeeded Mr. Drewe as rector, was dated the 2d April, 1811, and was also to the same effect; and underneath each was the schedule of names and sums, amongst which was (under head proprietors) "Nathaniel Cook"; (occupiers) "himself"; (tenements) "Stock Meadow"; (annual payment) "13s. 5d."

A book of commissions was produced belonging to this Court, for the purpose of shewing, [655] that, on a former occasion (in 27 Geo. II.), the answer of Hall had been then given in evidence before the Commissioners, under a commission for the examination of witnesses, in a cause of *Acland v. Dennis*.

That book was objected to on the part of the Defendants, and rejected.

Upon this evidence Clarke and Boteler, for the Plaintiff, insisted that the modus for hay could not be supported. It was proved that the full value of the tithes in kind had always been in fact paid by composition, and that would be sufficient evidence to support the claim. The personal answer of Hall not taken upon oath, and partial proceedings in the Ecclesiastical Court, they submitted, proved nothing in answer to such a case, nor did the receipts which were put in: and with respect to the recitals in the agreements and deeds, at variance as they were with the substance and body of the agreements, they could not for a moment be weighed against the actual perception, recognized by and made the basis of those very instruments. No modus was proved to exist either by evidence of usage or perception, or to have ever existed even by reputation, and therefore the defence failing, there must be a decree for the Plaintiff.

Jervis and Wyatt, for the Defendants, insisted that the proceedings in the Ecclesiastical Court would alone be sufficient to establish that there [656] were at least some moduses covering these lands, as appeared by the admissions in the

personal answer of Hall, the former rector: and they observed that that answer being personal, required no oath. The books out of the custody of Binford also, and the recitals in the agreements and deed, they submitted, were unanswerable evidence: for that such facts and the acts of rectors are of infinitely more weight than any evidence of reputation, either one way or the other. So far therefore from there being no case made on the part of the Defendants, they insisted that it was impossible that the Court could decide the cause without referring the payments to an issue.

Cur. adv. vult.

THE LORD CHIEF BARON now delivered judgment:—This case, which now stands for judgment, I must say has very much distressed me on account of the difficulties which it presents. This bill was filed by the Rev. John Taylor, who is the vicar of Willand, in the county of Devon, and has been vicar there from 1817, against Nathaniel Cook and John Radford, who are two of the occupiers within that parish, and the demand of the bill is for the tithe of hay and agistment during 1818 for that one year. It appears that on his induction, the vicar, the Plaintiff, agreed to take 162l. and a fraction, per annum, for all the tithes in the parish until April, 1818, when the Defendants declined to pay their proportions of that sum, insisting that they had a right to [657] cover themselves by some small pecuniary payments in lieu of certain tithes.

The Defendants in their answer admit the vicar's right to the tithe of agistment, so that there must be a decree in his favor for an account of the tithe of agistment. It appears that the Defendant Cook occupies a close or parcel of meadow land in the parish of Willand, containing two acres, called Stock Meadow, and he occupies no more: and it is on that part of the case that the observations which I shall presently have to make principally arise. The Defendant John Radford occupies in the parish different quantities of land, of different descriptions, amounting in the whole to thirty-two acres. These two persons both insist on the following modus, as applied to the tithe of hay for every acre of meadow ground in the parish mowed and made into hay—two-pence at Easter for each acre of meadow land: and for every acre of dry ground or land grass, mowed and made into hay, one penny and no more. Then the Defendants state in their answer a great many other moduses, as being payable for other articles, which are not necessary to be attended to here: but they do not suggest that any of the moduses have been otherwise paid than as they may be comprized in the one large sum agreed to be paid for tithes in kind and for the moduses. That is the part of the case which certainly furnishes very great difficulty indeed, and principally because the moduses are not in their agreement separated from the other subject-matters of the general composition.

[658] Now, in this case, the evidence first produced on the part of the Plaintiff is rather by way of anticipation of the Defendants' case, and is used as a reply to their answer: I have taken it as it occurs, beginning with the evidence for the Plaintiff.

Mary Westcott says she has known the parish for fifty years, and never heard of any modus till half a year ago. [It may be observed here, once for all, that throughout the whole of this case there is a great deal in the depositions which is not evidence.] There is no instance of any modus being actually paid as a modus, nor of any distinct reputation respecting any modus. I do not lay any very great stress on such evidence in general, but I think it right to observe that there is not the least evidence of any reputation of any modus being paid in any part of the parish—and the moduses insisted on are parochial moduses—excepting that one of the Defendants' witnesses says that he has heard that there was some modus paid, but he never heard what the sum was.

John Jutson is the next witness—he says he occupied for fourteen years Stock Mead, which is the meadow now occupied by the Defendant Cook—that it contains about two acres—that it has been occupied ever since by the Defendant Cook, who is the owner of it—that before his occupation one John Stone occupied it for ten years—he says, that while he occupied Stock Mead, he paid to the rector, Mr. Drewe, the annual sum of [659] six shillings, in lieu of the tithes, which sum, in his estimation, was more than the tithe was worth: and it was paid by the former occupiers, as he understood. So that we see here is a payment not of a modus, but a payment of a sum which negatives the modus, as laid, as strongly as can be done: for instead of paying two pence an acre as is said to have been payable formerly, he paid six shillings: and he says, that during his time the payment of six shillings for the hay of these two acres never varied.

Then James Lapscott says that he lived servant with one of the vicars, the Rev. Henry Walrond—that he lived with him fifteen years, up to the time when Mr. Walrond died, which was in the year 1787. During all the time he lived with him, he says there was not any tithes paid in kind for any titheable matters, except pigs, geese, and honey, which articles were excepted in the composition; all the rest therefore were included in the general composition which, during the time he received the payments, did not vary; and he says, that he never heard of any *modus* for any article of tithe till the commencement of this suit.

The next witness is Robert Ebbels, who has known the parish forty years. He says he never heard of any *modus*—that his father occupied lands in the parish for nineteen years, and always compounded at a fixed sum, which never varied. He succeeded his father; and they always paid [660] a composition for all tithes, except for pigs, geese, and honey, these he did not enter into a composition for. The sum so paid by his father and himself was 5*l.* 10*s.*, and was to the best of his judgment a fair compensation for the tithes arising from the lands for which the same was paid, in case the same had been taken in kind, except pigs, geese, and honey, and if the tithe of hay, which we all know is a very important tithe, had been covered by a small *modus*, it must have made a considerable difference, and more especially when we recollect that this Stock Meadow paid six shillings in respect of two acres. He does not recollect that any *modus* or *moduses* were alleged to be payable in lieu of tithes of hay, or for any other tithes in the parish. He says that during his occupation he paid to Mr. Drewe, the succeeding rector, 5*l.* 10*s.*, without any alteration or variation, by half yearly payments—that in paying such composition he paid a fair compensation—and that in so doing the witness did not take into consideration any alleged *modus* or *moduses* for any titheable matters or things; because he did not know of any such *modus* or *moduses*.

Samuel Evans is the next witness whose evidence is material. He says his mother paid 2*l.* per annum in half-yearly payments, as an annual composition for tithes in kind, that he afterwards paid the same sum himself, and considered it a full compensation for the tithes in kind, in respect of and arising from all the lands he occupied, in [661] case the same had been taken in kind. He says that he has heard that the manner in which the sum was paid by the occupiers in lieu of tithes was by a rate agreed on between them and the rector, and that in making such compositions he did not take into consideration any alleged *modus* or *moduses* for hay, and that he never heard of any such *modus* till two years ago,—which is about the time when this suit commenced.

There are then a great many other witnesses examined, all of whom give evidence to the same effect. The last is Robert Seaman—he also occupied lands in this parish, and paid a composition for tithes to the full value—he did not consider the composition as a fixed and invariable payment—he did not consider it as a *modus*; for he never heard any thing of a *modus* while he lived in the parish, which was about thirty-five years. He says the Defendant Cook paid 6*s.* for Stock Meadow in the witness's time, which, according to his judgment was more than a fair compensation for the tithe if it had been taken in kind. He never heard of any *modus* till the stir was made. He then proceeds to state the composition paid by others, which he considers to have been quite equal to the real value of the tithes if they had been taken in kind.

We see there is no positive reputation of any *modus* spoken of in the whole of this evidence. There is no evidence of payment of any *modus* directly or indirectly: nor are *moduses* at all [662] taken into consideration in forming the composition; and if the *moduses* were included *quà moduses* in the composition, it certainly was done without the attention of any body being drawn to it; for it is quite clear that the occupiers thought they paid the full value of all their tithes, and it is also clear that Cook, in paying for these two acres the 6*s.*, paid it by way of composition for the tithe and in lieu of the tithes in kind. Now thus far this is certainly in itself, and standing alone, an extremely strong case; and if this were all the evidence, I should feel it impossible to hesitate. I must have pronounced a decree without the least doubt, in favor of the Plaintiff. Although it is a very distressing case where we see strong symptoms of the existence of *moduses*, the evidence of which may be very much affected by the habit in the parish of mixing up the *moduses* with the titheable matters payable in kind, in making compositions for the tithes; yet here it is quite clear from the evidence, that there was no difficulty of that sort made

originally on the part of the occupier, for they computed the value of the tithe according to the value of the tithe in kind, not calculating on any thing in respect of any modus.

But then on the other side, there is evidence given in support of the modus, of great importance certainly. There were proceedings in the Ecclesiastical Court in the year 1630; and it is clear from the books that have been produced, that a question was made respecting moduses [663] in a case of *Hall and Binford*. Hall was then rector of the parish, and Binford an occupier; but these entries which appear to have been minutes of acts of the Court, and are blended in a confused manner, contain no precise information except that such suits were depending between these two parties, Hall the rector, and Binford and Rook, who occupied lands in the parish. It is to be collected from these acts of the Court, however, that on the 10th of December, 1632, Binford obtained a prohibition, which may be seen in the proceedings of the Ecclesiastical Court, by which those proceedings were certainly suspended. But that appears also to have been only as to part of the things demanded; for in the following month of January, 1633, the Court proceeded in the dispute as to the tithes with respect to which they were not prohibited, and one was for the tithe of lambs, &c. I mention this to shew that the prohibition did not go to all, and that from this it appears probable that the prohibition issued on account of a modus or moduses for the tithe of some of the other things, which were demanded, but what those things were does not at all appear. What the modus was, what the composition was, or for what the prohibition went, does not appear now. It is very much to be wished beyond all doubt, that some of these things were ascertained. They may appear in the prohibition, and if that could be found, it possibly might throw some light on the subject. However, all that now appears from the acts of the Court [664] is, that there was a suit concerning the tithes, and that in respect of some of them a prohibition went. If the prohibition went on the account of moduses, as is most probable, then some modus must have been seriously put in issue, and must have been the subject of discussion in the Ecclesiastical Court on the suing of the prohibition. Then the answer of Hall was put in, and there I do not see any allusion made to any other act of the Court with reference to any cross suit, or any libel against Hall. Still, however, this paper, which is described as his personal answer, appears to be found in such a situation amongst the records of the Register, that I cannot exclude it from being received as evidence; and if we could find the proceedings on the prohibition, it might then be a very material piece of evidence on one side or the other. In that paper Hall admits that every parishioner had been used to pay to the parson for tithe of hay of the ancient meadow known by the name of Stent meadow, 2d. an acre, and not otherwise; but he does not hint at all at 1d. per acre for other hay as is stated in this suit, and he states other usual payments for milk, calves, cider, and herbs and roots, but he omits lambs. The prohibition accordingly did not issue with respect to the lambs, so that probably there was no payment for them, though something is said about 4d. a lamb, and it was probably abandoned on account of the small amount.

[665] This paper, which purports to be Hall's answer, and the four accompanying papers, were, it is said, produced before Commissioners in the time of Acland, a preceding rector, in a tithe cause; and that evidence was offered merely to shew that it was not recently fabricated for the purpose of the cause, but that it was at that time existing in the Register's Office, and has been there ever since probably. An objection was made to receiving that paper in evidence, but I did not consider myself at liberty to exclude it.

There are next some receipts produced. With respect to those I must say I hardly know what to make of them. They, however, afford some evidence, certainly, though very slight, of some customary payments: I observe also that they appear to be receipts for half years. I do not remember any instance of moduses being paid half yearly; it is a very uncommon way of paying moduses; that is, however, merely observation. We have next given in evidence on the part of the Defendants, these very extraordinary deeds, and really I do not know what to think of them. The first is in 1806, when Mr. Drewe was rector of the parish, and it recites, that certain moduses or customary payments, and so on, had been paid for every acre of meadow ground mowed and made into hay, the sum of 2d. and no more for one year, and also in full satisfaction for the tithe of meadow hay in every acre of dry ground made into hay, 1d. Here they state the two moduses, though [666] not as stated in Hall's supposed answer. Then, after admitting those moduses, they agree that the occupiers

shall pay for the tithes of the parish as if such moduses did not exist: for example (and one instance will suffice in this alleged parochial modus), Cook's meadow, which is said to be covered by the sum of 4d. as a modus, is to pay 13s. 5d. Thus, whilst they insist on the existence of these moduses, they do not stipulate for the payment of them as moduses, but include them in the composition for the tithes in kind at their full value. A provision, it appears, was introduced in the deed, that at the time of entering into these agreements with the clergymen, it was to be without prejudice to the moduses. It is certainly a very singular proceeding, and I cannot contemplate it with any degree of patience. With respect to these clergymen, I cannot conceive what could be their inducement to make the admission of the existence of the moduses, for I cannot impute to them the roguery of committing a fraud on the church by furnishing this evidence against themselves, merely that they might have the stipulated increase of payment by thus excluding the moduses. That would be an uncharitable supposition, and one which I do not think myself justified in adopting in this case. That is an observation, however, which I cannot refrain from making upon the two agreements, and the deed, wherein we have these two successive clergymen, first, Mr. Drewe, and then Mr. Newcomb, gravely stating in the recital that these [667] moduses were the only payments that were to be made to them for the tithe of hay, and then the occupiers proceed to agree to pay a great deal more, infinitely more, than the moduses, and seem to calculate on the full value of the tithe in kind, still, however, protecting themselves as well as they can, by saying that this payment shall not be prejudicial to the moduses which are recited in the deed. With respect to Cook's meadow, we first hear of 2d. an acre being due, then of 6s. an acre being paid, and then again of 13s. 5d. being allowed to the rector for the same two acres, and that, indeed, certainly does not seem to me to be a very large sum for the tithe of two acres of meadow hay. Under all these circumstances upon the whole case, considering what proceedings were had with respect to this subject when it was in the Ecclesiastical Court, with the evidence of these receipts, though I do not think they weigh very much, and with these deeds executed by two successive clergymen, and without any reason assigned, for there is no attempt to shew that they did it fraudulently, or under the effect of duress, and as I cannot impute to them any impropriety of conduct, I do not feel myself authorized to say that there is not some of the evidence that has been given on the part of the Defendant, conflicting with that which has been produced for the Plaintiff, and which, if uncontradicted, would make as strong a case as could be made for the clergyman. Under these circumstances, I have, after having per-[668]-plexed myself very much on the subject, in my anxiety to come to a proper conclusion upon it, at last determined that I cannot dispose of the suit without sending it to an issue. The question of modus or no modus will be sufficient. It is one of the most extraordinary cases that I have ever met with.

DECREE.

An account of tithes of agistment, with costs.

An issue on the modus as laid in the answers. Costs of issue and further directions reserved, with the usual directions.

THE ATTORNEY-GENERAL v. CULLEN. Saturday, 16th Dec. 1820.—The Court will set a condemnation of goods seized passed for want of claim, in order that the defendant may enter a claim, under circumstances, where the party applying offers payment of the costs of the condemnation, on the terms of his paying also the costs of the application: and they refused in such a case to order the Defendant to find bail as one of the terms of making absolute a rule to shew cause.

Touching the seizure by the Officers of the Customs of certain quantities of goods, appraised and returned into Court by indentures of appraisement.

Jervis, on the part of the defendant claiming property in these goods, had obtained a rule calling on the Attorney-General to shew cause why the condemnation of the whole which had been seized by the officers of [669] the customs, and condemned for want of claim, should not be set aside: and the Defendant be at liberty to enter and perfect his claim thereto, upon payment of the costs occasioned to the Crown by proceeding to such condemnation.

The affidavit of the Defendant (sworn on the 13th instant), on which the application was made, stated that the goods claimed were seized on the Deponent's premises, on the 10th of October—that he was informed on the 2d of December of their having been condemned on the 21st of November—that he was ignorant of the mode of proceeding to recover the goods—that on the seizure being made, he went to the house of a friend, at some distance from his residence, for the purpose of obtaining his advice, whom he could not then find—that ten days afterwards he was compelled to make a long journey on business, and did not return till the 27th of November—and that he was afterwards advised to claim the goods, when he found they had been in the mean time condemned for want of claim.

The affidavit also stated that the Deponent bought the goods seized, by sample, of a regular mercantile traveller at a fair price: and that the Deponent had a good defence to the information. To that last assertion the Defendant's solicitor, who joined in the affidavit, also deposed.

Clarke, for the Attorney-General, now shewed cause. He urged that there was no ground fur-[670]-nished by the claimant's affidavit, (which was loose and vague in its statements, in not giving the names of persons alluded to, or the particulars of any of the facts alleged) for setting aside the condemnation which had regularly passed: submitting that granting the present application, on such slight grounds, would furnish a precedent which would be very mischievous in its consequences, and would render such motions very frequent in practice.

He also put in an affidavit, made by a clerk in the office of the solicitor for the customs, stating that, on the 15th of November, before any process had issued against the Defendant, notice of special bail was served by an attorney on the solicitor of the customs.

Under these circumstances it was submitted that the rule ought to be discharged, with costs.

Jervis, about to support the rule, was stopped by the Court. They stated that under all the circumstances, it appeared to them that no mischief could arise from making the rule absolute, if the Defendant chose to accede to the terms of paying the costs of the condemnation, and of this application.

Per Curiam. Rule absolute.

Clarke then applied that it might be added to [671] those terms, that the Defendant should be ordered to find bail; but

The Court—observing that there could be no reason resulting from merely making this rule absolute why bail should be required, as the order afforded no facility to enable the Defendant to leave the country which he had not before—refused the application.

THE KING v. SETON. On an Extent. Saturday, 16th Dec. 1820.—An application—to discharge a Defendant in prison under an extent for duties in his hands, being a part of money received by him for premiums and duties on policies, as agent of an insurance company, on the ground of his having been arrested by the office for the whole balance due from him to them, including such duties, before the extent issued, as to which debt he was afterwards discharged under the insolvent act—refused, by discharging a rule to shew cause: the Court holding, that such a ground raised a question of merits, which could not properly be brought before the Court but by traversing the inquisition; and that they could not set aside an extent quia improvide emanavit, on motion, on a statement of such facts by affidavit as would amount to a defence.

Price had obtained an order, calling on the Attorney-General to shew cause why a writ of supersedeas should not issue to discharge the Defendant out of custody as to this extent.

The application was founded on an affidavit, stating that the Defendant, having been agent to the Union Life and Fire Insurance Office, had received various sums of money amounting to 55l. 18s., as the premiums for effecting insurances in the said office, and also the duty thereon—that he was arrested in July last, at the suit of the secretary to the said office, for a balance due to them on account of money so received by him—[672] that he obtained his discharge under the insolvent act in

October—and that he was again arrested on the 2d of November for the duties by virtue of this writ of extent, which had issued on the affidavit of the said secretary, made by him on the 22d of July, stating that the Defendant was indebted to the King in 30l. 16s. 6d., which the Defendant stated was part of the said sum of 55l. 18s.

The affidavit also stated that on the 20th of July the Defendant's effects were seized, and sold on the 22d under a fieri facias, in the suit for 55l. 18s.; and notice was given to the sheriff on behalf of the Crown to retain the proceeds for the use of the King.

On those facts it was submitted that the Defendant, having been already arrested at the suit of the office for the same debt, and discharged from gaol under the insolvent act, as to his person, in respect of that debt, there was no ground for arresting him again on the Crown process for part of the same debt, under colour of its being due to the Crown, the Defendant being a mere servant of the insurance office, in whose hands any money received by him would be in law received for the office, and would render them liable to the Crown.

Shepherd, on the part of the Attorney-General, shewed cause, contending that that part of the money received by the Defendant, which was [673] applicable to the duties on the policies, was money of and belonging to the Crown, with respect to which the Defendant could not have been discharged by his discharge under the insolvent act, as to the debt due from him to the Insurance Company, and therefore it furnished no answer to this demand of the Crown for duties.

Per Curiam. Whatever may be the merits of the Defendant's case upon the facts, the Court cannot on this motion, founded on affidavit, hear his Counsel. He should have traversed the inquisition, if he would avail himself of merits; but an extent cannot be set aside in this summary way, even on grounds which would have afforded a defence to the extent, stated in an affidavit made to support an application to us to quash the writ, in effect, quia improvide emanavit.

Rule discharged *.

[674] M'MORRIS v. ELLIOT AND OTHERS. Thursday, 14th Dec. 1820.—A bill of charges for goods furnished, set out item by item in a schedule, to an answer to a bill filed for a discovery of the consideration given for a bill of exchange, requiring the Defendant to set forth a full, true and particular account of the consideration, and every part of it, with the times when, and places where &c. is impertinence.

The Plaintiff filed exceptions to the Deputy Remembrancer's certificate on the reference to him of the answer of the first named Defendant in this case, for scandal and impertinence.

The principal exception was, that the officer had certified the answer to be not impertinent, although it set forth, by way of schedule, a long account of minute items in detail and of considerable length, forming a bill of charges for goods sold and delivered to a person on whose behalf the Plaintiff was charged to have endorsed certain bills of exchange in the hands of the Defendant.

The bill was filed for a discovery and an injunction to restrain the Defendants from proceeding in an action at law, which had been commenced against the Plaintiff on the indorsement: and it charged that the Plaintiff was not the indorser of the bills, and that the Defendant knew the Plaintiff never received any consideration for indorsing the bills, if he had indorsed them. (which he denied); that they were accommodation and fictitious bills; and that the Defendant Elliot gave no consideration, or an inadequate consideration for them: and so it would appear if he would set forth a full, true, [675] and particular account of that consideration, and every part of it, with the times when, and the places where, such consideration, and each and every part thereof was paid and given. The bill afterwards interrogated the Defendant in the same terms as to the fact so charged.

The Defendant answered that interrogatory by referring to a schedule to his answer, which consisted of a bill of the particulars of his charges against one of the

* The solicitor of the stamp duties having opposed the Defendant's discharge, on the question of right only, as soon as the point was disposed of, consented to a supersedeas issuing to discharge him out of custody.

Defendants, for articles furnished by him in the way of his trade, and in consideration of which he had taken the bills of exchange.

Agar and Wakefield in surport of the exceptions, contended that setting out a long bill of charges running through several folios, was clearly unnecessary with a view to the object of the inquiry, and furnished no intelligible information, whereas a short and pertinent answer, substantially meeting the interrogatory, would have done so, and have been free from the objection—and they cited the case of *Alsagar v. Johnson* (4 Ves. 217) where the Lord Chancellor determined, that a reference to the bills delivered and in the custody of some of the Defendants, would have fully answered the interrogatory, and that scheduling the whole bill of costs was impertinent.

[676] Spence endeavoured to shew that the report was right, submitting that the particularity of the charge, and interrogatory in the bill, required the answer which had been furnished to be as full as it was, or it would have been exceptionable for insufficiency: and he distinguished the present case from that which had been cited, by the circumstance of the interrogatory in that case not requiring, as in this, a particular detail of every item of the account which formed the consideration of the bill of exchange: and the object of the interrogatory there was not satisfied or met by that mode of answering.

Per Curiam. It is quite impossible to suffer such a mode of answering as this. It is clearly impertinent, and the exception as to that part of the report must therefore be allowed. There is nothing in the bill by way of charge or interrogatory, which calls for or warrants the schedule which is the subject-matter of the exception. The interrogatory is in the usual form, and is such as may be found in every bill. It must be referred to a Master to strike out the impertinent matter, and to tax the costs.

Exception allowed, and Reference ordered.

[677] WILDBORE, Clerk, *v.* BRYAN AND ANOTHER. EX PARTE WILDBORE. Thursday, 14th Dec. 1820.—The bill of costs of an attorney, agent to the attorney employed by the party in respect of whose business the agency charges have been incurred, will not be ordered to be referred to a Master to be taxed, on the application of the client.

The Plaintiff had obtained an order, on motion, on the 18th of November, that the attorney represented to have been the solicitor of the Plaintiff in this cause and other matters, should, within a fortnight, deliver to the Plaintiff, a bill of his fees and disbursements in such cause and matters; and that it might be referred to one of the Masters of the Court to be taxed pursuant to the statute*:—and that the attorney should, at the foot of his bill, give credit for all sums received by him from or on account of the Plaintiff—and to refund any overplus, the Plaintiff undertaking to pay, &c. And it was also ordered, that on being paid, the attorney should deliver up deeds and papers &c. (concerning which and his bill, he was to be examined on interrogatories,) and until taxation, to be restrained from all proceedings at law in respect of such bill.

The affidavit of the Plaintiff, in support of the order which had been obtained, stated that he employed an attorney in the country in a pecuniary transaction, in respect of which this suit (in equity) was instituted; and that in the conduct of it, as far as it had proceeded, the town [678] attorney had been acting as the immediate solicitor of the Plaintiff, and not as agent of the country attorney.

A material fact appeared on reference to the warrant to prosecute. It was taken and filed in the name of the town attorney.

Merrivale now moved to discharge that order, on the part of the town attorney, with costs, on an affidavit made by him and his clerk, stating that he had been employed by the country attorney as his agent in the business; and that he had not been employed by the Plaintiff as his solicitor in the cause; that he had no claim or demand on the Plaintiff in respect of any costs and charges in preparing and filing this

* This part of the application was clearly improper, if the town attorney were to be considered as an agent: because an agent's bill has been expressly decided not to be within the statute.

bill; and that he had made out and sent his bill of charges to the country attorney, on the 1st of September last.

Upon the facts stated in that affidavit, it was submitted that the order which had been irregularly obtained, and upon a misrepresentation of the character in which the attorney in town had been employed, ought to be discharged with costs. He contended that, although there were instances of an agent's bill having been referred to be taxed on the application of the solicitor by whom he was immediately employed, yet they were referred under particular circumstances, and there was no case wherein an order to refer an agent's bill had been made on the motion of the client, between whom and the [679] agent there was no privity or mutual liability: and he cited an *Anonymous* case from Wilson's Reports (1 Wils. 266), and *Binsted v. Barefoot* (Dick. 285), in both of which, orders for referring agent's bills to be taxed were discharged as irregular.

Jervis and Norton opposed the motion. They submitted that it was a matter for the Court to determine, whether the town attorney were the solicitor in the cause, or only agent to the country attorney, upon all the facts before them. They observed that the town attorney's name having been inserted in the warrant, was a mere mistake, and not conclusive: and they contended that, even if he were agent, that was not a reason why his bill should not be referred for taxation: for the agent being an attorney is subject to the authority of the Court, as if he were the attorney immediately employed; and the policy and reasons of the practice in that respect, would be equally applicable. It having been but recently, distinctly, and expressly determined, that an agent had a lien for his charges against the attorney employing him, on the papers of the client (*c*), the cases on the question of an agent's bill being taxable, require to be re-considered, for that position would make a material difference in the principle on which the practice has heretofore proceeded. The authorities establish generally, that at law an agent's bill is subject, and may [680] be referred to be taxed, *Dixon v. Plant*, and *Ex parte Bearcroft* (Dougl. 199, 200, in notis).

[Wood, Baron. Not on the application of the client of the attorney immediately employed. An agent's bill is clearly not taxable by the client.

Graham, Baron. If we were to hold that the bill of an agent were taxable on the motion of the client, I know not how far it would lead us, or whether we might not be asked to tax the stationer's bill.]

The motion was ordered to stand over till the Term, when the Court discharged the order of the 18th of November, but without costs.

SANDERSON (ON BEHALF OF HERSELF AND ALL THE OTHER CREDITORS OF WHARTON, Deceased) v. WHARTON, Widow and Executrix of the Testator, AND FRANCIS WHARTON, his Heir at Law. Demurrer. Friday, 15th Dec. 1820.—Demurrer to a bill by creditors, praying a sale of testator's real estate to pay unsatisfied debts for want of sufficiency of personal estate, where he had directed his debts to be paid by his executors, and devised his real estate, on the ground that it was not a charge on the real estate, over-ruled, (but without costs or prejudice to the question,) as being premature; because the Court would marshal assets, and therefore the cause must necessarily be brought to a hearing to enable the Court to do justice.—*Quære*, whether under such a will the real estate of the testator be charged with his simple contract debts?

The Plaintiff, by this bill, prayed an account of the testator's debts, and of his personal estate [681] and effects, unadministered, to be applied in a due course of administration, and in case of insufficiency, for a sale of the real estate for payment of unsatisfied debts.

The bill stated the testator's will to be as follows:—"I do hereby direct that all my just debts which I shall owe at my decease, the expences of my funeral, and charges of proving my will, shall be paid by my executors hereinafter named." The testator then gave and bequeathed all his real and personal estate and effects to his wife for life, remainder to his children, to be equally divided amongst them, share and share alike, to hold to them, their heirs, executors, administrators, and assigns,

(*c*) *Ward v. Hopple*, 15 Ves. 298. *Ex parte Steele*, 16 Ves. 164; and *Bray v. Hine and Others, Assignees, &c.* ante, vol. vi. p. 203.

for ever, according to the nature of the same estate, as tenants in common, with benefit of survivorship. And he appointed two other persons joint executors, in trust, with his wife.

The Defendants, as to so much of the bill as prayed that the real estate might be sold, and that they might be restrained from receiving the rents and profits, and as to all the charges and enquiries respecting the testator's real estate, demurred generally for want of equity in the bill entitling them to relief or discovery: and they answered the rest of the bill.

Belt, in support of the demurrer, relied on the authority of the case of *Powell v. Robins* (7 Ves. 209).

[682] The Lord Chief Baron (stopping Wakefield, who was disposed to argue the case on the authorities, waiving the objection to the demurrer, which, however, his Lordship observed, the Court could not do) stated that the demurrer must be over-ruled, as operating in this stage of the cause rather to obstruct than advance the discussion of the question raised—a question which, his Lordship regarded as one of very considerable difficulty. In the case cited (said his Lordship) the Master of the Rolls marshalled the assets. In this case, being a creditor's bill, the same thing ought perhaps to be done, and the specialty debts may be thrown on the real estates, which, if the bill should be dismissed on demurrer, cannot be done; and it would be withdrawing from the Court the means of doing substantial justice between the parties. The heir at law must be before the Court at the hearing, for it may be necessary to throw the specialty debts upon him. I certainly never heard of a demurrer of this sort in this stage of such a cause before. It must therefore be over-ruled as irregular, but without any prejudice to the question, which is certainly one of very great consequence. The order must be drawn up without Costs on either side.

Demurrer over-ruled—but expressly, without prejudice to any question whether charge or not—and without costs.

[683] THE KING v. LARKING AND HUGHES. Friday, 15th Dec. 1820.—An immediate extent, and an extent in chief in the second (or any) degree, are to be satisfied before an extent in aid of a prior teste, where the same goods were seized under both extents, although the inquisition on the latter were taken before that on the former, and the same day as the inquisition on the immediate extent; and the venditioni exponas, on the extent in aid was tested before that which issued on the extent in chief in the particular degree.—An extent sued out on the affidavit of one of the partners in a firm, against whom an extent has issued in chief, containing the usual averment under the rule of the 15 Ch. I. is, notwithstanding, not an extent in aid, but an extent in chief in the particular degree, and entitled to the prerogative preference in execution due to immediate extents, or extents in the first instance.—It is not necessary that the Crown, proceeding to recover the debts of its debtor by extent within the degrees, should first apply the immediate debtor's proper effects in discharge of its debt, before it resorts to the debtor's debts. So held in a case of two concurrent extents, one in chief in the second degree, and the other in aid, the latter having first obtained execution of the venditioni exponas, and both in fact proceeding for the benefit of the Crown, the contest being between two different Boards of the Revenue.—When the extent in chief has been satisfied, the parties prosecuting the extent in aid should apply to the Court by motion, to be paid out of the overplus, if any, which, under the last act of Parliament, is ordered to be paid into Court to abide their orders respecting it.

An extent had issued into Kent, tested the 6th of November, 57 Geo. III., against the Defendants, reciting, that by an inquisition, under an extent (in chief,) issued into Middlesex, on the 2d of July, 1816, against Bruce and Co., they were found indebted to the King for money had and received by them for his Majesty's use, on account of the Receiver-General of the taxes for the county of Southampton. By the inquisition taken under that extent, the present Defendants were, on the 4th of the same month of July, found indebted to Bruce and Co. for money lent, &c., in the sum of 60,000*l.*, which debt the Sheriff seized into the King's hands, under an inquisition taken on the 13th of September following. The Sheriff had seized the effects of Larking and Hughes under an extent against them also tested the 4th of July, which

had issued at the instance, and in aid of the Kent Insurance Company, in which the stamp office was interested, for a debt of 610l. 5s. 7d., due to them (the Company) from the Defendants, before he seized under the other extent.

[684] On the latter, the writ of venditioni exponas issued, tested the 25th April, 1817, and on the former a similar writ was issued, tested the 23d of December in the same year. In the Sheriff's return to the last writ, he stated that, by virtue of both writs, he had sold and disposed of the effects seised; that he had received from the debtors in the writs mentioned, several sums of money, which, with the proceeds of the sale of the goods, (&c.) amounted to 5855l. 16s.—and that he had paid thereout the sum of 4000l. to and for the use of the King, the remainder of which sum, after deducting his poundage, he had ready; praying the directions of the Court.

In the course of the last Term Shepherd obtained an order, calling on the Defendants to shew cause, at these Sittings, why the late Sheriff of the county of Kent, or his Under-sheriff, should not pay the sum of 855l. 16s., the remainder of the monies in his hands, as appeared by his return to the writ of venditioni exponas, issued in this cause, into the receipt of the Exchequer, to the credit of the Receiver-General for the county of Southampton, on account of the assessed taxes for the year 1815^{*1}.

Manning, on the part of the Kent Insurance Company and the Stamp Office, now shewed cause, submitting that the extent on their part [685] ought to be previously satisfied before the whole was paid over to the Receiver-General, as prayed; for he contended,

First, That the extent against the Defendants, under the proceedings against Bruce & Co., was an extent in aid, or at least an extent in chief in the second degree^{*2}, and in the nature of an extent in aid: and therefore not entitled to be first served, where the proceedings were later in time, in consideration of prerogative precedence due to immediate extents. That this extent through Bruce and Co., was in form and effect an extent in aid merely, he submitted, appeared from the affidavit on which the fiat had been granted. It was made by one of the partners in the firm of Bruce and Co., and contained the allegations as to the debt not being a trust debt, or sued for in any other Court, according to the requisitions in the rule of the 15th Ch. 1.

If it were an extent in aid, the prior extent, or that which had been first, completely executed by the sale under the venditioni exponas, would, he contended, be entitled to be first satisfied out of the money in the hands of the Sheriff: and he submitted that, if it was an extent in chief in the second degree, there was no [686] authority on which the right to preference now claimed as against an extent in aid, could be established. The case of *The Queen v. Quash* (Park. Rep. 281), which he anticipated would be relied on as an authority for that purpose, he observed, was the case of an immediate extent, and therefore did not apply to the present case: and this he urged was a contest in effect between two different departments of the Revenue, the Taxes and the Stamps. The proceeding on the part of both parties was therefore a bonâ fide proceeding for the benefit and security of the Revenue, and for which the process was legitimately designed.

Secondly. It was submitted that, if the Court should be of opinion that this extent through Bruce and Co. were entitled to be first satisfied, in a general way and on legal principles; yet, as in this case, other effects of Bruce and Co. having been seised under the extent against them, and which could be made available to the Crown by applying them in discharge of the extent, they ought not to resort to the debts of the Crown debtors, until it should be found that those effects were insufficient to satisfy the preferable demand.

The Attorney-General, in support of the order, insisted that the extent against the Defendants, under the inquisition against Bruce and Co., was not an extent in aid, but an extent in chief, perhaps in the second degree, and being so, (in [687] whatever degree) the Crown was entitled to have it executed before an extent in aid: and he

^{*1} It was made part of the order that notice should be given to the prosecutor of the extent in aid, by serving a copy of the order on his solicitor or clerk in Court, one week previous to the day of shewing cause.

^{*2} This extent was in chief in the first degree, the extent against Bruce and Co. being an immediate extent in chief, or an extent in chief in the first instance, and that against their debtors an extent in chief in the first degree. Vide the note to observations in the case of *The King v. Giles*, ante, p. 386.

relied on the authority of *The Queen v. Quash* (Park. Rep. 281), and *The King v. Bowdage* (Park. Rep. 282), in both of which cases an immediate extent was held to be preferable to an extent in aid: and in the second, it was after a venditioni exponas: and there, it seems, that under the immediate extent, the goods seized under the extent in aid might have been found: and he urged that an extent in chief, even in the second degree, was entitled to the same preference.

He contended also, the Crown was not under any obligation to apply the goods and chattels seized before the debts were resorted to, but was entitled to have recourse to either, whichever might be found most convenient.

GRAHAM, Baron. Unless the Crown were entitled to be preferred in this case, extents in chief would be frequently rendered completely nugatory by extents in aid. It is by means of the extent against Larking and Co., that the Crown seeks to make the process available against Bruce and Co., for the debts due to them from Larking and Hughes, are a part of their disposable property, and are in the hands of the Crown, applicable to the satisfaction of the Crown's demands. We have no authority to say, that the Crown shall resort to this or that particular species of property in executing the prerogative process.

WOOD, Baron. The debt due to Bruce and Co. was seized under the extent against them, just as any other part of their effects had been seized under the same proceeding, and the inquisition on the extent against Larking had relation to that which was taken on the extent against Bruce and Co. It is impossible that the Court can interfere in the manner proposed. The parties prosecuting the extent in aid, must wait the result of the extent in chief. If there should be any surplus remaining after that extent shall have been satisfied, they may then apply to the Court to be paid thereout. In the last act of Parliament*, there is a provision, directing that the overplus shall be paid into this Court, to be returned or disposed of as the Court shall think fit, upon a summary application.

Per Curiam. We think there is nothing in what has been urged which we can consider as furnishing any objection to our making the

Order absolute.

[689] HOULDITCH AND HOULDITCH v. NIAS, RICHARDS, AND E. HOULDITCH. Saturday, 16th Dec. 1820.—On a bill filed to obtain re-discovery from a Defendant proceeding at law to recover against the Plaintiff the amount of a bill of exchange, whether the defendant did not know that it was accepted by one of the partners in the name of the firm, for his own private debt, and an injunction to restrain further proceedings, and that the bill of exchange might be declared to be fraudulently accepted, and ordered to be delivered up to be cancelled, to which the Defendant, the plaintiff at law, bringing the action, answered, that he had such knowledge—the Court refused to grant an injunction to stay proceedings, because there was a defence at law, but as there was a prayer for relief, requiring the bill of exchange to be delivered up to be cancelled, and as one of the Defendants had not answered, and there was a direct charge of fraudulent collusion in the bill which was not sufficiently denied, they ordered the injunction to stay execution.

The Plaintiffs, who were partners in trade, filed this bill for a discovery, praying that the bills of exchange in the pleadings mentioned, might be declared to be fraudulently drawn and accepted, and not available in the hands of the Defendants, and might be delivered up to be cancelled; and for an injunction to restrain the Defendant Nias from proceeding in an action at law which he had commenced against the Plaintiffs as the holders of the bills, under the circumstances.

The bill stated that the Defendant and E. Houlditch were in partnership: that disputes having arisen between the Plaintiffs and E. Houlditch, they filed a bill against him in the Court of Chancery, for a dissolution, upon which he ceased to take an active part in the business which they had carried on, and the matter was referred, by order of the Court, to arbitration—that the arbitrator had prepared a draft of his award, which was read to the parties, whereby it appeared that he had awarded a dissolution of the partnership, and the payment of a considerable balance due to the

Plaintiffs from E. Houlditch—that E. Houlditch caused a postponement of the award on some pretence, for the purpose of obtaining, by fraudulent means, a part of the partnership property for his private use, and amongst other things purchased of the Defendant Richards, a linen-draper, a quantity of goods for himself and daughter, for which he accepted the bill of exchange in question, drawn by Richards, on the firm of Houlditch and Co. which the Defendant Nias afterwards discounted for Richards. The bill charged fraud and collusion between the Defendant Houlditch and the other Defendants, and it also charged, and the answer of the Defendant Nias admitted that the Defendant Nias was in Richards's shop when E. Houlditch bought the goods, and proposed the acceptance in payment, and that they both knew that the goods were purchased for E. Houlditch's private use.

Clarke and Tinney now moved for an injunction on the merits confessed in the answer of the Defendant Nias, or until the Defendant Houlditch should answer the bill,—submitting that E. Houlditch had no right or authority under the circumstances charged, to accept the bill in the name of the firm for his own private debt, and the other Defendants being fixed with knowledge of the facts, had no right to sue at law to recover on the bills against equity and conscience, and therefore a Court of Equity would interfere to restrain them from proceeding.

[691] Foulblanque and Cooper opposed the motion, insisting, that the bill had not stated any equitable ground for the interference of the Court, for that the Plaintiff had, if his charges could be proved, shewn that which would be a good defence at law. There was, therefore, no reason furnished, why there should be an injunction, and the Court would not give the relief prayed by the bill in other respects, as to ordering the bill of exchange to be delivered up to be cancelled: *Ryan v. Macknath* (3 Bro. C. C. 15).

Per Curiam. This is clearly not a case in which the Court can interfere to stay the proceedings at law. The Plaintiff can avail himself of the matters stated in the bill on his defence to the action at law. He has obtained an answer to the facts, as to which he interrogated the Defendants, but no equity has been disclosed on which this Court can restrain the proceedings at law.

But then the bill has properly prayed relief, in respect of having the bill delivered up to be cancelled, if the Defendant at law should succeed, and there may be a ground of defence of which the Plaintiff could not avail himself at law, furnished by the answer of the other Defendant—there is, besides, a direct charge of fraud in the bill, to which there is not a sufficiently distinct answer given.

[692] Therefore we are of opinion that an injunction must go, not to injoin the Defendant from proceeding further in his action at law, but to stay execution.

Injunction ordered, to stay execution.

CORAM RICHARDS, LORD CHIEF BARON.

DRAKE, Clerk, v. SMITH, BART. AND OTHERS. Saturday, 16th Dec. 1820.—A money payment of five shillings yearly, at Lammas, by every occupier of lands or tenements within a district, set up as a modus, in lieu of all tithe hay within the district, although proved *prima facie* in point of fact:—Held to be disproved as a modus for all the hay in the whole township, by the evidence of terriers, stating that “in (the district) only five shillings per year for all the hay in their (the occupiers) crofts” was payable, the parol testimony of the money payment, and the evidence of terriers, being quite consistent with each other, there being nothing contradictory in the terriers so limiting and specifying the object and consideration of the sum proved to be paid generally throughout the parish in lieu of hay, to such hay as was grown in crofts.—The case of *Drake, Clerk v. Smyth*, (ante, vol. v. page 369.) corroborated and confirmed.—On a bill filed for the same tithes as were sought in that case, an account was decreed against Defendants, relying on the same defence whereby the same points were raised, with costs.

This bill was filed by the Plaintiff against the Defendants for an account of tithes, under the same circumstances as his former bill against Smyth and others*. The

* Vide ante, vol. v. page 369.

defence set up was the same moduses : and the same evidence was produced in support of them. The hearing was therefore in effect so far a re-hearing of the former cause.

[693] Martin and Simpkinson for the Plaintiffs, and

Wetherell and Barber for the Defendants, having been heard on either side, the cause was adjourned for judgment, which was now delivered by

THE LORD CHIEF BARON, who, after stating the case, proceeded as follows :—

If I am wrong in the opinion which I have again formed on this case, on the same evidence as was produced on the former occasion, it is because I cannot, with all the attention to the case which I have given it—and which, considering myself called on by this new cause to review my own judgment as delivered then, I have thought it was the more especially my duty to do—discover any reason for altering the opinion which I then formed.

Much argument was used on the subject of the comparative weight of the terriers, and the parol evidence as opposed to each other in the different views which might be taken of the effect of such conflicting evidence on either side, as operating to direct the decision of the Court in determining this cause. I have listened to the arguments of the Counsel for the Defendants, which I must say occupied no small proportion of the time of the Court ; and the only conclusion to which they have enabled me to come is, that they had adopted a mistaken view of the case [694] from beginning to end. I do not consider the terriers which were produced in evidence in this cause as conclusive, nor ever did, but I do consider that, coupled with the parol testimony which mutually explain each other, sufficient proof is furnished by the effect. Thus, when it is proved by the parol testimony, that no tithe of hay has been paid in kind in the township of Sharlston, and that 5s. have been paid in lieu of tithe of hay in the township, a question arises whether that sum were paid in lieu of the tithe of hay of the whole township ; for in the great body of the evidence given that does not appear, — then the terriers become very material. From them we find that the consideration of the payment is confined to hay grown in the occupiers crofts, and that is by no means inconsistent with the parol testimony of the payment for hay. Sometimes terriers are of very little value as evidence in these cases, and sometimes they afford evidence of the utmost importance. On the ecclesiastical survey I do not mean to lay much stress ; but still it is evidence to a certain extent, and as far as it goes it is inconsistent with this payment being a modus. The terrier of 1716, which is the first produced, speaks of the tithe of hay, or a modus for all hay within Warmfield and Kirkthorp, “but in Sharlston (it says, distinguishing that from the other townships) 5s. per year for all the hay in their crofts, and nothing paid for all other hay or herbage.” It then enumerates several articles of small [695] tithes as payable. Now I cannot otherwise understand those words, than as meaning that the 5s. is paid for the hay in their crofts only, and that nothing was paid for all other hay or herbage, that is, for all hay not made in what they call their crofts, — being a payment for such hay in the parish as is grown in crofts, and a prescription in non decimando as to all the rest of the hay in the parish *. The modus, therefore, if it be one, is expressly confined to the hay growing in their crofts, and in adopting that as the meaning of the passage, the parol evidence, and this terrier, confirm each other. The next terrier is dated in 1727, and is in the same terms with respect to the item which states the hay moduses, only that it states “nothing paid for all other hay except herbage,” apparently making a distinction between hay and herbage, which have usually been considered synonymous in this Court ; and there have been of late considerable discussions on the meaning of these words †. [Here his Lordship stated the terms of the several other terriers, remarking that they were sufficiently authenticated by bearing the signature of three churchwardens, and some of the inhabitant occupiers.] These terriers evince great anxiety in the parties to commemorate the prevailing understanding with respect to these matters, and accordingly they [696] furnish a very minute account. It appears quite clear to me, that this payment for the hay grown in crofts does not affect or touch the rest of the parish, and if it does not cover the whole parish, the evidence with respect to the payment of the five shillings, is quite consistent with the terriers,

* Or it might have been, considering the loose structure of the language of such instruments in those days, intended to express that there was no money payment for other hay.

† Vide *Byam v. Booth*, ante vol. ii. page 231.

which shewing that it does not cover the whole. I cannot therefore, with this impression on my mind, make any other than the same decree as before: and it must be with costs.

I am glad to find that the other case * is gone to the House of Lords.

On the subject of there being an obligation on me to refuse issues in this case, I will not waste one word in discussing so clear a matter.

DECREE.

An account of all the tithes sought by the bill, with Costs.

[697] DUNCAN v. THE COMPANY OF PROPRIETORS OF THE MANCHESTER AND SALFORD WATER WORKS AND OTHERS. Saturday, 16th Dec 1820.—Bill filed on bonds given by an incorporated company, to pay money borrowed by them under the authority of their act of Parliament, which gave the lenders a lien on the profits of the Company,—held to be not demurrable, on the ground that the Plaintiff's remedy was at law.—Where a demurrer has been overruled, and the time allowed by the rules of the Court for pleading has expired in the mean while, the Court will give leave to plead and allow further time.

The Defendants had demurred to this bill, which was filed against them for an account and payment of certain bonds executed by the Company to one of the Defendants, and by him assigned to the Plaintiff for valuable consideration: and for an account of the property and effects of the Company; and for sale or mortgage of the works, if their funds were insufficient.

The bill was founded on the act of Parliament, which had been obtained by the Company, enabling them to borrow money in sums of not less than 100*l.* for which bonds were to be given by them, and the holders were to have the option of being paid their money, or become possessed of shares in the works, each to the amount of 100*l.*; and the act provided, that all persons holding such bonds, should be entitled to a lien on the rates and profits of the works. It suggested pretences that the Company were unable to pay—the works producing nothing; and charged the contrary.

The demurrer was attempted to be supported on the position that the Plaintiff had a remedy at law on the bonds; but the Court over-ruled [698] it, holding that the Plaintiff was entitled to demand an account, as prayed.

A motion was now made on the part of the Defendants, that they might still be permitted to plead to the bill; notwithstanding the time allowed for pleading by the rules of the Court had expired, pending the demurrer: and that they might have time to put in such plea, as it must be done by commission.

Agar opposed the application, on the ground that the Defendants were precluded by the course of practice of the Court; but

The Court granted the motion—giving time for a fortnight, to plead and return the commission.

* *Drake v. Smyth*, ante, vol. v. page 369. That appeal is not yet determined.

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